

To Be Argued By:  
BARRY R. OSTRAGER

New York County Clerk's Index No. 602446/07

---

---

# New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

—◆◆◆—  
GOLDEN GATE YACHT CLUB,

*Plaintiff-Respondent,*

—against—

SOCIÉTÉ NAUTIQUE DE GENÈVE,

*Defendant-Appellant,*

—and—

CLUB NÁUTICO ESPAÑOL DE VELA,

*Intervenor-Defendant.*

---

## REPLY BRIEF FOR DEFENDANT-APPELLANT

---

BARRY R. OSTRAGER  
JONATHAN K. YOUNGWOOD  
GEORGE S. WANG  
LAURA D. MURPHY  
SIMPSON THACHER & BARTLETT LLP  
425 Lexington Avenue  
New York, New York 10017  
(212) 455-2000  
*Attorneys for Defendant-Appellant*

## Table of Contents

|   | Page |
|---|------|
| PRELIMINARY STATEMENT .....   | 1    |
| ARGUMENT .....  | 2    |
| I.    THE TRIAL COURT’S ORDERS RELATING TO THE PROPER<br>CHALLENGER OF RECORD SHOULD BE REVERSED AND<br>THE RACE DATE SHOULD BE RESOLVED IN ACCORDANCE<br>WITH THE DEED OF GIFT ..... | 2    |
| II.   THE EARLIEST POSSIBLE RACE DATE IS MAY 1, 2009 .....  | 5    |
| A.   GGYC is Precluded From Arguing for a Race Date Prior To<br>March 2009 .....  | 5    |
| B.   GGYC Simply Ignores the Rule of Law That No Rights and<br>Obligations are Determined Until Orders are Entered by the<br>Courts.....  | 6    |
| C.   SNG Cannot Be Prejudiced For Exercising Its Rights Under<br>New York Procedure .....   | 8    |
| D.   The Earliest 2009 Date for a Northern Hemisphere Race<br>Between SNG and GGYC is May 1 .....   | 10   |
| CONCLUSION .....  | 12   |

## Table of Authorities

### Cases

|   |   |
|---|---|
| <i>Broadwall Amer., Inc. v. Bram Will-El LLC</i> , 821 N.Y.S.2d 190<br>(1st Dep't 2006) .....   | 8 |
| <i>Hecht v. City of New York</i> , 60 N.Y.2d 57 (1983).....                                     | 5 |
| <i>James Talcott Factors, Inc. v. Larfred, Inc.</i> , 496 N.Y.S.2d 27<br>(1st Dep't 1985) ..... | 7 |
| <i>Mercury Bay Boating Club v. San Diego Yacht Club</i> , 76 N.Y.2d 256<br>(1990) .....         | 9 |
| <i>Nobu Next Door, LLC v. Fine Arts Hous.</i> , 771 N.Y.S.2d 76<br>(1st Dep't 2004) .....       | 8 |
| <i>Omansky v. 64 N. Moore Assocs.</i> , 703 N.Y.S.2d 471 (1st Dep't 2000) .....                 | 5 |
| <i>Skolnik v. Metro-North Commuter R.R.</i> , 786 N.Y.S.2d 100<br>(2d Dep't 2004) .....         | 6 |
| <i>Whitfield v. JWP/Forest Elec. Corp.</i> , 637 N.Y.S.2d 4 (1st Dep't 1996) .....              | 5 |

### Statutes

|                                |   |
|--------------------------------|---|
| 22 NYCRR § 202.48 (2008).....  | 8 |
| N.Y. C.P.L.R. 2220 (2008)..... | 6 |
| N.Y. C.P.L.R. 2221 (2008)..... | 8 |

Defendant-Appellant Société Nautique de Genève (“SNG”) respectfully submits this reply memorandum of law in further support of its appeal from the May 12, 2008 Order of the Supreme Court, New York County (Cahn, J.) (“May 12 Order”), which was consolidated with its appeal from the March 17, 2008 Order of the Supreme Court, New York County (Cahn, J.) (“March 17 Order”).

### **PRELIMINARY STATEMENT**

Plaintiff-Respondent Golden Gate Yacht Club’s (“GGYC”) brief is predicated upon foundations that simply do not exist. Most significantly, GGYC assumes that it finally and irrevocably was declared the valid Challenger of Record in either July 2007 (when it issued its ambiguous challenge that post-dated Club Náutico Español De Vela’s (“CNEV”) challenge) or November 2007 (when the trial court issued a decision but not an order regarding CNEV’s challenge). As demonstrated in this appeal and throughout the record, GGYC is not the proper challenger and, in this regard, the orders of the trial court should be reversed.

Passing on the issue of the correctness of the trial court’s orders regarding the challenges of CNEV and GGYC, the earliest possible date on which GGYC was declared Challenger of Record was on March 17, when the trial court issued its first order in this case (the subject of SNG’s original appeal). But in both its opposition to SNG’s motion to stay that order and in its May 9 brief, GGYC

contended that an appeal of the March 17 Order was itself premature. Accepting, *arguendo*, GGYC's own arguments, no valid order appointing it Challenger of Record therefore existed until the issuance of the May 12 order (the subject SNG's second appeal). The 10-month notice period – which is intended solely to benefit SNG – therefore could not have started to run before that date. The November 27, 2007 memorandum decision could not, as a matter of law, start the clock on the notice period. GGYC's efforts to suggest otherwise and to force a race in less than five months must fail. Indeed, uncertainty regarding GGYC's status as Challenger of Record remains pending resolution of this appeal.

The only error made by the trial court concerning the date was its failure to adhere to the express terms of the Deed of Gift with respect to the timing of a Northern Hemisphere challenge. The race cannot therefore take place any earlier than May 1, 2009, the first date in 2009 on which a Northern Hemisphere race may be held.

## ARGUMENT

### **I. THE TRIAL COURT'S ORDERS RELATING TO THE PROPER CHALLENGER OF RECORD SHOULD BE REVERSED AND THE RACE DATE SHOULD BE RESOLVED IN ACCORDANCE WITH THE DEED OF GIFT**

GGYC wants the Court simply to overlook the two key substantive points advanced by SNG on this appeal and summarily affirm the trial court's decision disqualifying CNEV and declaring GGYC the Challenger of Record. But,

as demonstrated in SNG's previous briefs, the trial court erred in reaching both of these holdings. The record evidence overwhelmingly supports SNG's position that CNEV is the valid Challenger of Record and GGYC is not. The arguments advanced in GGYC's most recent submission can be swiftly disregarded.<sup>1</sup>

CNEV Is The Rightful Challenger: None of the supposed "requirements" of a yacht club cited by GGYC on pages four and five of its brief are in the Deed of Gift. (R. at 98.)<sup>2</sup> GGYC now concedes, as it must, that CNEV is not required to have vessels, members, a website, a telephone number, an address or any other arbitrary attribute before it may challenge for the America's Cup. (GGYC 5/22 Br. at 4.)<sup>3</sup> GGYC also does not dispute the substantial evidence of CNEV's incorporation and licensure. (R. at 440-560.) Instead, GGYC seeks to impose a requirement that new clubs are ineligible to challenge for the America's Cup. But the Deed of Gift does not prohibit new yacht clubs and does not require a new yacht club to have the same indicia of organization as other, more established yacht clubs.

---

<sup>1</sup> GGYC improperly seeks to use its May 22, 2008 opposition brief as a sur-reply to reargue the points already raised in its opposition brief, dated May 9, 2008. GGYC had a full opportunity in its May 9 brief to address the validity of both its challenge and that of CNEV. The only new issue raised by SNG's appeal of the May 12 Order was the trial court's specific application of the 10-month notice period. (SR. at SR10-SR11.) GGYC's improper sur-reply on any point other than the race date should be stricken.

<sup>2</sup> Citations to "R." refer to the Record on Appeal, filed on April 21, 2008.

<sup>3</sup> Citations to "GGYC 5/22 Br." refer to GGYC's Brief for Plaintiff-Respondent, dated May 22, 2008.

GGYC's point is further undermined by its admission in its May 9 brief that Mercury Bay Boating Club was a valid yacht club even though it operated out of nothing more than a car. (GGYC 5/9 Br. at 29;<sup>4</sup> R. at 799-800.) In addition, GGYC does not cite to any prohibition in the Deed of Gift concerning Real Federation Español de Vela's ("RFEV") sponsorship of CNEV. (R. at 567-568.) Nor does GGYC dispute that RFEV is a long established and well-respected yachting federation that competed with distinction in the 32<sup>nd</sup> America's Cup. (R. at 567-568.) GGYC also does not dispute that a panel of arbitrators, two of whom sat on the arbitration panel selected by GGYC for the 32<sup>nd</sup> America's Cup, affirmed the validity of CNEV's challenge for the 33<sup>rd</sup> America's Cup and correctly found that the word "having" can properly be used to indicate an intent to do something in the future. (R. at 887-888, 968.)

GGYC's Certificate Is Impermissibly Ambiguous: GGYC erroneously concludes that because SNG has ultimately deduced (and GGYC has ultimately conceded) that GGYC intends to race in a catamaran, its certificate is somehow cured of its original defect. SNG's current assumption and GGYC's subsequent admissions directly contrast the express language of GGYC's certificate. The certificate designates a "keel yacht" as its racing vessel. GGYC

---

<sup>4</sup> Citations to "GGYC 5/9 Br." refer to GGYC's Brief for Plaintiff-Respondent, dated May 9, 2008.

still does not dispute that a multi-hull is distinctly different from a “keel yacht” and does not dispute that the use of the term “keel yacht” in its certificate was misleading. Significantly, GGYC does not dispute that an ambiguous certificate violates the Deed of Gift and should be rejected.

## **II. THE EARLIEST POSSIBLE RACE DATE IS MAY 1, 2009**

The trial court properly ruled that the 10-month notice period could not begin to run until the uncertainties caused by litigation have been resolved. Since no order whatsoever was entered in this matter until March and the order addressing the date of the race was not entered until May 13, the 10-month period did not begin to run, at the earliest, until the spring of this year. There is no arguable basis for beginning the 10-month notice period in November 2007. Moreover, since as holder of the Cup, SNG has the right to set the location of the match and GGYC itself issued a challenge for the Northern Hemisphere, the earliest the race can take place is May 1, 2009, when the Deed of Gift allows for races in the Northern Hemisphere.

### **A. GGYC is Precluded From Arguing for a Race Date Prior To March 2009**

As an initial matter, GGYC has no right to argue for any race date prior to March 2009. It is axiomatic that an appellate court cannot grant affirmative relief to a non-appealing party. *See Hecht v. City of New York*, 60 N.Y.2d 57 (1983) (holding that the “Appellate Division . . . was without power to

vacate the judgment against [non-appealing] defendant”). Here, GGYC seeks to modify the trial court’s order in its favor by forcing SNG to race in October 2008, less than five months from today. Because GGYC has not filed a cross-appeal of the May 12 Order, this Court is precluded from addressing GGYC’s argument to reverse the May 12 Order in GGYC’s favor. *See Omansky v. 64 N. Moore Assocs.*, 337, 703 N.Y.S.2d 471, 473 (1st Dep’t 2000) (no jurisdiction to review trial court order denying cross-motion where none of the defendants filed any notice of appeal or cross appeal); *Whitfield v. JWP/Forest Elec. Corp.*, 223 A.D.2d 423, 423, 637 N.Y.S.2d 4 (1st Dep’t 1996) (same).

**B. GGYC Simply Ignores the Rule of Law That No Rights and Obligations are Determined Until Orders are Entered by the Courts**

GGYC argues for a race date in October 2008 under the rubric of “equity” and warns of the “grave consequences for commercial law in New York” if this Court selects any other date. (GGYC 5/22 Br. at 7-11). It asserts that the 10-month notice period began to run from the November 27, 2007 memorandum decision. It further submits that SNG should have begun to prepare to race GGYC beginning on that date. However, GGYC disregards the fundamental principle of New York law that only entered orders are binding and can compel action or give rise to the right to appeal. Under the terms of CPLR 2220(a), an order must be entered and notice of entry served before an order may be enforced. *See Skolnik v.*

*Metro-North Commuter R.R.*, 786 N.Y.S.2d 100, 100 (2d Dep't 2004) ("As no order was entered upon the decision, the Supreme Court's ruling as embodied therein was without effect"); *James Talcott Factors, Inc. v. Larfred, Inc.*, 496 N.Y.S.2d 27, 30 (1st Dep't 1985).

While GGYC is correct that this litigation tolled the 10-month notice period, it is incorrect that that period began to run on November 27, 2007. The November 27, 2007 memorandum decision was not reduced to an order until May 12, 2008. (SR. at SR7.)<sup>5</sup> The November 27, 2007 decision did not and could not mandate that SNG prepare for a race against GGYC. As the trial court correctly explained in its May 12 Order, a "binding decision [does not exist until] an order has been made by the Court. Only such an order triggers finality, for example the right to appeal." (SR. at SR11.)

GGYC's arguments on this point have been completely inconsistent. In its May 9 brief, GGYC argued that this appeal was premature because it was filed "prior to the motion court's settlement of an order implementing the November 27, 2007 Decision." (GGYC 5/9 Br. at 23-24.) Here, GGYC argues that SNG's time to prepare for a race against GGYC should begin in November, despite the lack of an order at that time. There is no basis for running the 10-month notice period from the November 27, 2007 memorandum decision.

---

<sup>5</sup> Citations to "SR." refer to the Supplemental Record on Appeal, filed on May 15, 2008.

**C. SNG Cannot Be Prejudiced For Exercising Its Rights Under New York Procedure**

GGYC's complaints of inequity are further belied by the fact that SNG has not sought to delay resolution of this litigation.<sup>6</sup> As instructed by Justice Cahn, SNG properly participated in the settle order process that is contemplated under 22 NYCRR § 202.48(c). (R. at 1415-1521.) It also properly filed a motion to renew and reargue under CPLR 2221 (R. at 1536-1546.), and properly sought a ruling on the trial court's invited order to show cause. (R. at 1898-1899.)

Significantly, GGYC previously acknowledged that SNG was within its rights when it sought an order to show cause why GGYC should not be disqualified as Challenger of Record. At the April 2, 2008 hearing before Justice Cahn, counsel for GGYC on numerous occasions stated that SNG "had a right to" file its subsequent motions. Counsel reiterated this point by stating "I am not saying they didn't have a right" and "Now, they were entitled to do that." (R. at 3253.) Not surprisingly, the trial court confirmed that SNG's filings were proper and not made for the purpose of delay: "I do not deem this litigation, nor any of

---

<sup>6</sup> The cases GGYC relies upon for the proposition that SNG is not entitled to equitable relief are inapplicable. In those cases, the plaintiff initiated litigation in order to avoid its obligations to perform by a certain date. *See, e.g., Broadwall Amer., Inc. v. Bram Will-El LLC*, 821 N.Y.S.2d 190, 193 (1st Dep't 2006) (plaintiff sought tolling of option period, which the appellate division rejected because the same court in a prior motion had denied the request for tolling of the option period); *Nobu Next Door, LLC v. Fine Arts Hous.*, 771 N.Y.S.2d 76, 77 (1st Dep't 2004) (plaintiff instigated action to toll period of time it had to renew lease agreement and cure breaches of its lease agreement). In this case, GGYC is the party who initiated this litigation.

the motions made therein, to have been frivolous . . . .” (SR. at SR10.) It would be inequitable to punish a party for mounting its best defense to a claim within the bounds of the law.

The 10-month notice period inures for the benefit of SNG, the Defender, not GGYC. As stated by the Court of Appeals in *Mercury Bay Boating Club v. San Diego Yacht Club*:

Because the deed allows a challenge to be mounted upon 10 months’ notice, the defender of the Cup is allowed only this short time to construct a defending vessel although the challenger has had unlimited time to mount a challenge and thus may have taken years designing and constructing its challenging vessel.

76 N.Y.2d 256, 268 (1990).<sup>7</sup> SNG is not getting any additional time in which to prepare because uncertainty still remains regarding the valid Challenger of Record. GGYC’s equitable argument is based on the claim that it is somehow a wronged party and that SNG breached the Deed of Gift. This is not supported by the findings of the trial court, which expressly held that SNG had not breached its fiduciary duties. (R. at 52, SR. at SR15.) Rather, SNG was faced with more than

---

<sup>7</sup> GGYC’s reliance on the *Mercury Bay* court’s instruction to “accept the challenge, forfeit the Cup, or negotiate agreeable terms with the challenger” is inapposite. In that case, there was no dispute whether Mercury Bay was a valid challenger, the issue was whether the racing vessel was permitted under the Deed of Gift. Here, SNG disputes that GGYC is the valid Challenger of Record. When GGYC issued its challenge, SNG had already accepted a challenge from CNEV, which SNG believes to be the valid challenger. Thus, SNG did not have the option to accept GGYC’s challenge because the Deed of Gift precludes a Defender from accepting a challenge before a pending event has been decided. (R. at 99.)

one competing challenge when under the Deed of Gift it could accept only one. That the trial court (incorrectly SNG submits) found in favor of GGYC does not mean SNG acted in an improper manner.

**D. The Earliest 2009 Date for a Northern Hemisphere Race Between SNG and GGYC is May 1**

Setting aside GGYC's efforts in misdirection and confusion, the issue is clear: a race can only take place 10 months after the valid Challenger of Record is determined. Here, SNG concedes that under the May 12 Order, the earliest race date is March 2009. However, even a March 2009 race would be improper. The trial court erred in this respect and the Northern Hemisphere race contemplated by both SNG and GGYC cannot take place until May 1 at the earliest.

The parties clearly intended that the match would take place in the Northern Hemisphere, where, under the Deed of Gift, races can only take place between November 1 and May 1. (R. at 98.) GGYC expressly selected a Northern Hemisphere match in its Notice of Challenge and cannot now escape those words in order to obtain a tactical advantage. (R. at 102.) In fact, the proposed order GGYC submitted to the trial court explicitly designated Valencia, Spain as the venue for the match. (R. at 1420.) The trial court entered that portion of the order.

(SR. at SR16.) SNG seeks a modification of that order simply to comport with the parties' intentions and to meet the requirements of the Deed of Gift.<sup>8</sup>

---

<sup>8</sup> SNG is not seeking a modification of the Deed of Gift; rather it is seeking a modification of the May 12 Order to comply with the Deed of Gift. GGYC seems to argue for a race in Valencia, Spain in March 2009, which evidences its disregard for the Deed of Gift. In any event, "the uncertainty created by this litigation," cited by the trial court, continues during the pendency of this appeal. (SR. at SR 10.)

**CONCLUSION**

For the foregoing reasons and the reasons set forth in SNG's appellate brief, dated April 21, 2008 and its reply brief, dated May 15, 2008, Appellant-Defendant SNG respectfully requests that this Court reverse the trial court's March 17 and May 12 Orders and, in any event, hold that the next America's Cup take place no earlier than May 1, 2009.

Dated:       New York, New York  
              May 23, 2008

Respectfully submitted,

SIMPSON THACHER & BARTLETT LLP

By: 

Barry R. Ostrager

Jonathan K. Youngwood

George S. Wang

Laura D. Murphy

425 Lexington Avenue  
New York, New York 10017  
Tel: (212) 455-2000  
Fax: (212) 455-2502

**Attorneys for Defendant-Appellant  
Société Nautique de Genève**

## **PRINTING SPECIFICATION STATEMENT**

This computer-generated brief was prepared using a proportionally spaced typeface.

Name of typeface: Times New Roman

Point size: 14-point type

Line spacing: Double-spaced

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum is 2,864 words.