SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 29, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Saxe, Friedman, Nardelli, Williams, JJ.

3041 Charles McCoy, Index 102384/00
Plaintiff-Respondent,

Mary Ann McCoy,
Plaintiff,

-against-

Metropolitan Transportation Authority, et al.,
Defendants-Appellants,

Manhattan and Bronx Surface Transit
Operating Authority, et al.,
Defendants.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellants.

Quirk & Bakalor, P.C., New York (Timothy J. Keane of counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered November 20, 2007, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' motion for a framed issue hearing to determine, for purposes of plaintiff-respondent's Labor Law § 241(6) claim, whether a certain piece of equipment is a mobile crane within the ambit of the Industrial Code, reversed, on the law, without costs, and the motion granted.

On the prior appeal, this Court allowed plaintiffs to amend their bill of particulars to allege violations of Industrial Code (12 NYCRR) § 23-8.1(f)(1)(iv) and (2)(i) and § 23-8.2(c)(3), on the ground that such provisions "could provide a predicate for liability under Labor Law § 241(6)" in that the horizontal movement of the raised load constituted "hoisting" (38 AD3d 308, 310 [2007]). This holding was not, however, a determination on the merits and, therefore, it is not binding as law of the case on the issue of whether the Gradall 534B rough terrain forklift used to hoist the load constitutes a mobile crane (*see e.g. James v R & G Hacking Corp.*, 39 AD3d 385, 386 [2007], *lv denied* 9 NY3d 814 [2007]). Nor did defendants, by choosing not to argue the point in opposition to plaintiffs' prior appeal or by deciding not to pursue their own appeal from the same order, waive or abandon their right to argue the merits on this issue at a subsequent point in the litigation.

Contrary to the view expressed in the dissent, the motion court, in the June 2005 order from which the prior appeal was taken, did not render a "determination that an issue of fact was presented as to whether the Gradall is a mobile crane." In fact, the June 2005 order denied plaintiffs leave to add to their bill of particulars certain Industrial Code provisions (including those

now at issue) without even referring to the mobile crane issue, and granted leave to add certain other provisions while expressly "[a]ssuming, without deciding," that the Gradall is a mobile crane. This Court disposed of plaintiffs' appeal from the June 2005 order (which was modified, by a 3-2 vote, to permit plaintiffs to add the provisions now at issue) without engaging in any analysis of whether the Gradall is a mobile crane, in either the majority writing or the dissent. Thus, before defendants moved for a framed issue hearing, neither the motion court nor this Court had ever determined that a triable jury issue exists as to whether the Gradall constitutes a "mobile crane" within the meaning of the Industrial Code. The dissent cites no authority from any source -- statute, procedural rule, or case law -- that would warrant denying defendants, under these circumstances, the opportunity to obtain a pretrial judicial determination of the legal question of whether the Gradall constitutes a "mobile crane" under the relevant regulations (*see Morris v Pavarini Constr.*, 9 NY3d 47, 51 [2007] ["The interpretation of the (Industrial Code) regulation presents a question of law, but the meaning of specialized terms in such a regulation is a question on which a court must sometimes hear evidence before making its determination"]; *Messina v City of New York*, 300 AD2d 121, 123 [2002] ["The interpretation of an Industrial Code regulation and

determination as to whether a particular condition is within the scope of the regulation present questions of law for the court"]).

All concur except Mazzarelli, J.P. and Saxe, J. who dissent in a memorandum by Saxe, J. as follows:

SAXE, J. (dissenting)

I would affirm the order denying defendants-appellants' motion for a framed issue hearing to determine, for purposes of plaintiff-respondent's Labor Law § 241(6) claim, whether a certain piece of equipment is a mobile crane within the ambit of the Industrial Code.

In the order challenged on the prior appeal, Supreme Court dismissed plaintiffs' common-law negligence claims and Labor Law § 200 and § 240(1) claims, as well as the Labor Law § 241(6) cause of action with respect to certain claims; it permitted plaintiffs to amend their bill of particulars to include violations of Industrial Code §§ 23-8.2(d)(1) and (d)(2) and, as to those sections, held that the question of whether the Gradall 534B rough terrain forklift was a mobile crane presented an issue of fact. On appeal, plaintiffs challenged particular aspects of Supreme Court's order denying in part and granting in part defendants' motion for summary judgment and plaintiffs' motion to amend their bill of particulars; defendants withdrew their appeal. We modified so as to permit amendment of the bill of particulars to include asserted violations of three other Industrial Code provisions as well, and otherwise affirmed.

On the eve of trial, defendants moved for a stay of trial and a framed issue hearing to determine, as a matter of law, the issue Supreme Court had already held to be a question of fact,

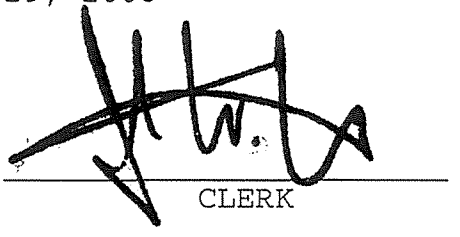
namely whether the Gradall was a mobile crane as contemplated in the Industrial Code. This point could have been raised by defendants in the appeal they instead decided to withdraw.

While the prior appeal was limited, and we were not required to review the holding as to the characterization of the Gradall, defendant made a strategic decision to leave unchallenged the determination that an issue of fact was presented as to whether the Gradall is a mobile crane. Having declined to appeal from that aspect of the decision, they should not be permitted to make an end run around the decision, thereby successfully sidetracking the trial on the very day on which jury selection was scheduled to begin. The matter should now proceed to trial on the question of whether defendant was negligent under any of the theories plaintiff proffered, including the Industrial Code provision applicable to mobile cranes.

Accordingly, I respectfully dissent.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 29, 2008



CLERK

Tom, J.P., Andrias, Nardelli, Williams, JJ.

3614 Lydia Cicero, et al., Index 600737/05
Plaintiffs-Appellants,

-against-

Great American Insurance Company, et al.,
Defendants-Respondents.

Russo, Keane & Toner, LLP, New York (Thomas F. Keane of counsel), for appellants.

London Fischer LLP, New York (Daniel Zemann, Jr. of counsel), for respondents.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered August 2, 2007, which, in an action pursuant to Insurance Law § 3420 against an excess insurer and its affiliates, denied plaintiffs' motion for summary judgment, unanimously reversed, on the law, without costs, the motion granted, and plaintiffs awarded judgment in their favor and against defendants in the sum of $1,501,211.00 plus interest and costs. The Clerk is directed to enter judgment with 9% interest from December 8, 2004, the date of entry of judgment against Western Beef, Inc. in the underlying personal injury action.

In plaintiffs' underlying personal injury action against Western Beef Inc. for serious injuries suffered by Lydia Cicero on January 20, 1998, when she slipped and fell in its supermarket, a preliminary conference order directed Western Beef to respond to plaintiffs' combined demands, dated May 27, 1999,

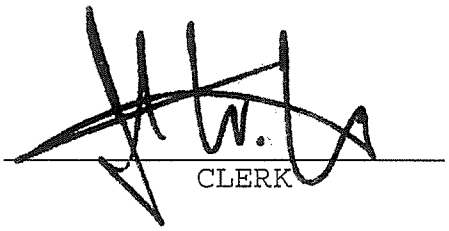
and disclose "the existence and contents of *any* insurance agreement as described in CPLR § 3101(f)" (emphasis added). On January 21, 2000, counsel for Zurich American Insurance Group, Western Beef's insurer, responded that, at the time of plaintiff's accident, Western Beef was insured by Zurich American Insurance Group under a policy that had a single limit coverage of $1,000,000. Almost four years later, on the eve of trial, Western Beef's broker notified Zurich American that Western Beef had $25 million in excess coverage with Great American Insurance Company. Counsel for Zurich American then notified counsel for plaintiffs, who promptly gave notice of their claim, on January 9, 2004.

While, ordinarily, whether plaintiffs acted diligently in ascertaining the identity of Western Beef's insurer or insurers would present an issue of fact, under these circumstances, where Western Beef affirmatively misled plaintiffs as to even the existence, let alone the identity, of its excess insurer and failed to cooperate with its primary insurer, Zurich American, in the latter's attempts to ascertain whether there was any excess

coverage, plaintiffs' efforts were sufficient and the notice given by them shortly after they learned of the excess coverage and American National's identity was timely as to them.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 29, 2008



Tom, J.P., Andrias, Nardelli, Williams, JJ.

3615N Lydia Cicero, et al., Index 600737/05
Plaintiffs-Respondents,

-against-

Great American Insurance Company, et al.,
Defendants-Appellants.

London Fischer LLP, New York (Daniel Zemann, Jr. of counsel), for appellants.

Russo, Keane & Toner, LLP, New York (Thomas F. Keane of counsel), for respondents.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 11, 2008, which, in an action pursuant to Insurance Law § 3420 against an excess insurer and its affiliates (collectively Great American), denied Great American's motion for leave to amend the answer to include an affirmative defense of res judicata and, upon amendment, for summary judgment dismissing the complaint on that ground, unanimously affirmed, without costs.

Great American disclaimed coverage in the underlying action for personal injuries, brought by plaintiffs herein, because it did not receive timely notice of the accident from its insured, the defendant in the underlying action (Western Beef). Western Beef then commenced a declaratory judgment action against, among others, Great American and the broker who sold it the excess insurance as to the rights and obligations of the parties under

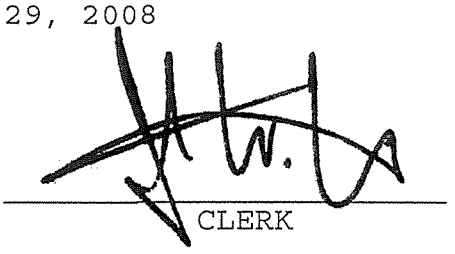
the excess insurance policy (*Western Beef, Inc. v J&H Marsh & McLennan, Inc., et al.* [Sup Ct, Queens County, Index No. 9365/04]). Plaintiffs settled the underlying action and, as part of the settlement, Western Beef assigned to plaintiffs its rights against Great American and the other defendants in the declaratory judgment action. Plaintiffs then took over the prosecution of the declaratory judgment action and also commenced this direct action against Great American to recover the portion of the settlement exceeding the primary policy limit. A motion for summary judgment in the declaratory judgment action resulted in a declaration that Great American was under no obligation to satisfy the judgment against Western Beef in the underlying action, the court holding that timely notice by Western Beef to its insurance broker did not constitute timely notice to Great American because the evidence failed to show that the broker was Great American's agent as well as Western Beef's.

We reject Great American's argument that the instant action is precluded by this declaration. The assignment to plaintiffs of Western Beef's rights under its policy with Great American did not diminish their statutory right to pursue a direct action against the insurer, which is independent of the insurance contract (*see Lauritano v American Fid. Fire Ins. Co.*, 3 AD2d 564, 567 [1957], *affd* 4 NY2d 1028 [1958] [noting the absence of privity]). The determinative issue in the declaratory judgment

action was whether notice of plaintiffs' claims in the underlying action given by Western Beef to its broker could be imputed to Great American; here, no contract, agency or insurance coverage issues are involved. Rather, this is a statutory action to collect an unpaid settlement in which the only defense available to Great American is that plaintiffs did not satisfy their statutory obligation to provide notice as soon as reasonably possible "in light of the opportunities to do so afforded [them] under the circumstances" (*Appel v Allstate Ins. Co.*, 20 AD3d 367, 369 [2005] [internal quotation marks and citations omitted]). "While a valid final judgment bars future actions between the same parties on the same cause of action, [a] subsequent action will not be barred by res judicata where the nature or object of the second action is distinct from that in the prior action in which the judgment was rendered" (*GTFM, LLC v Nagy*, 18 AD3d 266, 268 [2005] [internal quotation marks and citations omitted]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 29, 2008



CLERK

Mazzarelli, J.P., Friedman, Buckley, Sweeny, Renwick, JJ.

3672 Joan Crawford, et al., Index 118914/03
Plaintiffs-Respondents,

-against-

City of New York,
Defendant,

Petrocelli Electric Co., Inc.,
Defendant-Appellant.

Fiedelman & McGaw, Jericho (Ross P. Masler of counsel), for appellant.

The Breakstone Law Firm, P.C., Bellmore (Jay L.T. Breakstone of counsel), for respondents.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 16, 2007, which, to the extent appealed from, denied defendant Petrocelli's motion for summary judgment dismissing the complaint and cross claims against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The complaint alleges that on March 31, 2003, at approximately 12:30 p.m., plaintiff Crawford was standing on the corner of East Broadway and Catherine Street in Manhattan when, without warning, a traffic signal pole fell over and struck her on the head. The complaint further alleges that Petrocelli breached its contract with the City by failing to properly maintain the pole, and that plaintiffs will rely on the doctrine of res ipsa loquitur to establish Petrocelli's negligence.

In moving for summary judgment, Petrocelli argued that it had neither actual nor constructive notice of the allegedly dangerous condition. Specifically, Petrocelli argued that its contract with the City required it to perform maintenance on traffic signal poles "only upon notification of a defective condition from the City," and that it was not obligated to search for traffic signals in need of repair. With reference to this specific signal pole, Petrocelli's project manager submitted an affidavit stating that there were no calls or notifications from the City during the two-year time period prior to the incident.

Lester Berkowitz, a Petrocelli repairman, replaced two lamps on adjacent poles at the intersection in question on February 3, 2002. He performed a visual inspection of all the poles at the intersection on that date and found no indication of any visibly broken parts of the base on any of them.

Berkowitz also did a visual inspection of all the poles when he returned to the intersection on March 22, 2003, to follow up on a repair job started by another repairman. This inspection did not reveal anything unusual about any of the poles.

On the date of the incident, Ronald Campbell, a Petrocelli employee, responded to the intersection and inspected the downed pole. He found the "mats and studs" in good condition, and that they did not need to be replaced. Campbell and other Petrocelli repairmen stated that the only way a traffic pole could fall over

was from one heavy impact or numerous light impacts from vehicles.

In opposition, plaintiffs contended that the inspection by Berkowitz was inadequate and asserted the existence of questions of fact as to whether Petrocelli had constructive notice of the dangerous condition. Plaintiff argued res ipsa loquitur and submitted an affidavit of an expert who opined that the most probable reason the pole fell was that it was never properly installed. Noting that the base of the pole showed no damage, the expert stated that the pole was never properly secured to the anchor bolts on the concrete foundation. All the securing features related to the pole were located inside the base, and not visible from the outside of the pole. He also observed that there were no indications of trauma or other damage to the base or the pole, indicating that nothing like a car or truck struck the pole causing it to fall.

In reply, Petrocelli argued that it had not installed the pole, which was probably done in the 1920s or 1930s, and that plans for traffic signals at that intersection had last been revised in 1975, some eight years prior to Petrocelli's obtaining the maintenance contract. Lastly, Petrocelli argued that res ipsa loquitur did not apply because plaintiffs could not establish that it had exclusive control of the subject pole, inasmuch as the public and fire department had "unfettered access

to the instrumentality."

The IAS court denied the motion for summary judgment, finding that although Petrocelli did not have actual or constructive notice of any defect in the pole, plaintiffs raised issues of fact as to the applicability of res ipsa loquitur, since Petrocelli was the "only known party who had access to the internal structure of the pole" where all mechanisms to secure the pole are located.

In order to submit a case to a trier of fact on the theory of res ipsa loquitur, a plaintiff must establish the event to be (1) of a kind that ordinarily does not occur in the absence of someone's negligence, (2) caused by an agency or instrumentality within the exclusive control of the defendant, and (3) not due to any voluntary action or contribution on the part of the plaintiff (*Corcoran v Banner Super Mkt.*, 19 NY2d 425, 430 [1967]).

The first and third prongs were clearly established. It is the issue of exclusivity of control of the instrumentality that is troubling in this case.

We do not accept Petrocelli's argument that the only way a pole will fall is from one large or many smaller impacts over time. Its own witnesses stated there was no damage to the external base of the pole or indication that it had been struck by anything at any time. Nor do we accept Petrocelli's argument that the Fire Department's call box attached to the pole negates

the concept of exclusive control. Petrocelli presented no evidence that the Fire Department had any access to the internal mechanism of the pole.

Exclusivity, as it applies to res ipsa loquitur, is a relative term. "It does not require the elimination of all other possible causes of the incident" (*Banca DiRoma v Mutual of Am. Life Ins. Co., Inc.* (17 AD3d 119, 121 [2005]) but simply "a rational basis for concluding that 'it is more likely than not' that the injury was caused by defendant's negligence" (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]). "Nor does the doctrine require sole physical access to the instrumentality causing the injury, which can be applied in situations where more than one defendant can exercise exclusive control" (*Banca DiRoma*, 17 AD3d at 121). Control of the internal workings of an object satisfies the "exclusive control" element (*see Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d 297 [2007]).

However, there should be a connection between exclusive control of the instrumentality and the incident in question. In *Ianotta*, for example, the internal mechanisms on the elevator doors which caused them to retract were certainly within the exclusive control of defendants, who periodically inspected and serviced the elevators in the building where the injury took place. The defendant elevator maintenance company had a duty, pursuant to its contract with the building owner, to periodically

inspect and perform routine maintenance on the elevators in the building. Plaintiff's expert opined that the reason the pole fell here was that it was never properly secured when it was first installed. This installation long predated Petrocelli's contract with the City. Plaintiff did not present any evidence that Petrocelli had performed, or was required to perform any maintenance work on the subject pole. There is no proof that Petrocelli was required to perform visual or any other inspections of other poles at intersections when it was called to make a repair on a particular pole. The mere fact that Petrocelli is the only party to this action with access to the internal mechanisms of the pole is not be sufficient to meet the requirements of exclusivity of control, absent some showing that it had an obligation to inspect or maintain those mechanisms without direction from the City.

Simply put, there is no showing of any negligence on the part of Petrocelli. Without a viable cause of action for negligence, there can be no viable cause of action to which to apply the doctrine of res ipsa loquitur (*Ianotta*, 46 AD3d at 299).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 29, 2008

CLERK

JUL 29 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
John T. Buckley
James M. McGuire
Karla Moskowitz, JJ.

2951
Index 1036/06

In re GRA V, LLC, et al.,
Petitioners-Appellants,

-against-

Meenakshi Srinivasan, et al.,
Respondents-Respondents.

Petitioners appeal from an order of the Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered October 6, 2006, which denied the petition brought pursuant to CPLR article 78 to annul the determination of respondent Board of Standards and Appeals of the City of New York denying the application for a declaration that petitioner GRA V, LLC had acquired a common-law vested right to continue development under zoning regulations applicable prior to the enactment of more restrictive zoning.

Sheldon Lobel, P.C., New York (Richard Lobel and Jordan Most of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo, Stephen J. McGrath and Virginia Waters of counsel), for respondents.

BUCKLEY, J.

Petitioner GRA V, LLC (Owner) acquired two adjoining lots with the intention of developing a seven-story, 63-unit apartment building in an area that consisted mostly of detached one- and two-family homes, but was zoned R6, which allows medium density housing, i.e., buildings up to 12 stories. Residents of the area opposed the project, claiming that it would "destroy the character of the...neighborhood," and a race ensued: the community sought to obtain a rezoning to prohibit structures of Owner's planned magnitude, while Owner endeavored to complete as much of the construction as possible before any such rezoning.

Administrative Code of the City of New York § 27-157(a)(1) and § 27-164 require applications for new building and foundation permits to be accompanied by a "lot diagram ... drawn in accordance with an accurate boundary survey, made by a licensed surveyor." Instead of a lot diagram by a licensed surveyor, Owner submitted a "Sanborn map," published by the Sanborn Library LLC, which advises that "the information contained in this product is believed by the publishers to be reliable, but its accuracy is not guaranteed." Owner's architect affixed her stamp and signature to the Sanborn map, thereby attesting "to the best of [her] knowledge and belief, the plans and work shown thereon comply with the provisions of the building code and other

applicable laws and regulations."

The Sanborn map inaccurately depicted the structure on an adjacent lot as flush with the street line, when in fact it was set back one foot and nine inches. Owner's plans, based on that inaccuracy, would result in a building that violated the pertinent zoning regulations, which required a new construction in an R6 area on a street less than 75 feet wide to be located no closer to the street line than the adjacent existing buildings.

On September 7, 2004, the Department of Buildings (DOB) issued Owner a foundation and excavation permit. By September 28, Owner completed the excavation and poured about 85% of the foundation, spending approximately $450,000 on the project. On that same date, the City Council approved a law rezoning the area from R6 to R4A, allowing only one- and two-family residences, and thus prohibiting a building the size of Owner's planned construction. The next day, DOB issued a stop work order on the basis that the permit had been automatically revoked by the rezoning.

Owner filed a request to vacate the stop work order on the ground, inter alia, that it had acquired a common-law vested right to continue development of the project.[1] Initially, DOB

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[1]Petitioners now concede that they do not qualify for statutory vested rights under Zoning Resolution § 11-331.

did not contest Owner's invocation of the common-law vested right doctrine because, even though it was against DOB policy to accept Sanborn maps, Owner's architect had "stamped the map with her seal and assured the reviewing plan examiner that the map accurately represented the conditions at the site." It was only after the community submitted a survey demonstrating the inaccuracies of the Sanborn map, which revealed noncompliance with zoning regulations, that DOB opposed Owner's common-law vested rights argument. Even then, DOB declined to reject the request to vacate the stop work order until Owner submitted its own survey. It was only after Owner submitted its survey, confirming that the original plans did not conform to zoning resolutions, that DOB denied the request. Thereafter, Owner applied to respondent Board of Standards and Appeals of the City of New York (BSA) for a determination that it had acquired a common-law vested right to continue development of the project. BSA denied the application on the ground that the foundation permit upon which Owner relied was invalid, because Owner's plans were not accompanied by "an accurate boundary survey, made by a licensed surveyor," as required by Administrative Code § 27-157(a)(1) and § 27-164.

It is well settled that vested rights cannot be acquired in

reliance upon an invalid permit (*see Matter of Natchev v Klein*, 41 NY2d 833, 834 [1977]; *Matter of Jayne Estates v Raynor*, 22 NY2d 417, 422 [1968]). Even where DOB erroneously issues a permit due to its own initial failure to notice that a builder's plans do not comply with code provisions, no vested rights are acquired, since the permit could not have been validly granted in the first place (*see Matter of Perrotta v City of New York*, 107 AD2d 320, 324-325 [1985], *affd* 66 NY2d 859 [1985]). Furthermore:

> "A determination as to whether [a] petitioner had vested rights under [its] building permit must, of necessity, involve an examination of the validity of the permit, as well as compliance with technical provisions of the Zoning Resolution, and this is clearly an appropriate inquiry for agency expertise" (*id.* at 324).

The determinations of BSA, as the ultimate administrative authority charged with enforcing the Zoning Resolution, are thus entitled to great deference (*see Matter of Toys "R" Us v Silva*, 89 NY2d 411, 418-419 [1996]). Here, BSA's determination that the permit was invalid because Owner's application was supported only by an inaccurate Sanborn map, rather than an accurate actual survey, and that the proposed construction would run afoul of zoning resolutions pertaining to siting distances, was rational, and therefore should not be disturbed.

In contravention of *Matter of Perrotta* (107 AD2d 320), the dissent takes the position that the determination of the validity

of a permit and compliance with technical provisions is a pure legal issue for the courts and on which agency expertise is entitled to no deference. Moreover, the dissent argues that the foundation permit must be examined without regard to the rest of the proposed building, while simultaneously maintaining that the foundation permit is inseparable from the entire planned building. Specifically, the opposing writing argues that, for the purpose of assessing whether a foundation permit was validly issued, it is immaterial whether or not the above-ground structure would violate any zoning resolutions; but for the purpose of determining vested rights, the proposed above-ground structure must be deemed an integral part of the foundation permit, and thus a vested right in a foundation permit would automatically confer a vested right in the entire building. Respondents take the consistent position that a foundation permit should be examined as part of an entire construction, for both validity and vesting purposes, and *Matter of Glenel Realty Corp. v Worthington* (4 AD2d 702, 703 [1957], *lv dismissed in part and denied in part* 3 NY2d 708, 924 [1957]), quoted by the dissent, speaks of the foundation as "an integral part of the whole structure."

The dissent would also set a new standard for determining when the common-law vested rights doctrine applies: that a permit

need not have been validly issued, but merely somewhat validly. DOB and BSA take the position that a permit "is either valid or invalid" and that a "permit does not become valid because it is slightly invalid." In another context, one might say that there is no such thing as being slightly pregnant. In fact, the court in *Perotta* rejected the dissent's argument, ruling that it was not for the courts to declare that a permit was "'*technically* unlawfully issued'" or that "'compliance with mere technical matters [should] be viewed as curable irregularities, not as grounds for revocation [of a permit]'" (107 AD2d at 323 [emphasis in original, quoting the decision under review], *affd* 66 NY2d 859 [1985]). The principles of equitable estoppel underlying the vested rights doctrine apply only when there is a validly issued permit (*see Natchev*, 41 NY2d at 834; *Jayne Estates*, 22 NY2d at 422); the dissent would shift the analysis and apply equitable estoppel to the threshold issue of determining whether the permit was validly issued. However:

> "a municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches and the prior issue ... of a building permit could not confer rights in contravention of the zoning laws ...[;] estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results" (*Matter of Parkview Assoc. v City of New*

> *York*, 71 NY2d 274, 282 [1988] [internal quotations marks, brackets and citations omitted], *cert denied* 488 US 801 [1988]).

To the extent the dissent contends that DOB and BSA acted in an arbitrary and capricious manner in denying Owner's application, the record establishes that DOB at first was willing to consider the request, based on Owner's architect's stamping the Sanborn map as accurate, and only denied the application after reviewing Owner's own formal survey, which revealed the noncompliance with zoning regulations. Thus, DOB and BSA made their determinations based upon a careful evaluation of all the facts, with a full and fair opportunity for Owner to make any pertinent submissions.

Finally, the dissent's concern with unpredictable governmental action is unfounded in this case, where Owner knew that a change in the zoning law was possible, if not probable, and with that forewarning took a gamble to construct the foundation before that. Moreover, that gamble was staked on the risky use of a Sanborn map that was certified as accurate even though no survey had been undertaken. Indeed, the record supports an inference that Owner submitted a Sanborn map, rather than taking the time to conduct an actual survey, in order to gain speed on the competing community group. In the words of DOB:

> "As a matter of clarification, the submission of the Sanborn map instead of a survey is not the determinative issue here. Instead, the fact that the architect filed for an erroneous street wall setback is determinative. An architect should have realized that it was reckless to rely on a [Sanborn] map as accurately depicting the location of the adjoining properties to satisfy the requirements of ZR § 23-633.
>
> . . .
>
> "The architect should have known that only a survey would accurately depict the existing conditions at the site. Therefore, any hardship is self-created."

Absent from the dissent's discussion of equitable principles is mention of the fact that Owner created the very conditions leading to revocation of the permit by attesting to a Sanborn map as accurate without verifying whether that assertion was true.

Accordingly, the order of the Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered October 6, 2006, which denied the petition brought pursuant to CPLR article 78 to annul the determination of respondent Board of Standards and Appeals of the City of New York denying the application for a declaration that petitioner GRA V, LLC had acquired a common-law vested right to continue development under zoning regulations applicable prior to the enactment of more restrictive zoning, should be affirmed, without costs.

All concur except Andrias, J.P. and McGuire, J. who dissent by McGuire, J. in an Opinion:

McGUIRE, J. (dissenting)

On August 9, 2005, respondent Board of Standards and Appeals of the City of New York (BSA) issued a resolution determining that petitioners had not acquired a common-law vested right to continue development of a seven-story, 63-unit apartment building prior to September 28, 2004, the date the City Council changed the zoning law for the area in which the building was to be located. The revised zoning law authorizes only the construction of one- or two-family detached houses and thereby prohibits the construction of apartment buildings like the one petitioners proposed to build. That determination by BSA was predicated, in turn, on its determination of a question of law, i.e., whether, under the common-law vested rights doctrine, the foundation permit issued to petitioners on September 7, 2004 by the New York City Department of Buildings (DOB) was "validly issued."

In my view, BSA erred in deciding this question of law adversely to petitioners. Although the construction of the foundation in accordance with the permit did not itself violate any law, BSA nonetheless concluded that the foundation permit was not validly issued. It so concluded in part because of an error in its issuance that has no necessary consequences for the ability of petitioners to construct a building that would comply in full with all zoning requirements in effect prior to the

change in the zoning law. Critically, BSA never purported to find either that an above-grade structure complying in full with all such requirements could not be erected from the foundation or that the actual placement of the foundation violated any law. Indeed, petitioners' position on both of these points was not disputed before BSA.

The common-law vested rights doctrine "has generally been described as an application of the constitutionally based common-law rule protecting nonconforming uses," but "is also said to have been grounded on principles of equitable estoppel" (*Matter of Ellington Constr. Corp. v Bd. of Appeals of Inc. Vil. of New Hempstead*, 77 NY2d 114, 122 [1990]). Under this doctrine,

> "[i]t well settled that one who, in reliance upon a permit validly issued by a municipality, in good faith makes substantial improvements and incurs substantial expense in order to make his land suitable for a specific purpose or use, acquires a vested right to such use, even though, by reason of subsequent changes in the zoning ordinance such use has become a prohibited or nonconforming use" (*Matter of Glenel Realty Corp v Worthington*, 4 AD2d 702, 703 [1957], *lv dismissed in part and denied in part* 3 NY2d 708, 924 [1957]; *see also Incorporated Vil. of Asharoken v Pitassy*, 119 AD2d 404, 416 [1986], *lv denied* 69 NY2d 606 [1987] ["A vested right to complete a nonconforming building matures when substantial work is performed and obligations are assumed in good faith reliance on a permit legally issued"]).

After the foundation permit was issued, petitioners began

constructing the foundation. However, on September 29, 2004, the day after the City Council acted to change the zoning law, a DOB inspection showed that the foundation had not been completed. For that reason,[1] and in light of the rezoning, DOB issued a stop work order, dated September 29, 2004, prohibiting all work at the premises as of October 5, 2004. According to petitioners, prior to the cessation of work, the construction of the foundation and retaining walls was approximately 85% complete. As of September 28, 2004, petitioners had paid the general contractor some $203,000 of the estimated $275,000 cost of the foundation; an additional payment of $32,000 was due and owing to the foundation contractor. In addition, petitioners had spent approximately $65,000 for site clearing, asbestos removal and demolition work. All told, petitioners asserted that as of September 28, 2004, they had spent or committed to spend approximately $340,000.

BSA appears not to have reached the issue of whether the foundation had been substantially completed with substantial expenditures made by petitioners prior to the zoning change. Rather, BSA concluded that "notwithstanding the degree of

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[1]Under a provision of the zoning law not relevant to this appeal, a property owner has a statutory right to continue construction if the foundation has been completed and the building permit had been validly issued before the effective date of the zoning change.

excavation and foundation work performed," petitioners had "no vested right to continue construction at the site" because the foundation permit was "invalidly issued."

So far as can be gleaned from the resolution, BSA concluded that the foundation permit was not validly issued for two interrelated reasons. First, although Administrative Code of the City of New York § 27-157(a)(1) requires that applications for new building permits be accompanied by a "lot diagram ... drawn in accordance with an accurate boundary survey, made by a licensed surveyor," petitioners' application for the foundation permit was accompanied only by a "Sanborn map," which is not a map "made by a licensed surveyor." As is undisputed, however, and as the resolution expressly states, "when the plan examiner reviewed and approved the Foundation Permit on September 7, 2004, he accepted a Sanborn map in lieu of the required initial site survey." Second, the Sanborn map erroneously indicated that the building on an adjacent parcel, a garage, was built on or flush with the lot line. In fact, as was made clear by a survey undertaken at DOB's request after work on the foundation had ceased pursuant to the stop work order, the garage was set back 1.9 feet from the lot line. Under the setback requirements of the applicable zoning resolution, the street wall of the building petitioners proposed to build could not be located "closer to the

street line than the street wall of an adjacent existing building." However, if constructed in accordance with the building plans submitted by petitioners' architect at or about the time petitioners applied for the foundation permit, the street wall of the building petitioners proposed to build would be closer than 1.9 feet from the street line.

It is unclear whether BSA regarded the submission of a Sanborn map, rather than the lot diagram by a licensed surveyor required by Administrative Code § 27-157(a)(1), as alone sufficient to render the foundation permit invalidly issued. BSA, however, did not expressly state that this error was sufficient to render the foundation permit invalidly issued. Nor did it appear to regard the plan examiner's "accept[ance of] a Sanborn map in lieu of the required initial site survey" as having any relevance to the question of the validity of the permit's issuance.

In any event, the mere submission and acceptance of a Sanborn map cannot sensibly be thought to render a foundation permit invalidly issued. After all, a Sanborn map is not necessarily inaccurate with respect to the extent of the setback of an adjacent building. If a property owner incurred substantial expenditures in substantially completing a foundation permit issued after a municipal official's acceptance of a

Sanborn map that proved to be accurate, the municipality could not contend that the permit was invalidly issued. To accept that contention would be inconsistent with the "principles of equitable estoppel" (*Ellington*, 77 NY2d at 122) that support the vested rights doctrine. As the United States Supreme Court put it in discussing the equitable doctrine of estoppel, "[t]o say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government" (*Heckler v Community Health Serv.*, 467 US 51, 61 n 13 [1984] [internal quotation marks and citation omitted]). In my view, the requirement that a permit be "validly issued" does not mean that the permit must be impeccably issued.[2]

BSA's determination that the foundation permit was not validly issued appears to have been based on a different, albeit related, conclusion. Petitioners stressed before BSA that no above-grade structure had been constructed and that the construction and actual placement of the foundation below grade

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[2]A property owner could plan to erect the street wall of a proposed building farther back from the street line than required by law due to a Sanborn map that inaccurately indicated that the street wall of the adjacent building is set back farther than it actually is. It would be absurd as well as inequitable to conclude that a permit that otherwise would result in greater compliance with setback requirements would be invalidly issued if the municipal official accepted such a Sanborn map rather than the required diagram prepared by a licensed surveyor.

did not violate any law. As noted above, BSA did not purport to find to the contrary. Nor did BSA reject petitioners' contentions that (1) the foundation permit authorized the construction of the foundation only, not any portion of the superstructure above the foundation, and (2) with minor revisions to the planned superstructure, a building complying in full with all setback requirements could be constructed without any changes to the as-built conditions of the foundation.[3] By contrast, as BSA's resolution recites, DOB maintained that "the fact that no structure above-grade has been constructed does not have any relevance to the validity of the permit when issued." The basis for this contention was DOB's position, also recited in the resolution, "that the overall building design cannot be separated from the foundation design, and thus the overall structure must comply with zoning for the Foundation Permit to be valid upon issuance." After setting forth DOB's position, the resolution states that "[BSA] agrees with DOB's position as set forth above."

This unbreakable welding of the foundation permit with the

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[3]Nor, for that matter, do respondents (BSA and its commissioners in their official capacity) take issue with any of these contentions in the brief they submitted to this Court. Rather, respondents' position is that these contentions are irrelevant to the issue of whether the foundation permit was validly issued.

design of the building as contemplated at the time of the permit's issuance is flawed for several reasons. In the first place, it is unsupported by any precedent. To the contrary, it is inconsistent with *Glenel Realty* (42 AD2d 702). There, the property owners, in reliance on excavation and foundation permits, had "virtually completed" the foundations for the commercial buildings they planned to erect and had incurred substantial expense in doing so prior to an amendment to a zoning ordinance that prohibited the commercial buildings (*id.* at 702-703). The municipal respondent argued that the owners' "vested right, if any, must be confined to the foundation only, and does not extend to the completion of the superstructure or its use" (*id.* at 703). Although the Court went on to observe that "by express language, all of [the permits] relate to permission to erect the entire structure" (*id.*), it first rejected the municipality's argument that the vested right "must be confined to the foundation only." As the Court stated:

> "Such an argument is not only shocking to the sense of justice but also leads to a *reductio ad absurdum*. The foundation is an integral part of the whole structure; it *is the foundation*. Where, as here, the superstructure is a one- or two-story 'taxpayer' and part of the basement is to be utilized for rental purposes, the foundation may be said to be a major part of the whole structure. Consequently, the vested right in the foundation must connote a vested right to

> the erection and subsequent use of the specific superstructure for which the foundation was designed. *It is the construction of the foundation and the substantial cost thereof which establish and define the builder's vested rights in relation to the superstructure and its use, and which entitle him to complete it in accordance with the zoning ordinance in force at the time of the construction of the foundation"* (*id.* [final emphasis added]).

In essence, DOB's position, embraced by BSA, trivializes the valuable property rights protected by the vested rights doctrine, a doctrine that advances "the constitutionally based common-law rule protecting nonconforming uses" (*Ellington*, 77 NY2d at 122).[4] Under BSA's view of the requirement that a permit be validly issued, when a property owner constructs a foundation in good faith reliance on a foundation permit issued by a municipality and thereby incurs substantial expense (hundreds of thousands of dollars, for example), the owner is entitled to none of the

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[4]Thus, like the limitations imposed by the Fifth Amendment on the government's eminent domain power, the common-law vested rights doctrine "serve[s] to protect 'the security of Property,' which Alexander Hamilton described to the Philadelphia Convention as one of the 'great obj[ects] of Gov[erment]'" (*Kelo v City of New London*, 545 US 469, 496 [O'Connor, J., dissenting, quoting 1 Records of the Federal Convention of 1787, p 302 (M. Farrand ed 1911)]). I do not of course suggest that BSA's determination was tantamount to an unconstitutional taking of petitioners' property without just compensation. I do maintain, however, that the vested rights doctrine also helps "ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's ... power" (*id.*).

protections of the doctrine whenever plans for the superstructure submitted before or with the application for the foundation permit indicate that the superstructure would be noncompliant in any respect. This is so, under BSA's view, even when the foundation itself violates no legal requirements and even if the noncompliance, however minor, could readily be cured and a superstructure could be erected in full compliance with the zoning requirements in effect at the time of the foundation permit's issuance.[5]

That BSA's interpretation of the requirement that a permit be validly issued is indefensible is brought into focus by a concession BSA made at oral argument. Counsel for BSA was asked whether BSA's position would be the same if the relevant facts otherwise were the same but the plans for the superstructure above the legally unobjectionable foundation would result in the street wall being located one inch closer to the street line than permitted, and even if this minor error in the plans for the superstructure could readily be corrected. The answer that

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[5]Under this view, furthermore, the submission of the Sanborn map rather than the required surveyor's diagram is irrelevant. After all, if the same mistake made in the Sanborn map had been made by a licensed surveyor, the foundation permit still would be invalidly issued.

counsel gave, "yes," is absurd,[6] but it is entailed by BSA's position that a foundation permit is invalidly issued whenever the plans for the superstructure indicate any deviation from the required setback, however minor or easily corrected. In my view, given the common-law origins of the vested rights doctrine, it is particularly appropriate that the validly-issued requirement be construed in accordance with, not in disregard of, the common-law maxim *de minimis non curat lex*, i.e., the law does not concern itself with trifles (*see e.g. Matter of Dworman v New York State Div. of Hous. & Community Renewal*, 94 NY2d 359, 375 [1999]; *Van Clief v Van Vechten*, 130 NY 571, 579 [1892]).

Before discussing the majority's writing, three other points should be made. First, none of the cases cited by BSA support its view of the validly-issued requirement. With one possible exception, in the cases BSA cites in which permits were held to be invalidly issued, no building could be constructed consistent with the requirements of law in effect at the time of the

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[6]Consider, moreover, two property owners who are issued foundation permits and incur hundreds of thousands of dollars of costs in the course of constructing the foundations in good faith reliance on the permits. If the plans for the superstructure of one but not both of the buildings contain a slight but easily corrected error by the architect that if not corrected would result in a de minimis violation of setback requirements, one of the property owners would enjoy all, and the other property owner would enjoy none, of the protections of the vested rights doctrine.

permit's issuance (*see e.g. Matter of Perrotta v City of New York*, 107 AD2d 320, 325 [1985], *affd* 66 NY2d 859 [1985]; *Matter of Albert v Board of Stds. & Appeals of City of N.Y.*, 89 AD2d 960, 962 [1982], *appeal dismissed* 59 NY2d 673 [1983]; *Village of Asharoken*, 119 AD2d at 416). In the one possible exception, *Matter of Natchev v Klein* (41 NY2d 833 [1977]), it is not clear whether a compliant building could be erected. In any event, the permit at issue was a building permit and not a foundation permit, and there is no indication in the Court of Appeal's opinion or in the Appellate Division's opinion (51 AD2d 573 [1976]) that the property owner was seeking approval for a modification that would result in a building complying with all applicable legal requirements.

Second, BSA is not persuasive in arguing that separating the issuance of a foundation permit from the proposed building design "would encourage developers cognizant of a zoning change to file haphazard applications for foundation permits with the idea that they could simply 'fix' the building design after the effective date of the zoning change." One complete answer to this argument is that DOB need not approve "haphazard applications for foundation permits" or applications that are accompanied by a Sanborn map rather than a diagram prepared by a licensed surveyor. Another complete answer is that this argument would

deprive not only the haphazard property owner of the protections of the vested rights doctrine but also the circumspect owner who nonetheless makes a minor mistake. A third complete answer is that this argument ignores that haphazard applicants, like all other applicants, are entitled to the protections of the vested rights doctrine only if they show that they relied in good faith on the permit issued by the municipality.

Third, BSA made no finding on the question of good faith reliance by petitioners on the foundation permit. Notably, moreover, in their brief to this Court, respondents do not even dispute the issue of good faith reliance by petitioners on the foundation permit. Indeed, respondents implicitly concede the point to petitioners. After all, respondents contend that if this Court were to determine that the foundation permit was validly issued, a remand to BSA would be required to decide not the issue of good faith reliance but *only* the issue of whether substantial construction had occurred and substantial expenditures were incurred prior to the change in the zoning law.

The majority errs in attributing to me the position that "compliance with technical provisions is a pure legal issue for the courts and on which agency expertise is entitled to no deference." I do not of course subscribe to that position. BSA's determination in this case that the foundation permit was

not validly issued does not rest on any factual or technical determination made by BSA with which I disagree or to which I do not defer. Rather, BSA's determination rests on the conclusion of law, contrary to *Glenel Realty Corp.* (*supra*), that the validity of the foundation permit's issuance is inseparably fused with the plans for the superstructure that had been submitted at or about the time of the application for the foundation permit.

As is evident, I certainly do not "maintain[] that the foundation permit is inseparable from the entire planned building." Nor do I argue that "for the purpose of assessing whether a foundation permit was validly issued, *it is immaterial* whether or not the above-ground structure would violate any zoning resolution" (emphasis added). Rather, my position, squarely supported by *Glenel Realty*, is that BSA errs in maintaining that the foundation permit is inseparable from the planned building. If BSA had determined that no above-ground structure could be built from the foundation without violating a provision of the governing zoning law, I would not pause before deferring to that finding (as long as it was not irrational or without any factual support) and concluding that the foundation permit was not validly issued. Under BSA's view of the requirement that the permit be validly issued, any change in the plans for the above-ground structure -- such as the hypothetical

one-inch modification noted above -- however trivial and readily correctible, renders a previously issued foundation permit invalidly issued, even though the foundation authorized by the permit does not violate any applicable legal requirements, the property owner acted in good faith, and the foundation is substantially completed with substantial expenditures incurred by the property owner.

The majority paints an unflattering picture of petitioners, stating that they "gamble[d] ... on the risky use of a Sanborn map" in order to "gain speed on the competing community group," and even referring to DOB's contention -- never accepted by BSA -- that an "architect should have realized it was reckless to rely on a Sanborn map." But this unflattering portrait of property owners who ostensibly got what they deserved is inappropriate for two reasons: first, BSA made no findings adverse to petitioners on these matters and respondents implicitly concede petitioners' good faith; and second, the undisputed fact is that the error in the Sanborn map did not result in the construction of a foundation that violates any legal requirements, and the error is irrelevant to the ability of petitioners to construct a building complying in full with all the requirements of law in effect

prior to the change in the zoning law.[7]

Finally, *Matter of Parkview Assoc. v City of New York* (71 NY2d 274 [1988], *cert denied* 488 US 801 [1988]), relied upon by the majority, supports my position rather than the majority's. The permit at issue in that case was a building permit and the Court held that the permit "was invalid inasmuch as it authorized construction ... in violation of New York City Zoning Resolution § 96-06" (*id.* at 281). Here, by contrast, the permit is a foundation permit and it did not authorize construction of a foundation that violated any law.

In sum, my view is that BSA's conclusion of law that the foundation permit was not validly issued is contrary to law and irrational. As my view does not command a majority, it would be

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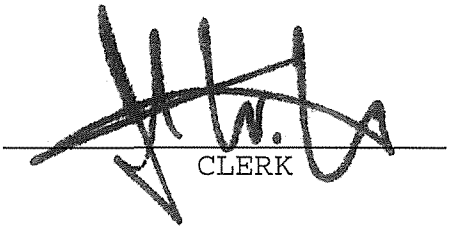
[7]The majority errs to the extent it suggests that once "a race ensued," to use the majority's apt phrase, petitioners acted improperly in seeking to get to the finish line before the competing community groups. Just as the community groups had every right to seek a change in the zoning laws as expeditiously as possible, petitioners had every right to develop their property as expeditiously as possible. Moreover, absent from the majority's discussion of equitable principles is mention of the fact that DOB's plan examiners approved the foundation despite what must have been an obvious flaw in the application. Furthermore, one can only wonder what the majority's view would be in a case in which a property owner's architect made an innocent error in good faith on a technical issue that similarly was irrelevant both to the legality of the foundation actually constructed in reliance on the permit and the ability of the owner to erect a superstructure complying in full with all then-applicable legal requirements.

pointless for me to grapple with the issue of whether the remaining issue -- whether petitioners substantially completed the foundation while incurring substantial expenditures -- can or should be decided by this Court rather than by BSA upon remand (*see Matter of Pantelidis v New York City Bd. of Stds. & Appeals*, 10 NY3d 846 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 29, 2008



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
Eugene Nardelli
Karla Moskowitz
Rolando T. Acosta
Leland DeGrasse, JJ.

4015-4016
Index 602446/07

Golden Gate Yacht Club,
Plaintiff-Respondent,

-against-

Société Nautique De Genève,
Defendant-Appellant,

Club Náutico Español De Vela,
Intervenor-Defendant.

Defendant appeals from orders of the Supreme Court, New York County (Herman Cahn, J.), entered March 18, 2008 and May 13, 2008, which, inter alia, declared Club Náutico Español De Vela's challenge invalid and Golden Gate Yacht Club the Challenger of Record under the Deed of Gift.

Simpson Thacher & Bartlett LLP, New York (Barry R. Ostrager, Jonathan K. Youngwood, George S. Wang and Laura D. Murphy of counsel), for appellant.

Latham & Watkins LLP, New York (James V. Kearney and Gina M. Petrocelli of counsel), for respondent.

DeGRASSE, J.

Defendant Société Nautique de Genève (SNG) appeals from an order that, insofar as is relevant to this appeal, declared plaintiff Golden Gate Yacht Club (GGYC) the Challenger of Record for the upcoming America's Cup race and invalidated the challenge by which such status was claimed by intervenor-defendant Club Náutico Español de Vela (CNEV).

The America's Cup is a silver cup trophy that constitutes the corpus of a charitable trust created in the 19th century under New York law (see *Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 260 [1990]). The Cup was first won in 1851 by the yacht *America* in a race around the Isle of Wight. George L. Schuyler, the sole survivor of the Cup's six owners, donated the trophy to the New York Yacht Club by Deed of Gift dated October 24, 1887 on condition that it be preserved "as a perpetual Challenge Cup for friendly competition between foreign countries." The America's Cup competition has become one of the world's premier international sporting events. Under the Deed, the holder of the Cup becomes its sole trustee, to be succeeded only by a successful challenger in a race at sea. The Cup has been defended 32 times since the inception of the competition. SNG, the current trustee or Defender, won the Cup on March 2, 2003 in the 31st America's Cup match and defended its title on

July 3, 2007 in the 32nd America's Cup match. Pursuant to the Deed of Gift:

> "Any organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match of this Cup, with a yacht or vessel propelled by sails only and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup."

The Challenger of Record is the first club to issue a challenge with respect to a given America's Cup. Under the Deed, the Challenger of Record must meet the annual regatta requirement, which will be discussed hereinafter, and must be (1) organized as a yacht club, (2) foreign, and (3) incorporated or licensed by its government. The Deed requires the Challenger of Record to give 10 months' written notice of the days for the proposed races, with the proviso that no race shall be held between November 1 and May 1 in the Northern Hemisphere or between May 1 and November 1 in the Southern Hemisphere. The 10 months' notice must detail the name, ownership, rig, and specified dimensions of the challenging vessel. The Deed precludes the Defender from entertaining any other purported challenge of record while the challenge of a qualified Challenger of Record is pending. Once a challenge is accepted, the Defender and the Challenger of Record

may, under the Deed, set the conditions of the competition as follows:

> "The Club challenging for the Cup and the Club holding same may, by mutual consent, make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match, in which case also the ten months' notice may be waived."

Through this "mutual consent" provision, every America's Cup match since 1970, save one, has been an event in which challengers from different countries competed in an elimination series for the opportunity to have a one-on-one race with the Defender (see *Mercury Bay Boating Club* at 262). The Deed provides for a 3-race match between the Defender and the Challenger of Record in the event of the parties' inability to agree upon the terms of a match. In such a case, the Defender chooses the courses of the races as well as the applicable race rules and sailing regulations. The winner of two of the three races is entitled to the Cup. In the last 38 years, only the 27th America's Cup match, held in 1988, was conducted as a two-boat race because the parties could not agree on terms. The 27th Cup match was also the subject of the Court of Appeals' decision in *Mercury Bay Boating Club v San Diego Yacht Club* (76 NY2d 256 [1990], supra).

On July 3, 2007, immediately after its victory in the 32nd

Cup match, SNG accepted CNEV's formal challenge for the 33rd Cup match. By way of background, CNEV was incorporated as a sporting association under the laws of the Valencia region of Spain on June 19, 2007, by Real Federacion Espanola de Vela (RFEV).[1] Established under Spanish law in 1990, RFEV is not a yacht club but a federation of sports clubs and individuals who promote the sport of sailing. Nevertheless, it competed in the challenger elimination series for the 32nd America's Cup. CNEV was incorporated for the express purpose of challenging for the 33rd Cup and avoiding lingering controversy regarding the capacity of a sailing federation, such as RFEV, to become a challenger and potential trustee under the Deed of Gift. Upon acceptance of CNEV's challenge, and in keeping with the Deed's "mutual consent" provision, SNG and CNEV entered into a protocol setting out the terms of the 33rd America's Cup match. When it filed its challenge, CNEV had not held an annual regatta. By letter to SNG dated July 11, 2007, GGYC, the Challenger of Record for the 32nd America's Cup, disputed CNEV's challenge as follows:

> "We respectfully submit that the challenge is invalid. Among other deficiencies, it is not from a *bona fide* yacht club, but from an entity organized in the form of a yacht club only a few days before the challenge was

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[1] CNEV was duly registered with the regional registry of sports organizations (Registro de Entidades Deportivas de la Comunitat Valenciana) on June 28, 2007.

> accepted by SNG and which has never had an annual regatta on an open water course on the sea or an arm of the sea as required by the Deed of Gift. It is also apparent that this 'Challenger of Record' has not performed any of the duties of the Challenger as contemplated by the Deed of Gift, but has simply delegated to the Defender the authority to determine all of the 'conditions' governing the match. This undermines the fundamental purpose of the Deed of Gift to preserve this competition as a Challenge Cup."[2]

GGYC proffered its own purported challenge with the letter and demanded recognition by SNG as the Challenger of Record for the 33rd America's Cup match. By its Notice of Challenge, GGYC proposed July 4, 2008 as the date of the first race and July 6 and 8, 2008 as the dates for the second and, if necessary, third races.

On July 20, 2007, invoking the arbitration provision of the protocol it entered into with CNEV, SNG applied to the 33rd America's Cup Arbitration Panel for a determination regarding CNEV's challenge. SNG's arbitration petition reads as follows:

> "There has been issued raised [*sic*] by prospective competitors in the 33rd America's Cup, including the Golden Gate Yacht Club, as to the validity of the challenge of Club Nautico Espanol de Vela. SNG as Trustee of the America's Cup makes an application to the Panel for a declaration that the challenge received from Club Nautico Espanol de Vela on 3rd July 2007 and accepted by SNG on the same date, is a valid challenge under the terms of the Deed of Gift of 24th October 1887, and that SNG is obliged to meet that challenge

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[2] CNEV subsequently held its regatta on November 24 and 25, 2007 in Valencia, Spain.

under the terms of the Deed of Gift."

July 20, 2007 is also the date on which GGYC commenced this action alleging that SNG breached the Deed of Gift and its fiduciary duty as trustee by accepting CNEV's challenge. GGYC contended that CNEV's challenge is invalid under the Deed because it was made when CNEV (1) was not an organized yacht club and (2) had not conducted an annual regatta. SNG moved and GGYC cross-moved for summary judgment with respect to the entire complaint. The motion court denied SNG's motion and granted GGYC's cross motion, vacating CNEV's challenge on the ground that CNEV had failed to meet the Deed's annual regatta requirement. Having made that determination, the motion court found it unnecessary to reach the question whether CNEV was an organized yacht club. SNG subsequently moved for leave to renew and reargue, asserting that GGYC's challenge is deficient, based upon its description of its vessel. The court denied that motion. An order incorporating the motion court's determination was entered on May 13, 2008. Noting that SNG's 10-month preparation period had been interrupted by this litigation, the court directed that the first challenge match race be held 10 months from the date of service of a copy of its order with notice of entry and that the second be held two business days thereafter and the third, if necessary, two business days after that. The court further directed that

the 33rd America's Cup match be held in Valencia, Spain, the venue designated upon SNG's acceptance of CNEV's challenge, or at a different location upon notice prescribed by the order.

This appeal turns on the meaning of the words "having for its annual regatta" as used in the Deed of Gift. In making its determination, the motion court found that the phrase is "plainly understood to mean that it is an on-going activity; the activity has taken place and is continuing." The court further found that the phrase "implies that the organization has had one or more regattas in the past, and will continue to have them in the future." Accordingly, the court reasoned that CNEV was not a qualified Challenger of Record because it had not held an annual regatta as of the date of its challenge. The Deed of Gift, a trust instrument, "is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself" (*Mercury Bay Boating Club*, 76 NY2d at 267). As SNG would have it, the annual regatta requirement can be satisfied where the yacht club "intends to hold an annual regatta and does so prior to the date of its proposed match." GGYC disputes SNG's construction, arguing that " '[h]aving' as commonly used in the law does not mean 'not having now.' It means 'possess.' And, in this context, it means, 'possess' an annual regatta." GGYC's argument is

untenable because, as a matter of standard English usage, the noun "regatta" cannot be the proper object of the verb "possess."

The record includes an excerpt from *An English Grammar For the Use of High School Academy, and College Classes,* by W. M. Baskervill and J. W. Sewell [1896]. According to this treatise, participles, such as "having," "express action in a general way, without limiting the action to any time, or asserting it of any subject." Participles "cannot be divided into tenses (present, past, etc.), because they have no tense of their own, but derive their tense from the verb on which they depend." An example given in the treatise is "fulfilling," which depends on the past-tense verb, "walked," in the following: "He walked conscientiously through the services of the day, fulfilling every section the minutest, etc." A further example is "dancing," which depends on a present-tense verb in the following verse:

> "Now the bright morning star, day's harbinger,
> Comes dancing from the East."

In accordance with the foregoing, "having for its annual regatta" can only be interpreted through strained English usage. If explicable at all, the phrase is subject to conflicting interpretations. We therefore hold that the Deed of Gift's annual regatta requirement is ambiguous. GGYC argued below that the participle, "having," in the Deed, derives its tense from the

words "shall always be entitled." "Shall," however, is a word used to form the future tense (Lutz and Stevenson, The Writer's Digest Grammar Desk Reference § 1C, at 16-17). Accordingly, GGYC's argument only confirms the ambiguity of the annual regatta requirement.

A court may resort to extrinsic evidence to construe an ambiguous provision of a trust instrument (*see Mercury Bay Boating Club*, 76 NY2d at 267). In this instance, the Cup's recent history is a source of relevant extrinsic evidence. SNG challenged for the 31st America's Cup by letter to the Royal New Zealand Yacht Squadron (RNZYS), the then trustee, on August 18, 2000. SNG, a Swiss yacht club, is situated on Lake Geneva and, as of the date of its challenge, had never held a regatta on an ocean water course, as required by the Deed. As a precautionary measure, SNG and RNZYS applied to the 31st America's Cup Arbitration Panel (ACAP 31) for a ruling regarding the validity of SNG's challenge and "seeking interpretations of the Deed of Gift relating to the criteria for future challengers by yacht clubs [*sic*] not located on the sea or an arm of the sea." ACAP 31 received submissions from three other yacht clubs, including the New York Yacht Club, none of which disputed the validity of SNG's challenge. ACAP 31 resolved the issue by determining that the Deed of Gift has no provision requiring the annual regatta to

have been held prior to the lodging of a challenge. GGYC attempts to dismiss ACAP 31's decision as "unremarkable" because SNG was not the Challenger of Record for the 31st Cup but merely a so-called "Mutual Consent Challenger." However, the Deed itself makes no such distinction with respect to the annual regatta requirement. Adoption of the distinction would mean that a yacht club, such as SNG in 2000, could win the Cup, serve as its trustee, and defend it, but lack the capacity to be a Challenger of Record. Nothing in the Deed of Gift calls for such an incongruous result.

As noted above, the motion court did not address GGYC's argument that CNEV is not an "organized Yacht Club," a status required but not defined by the Deed. An entity is "organized" if it has taken all steps "necessary to endow [itself] with the capacity to transact the legitimate business for which it was created" (*Matter of Corporation of Yaddo,* 216 App Div 1, 4-5 [1926]). According to its certificate of incorporation, CNEV was incorporated as a sports entity whose purpose is to support "sports activities practiced on the sea, and especially to promote the sport of sailing by organizing national and international regattas held in national territory." It has an address, bylaws and a board of directors. In addition, as indicated it is registered with the Valencian Registry of Sports

Organizations. Based upon the foregoing attributes, we hold that CNEV was organized as a yacht club at the time of its challenge. GGYC cites no authority to support its argument that a yacht club must have vessels to be organized. Therefore, CNEV met the Deed of Gift's organizational and annual regatta requirements. In light of the foregoing, we need not reach the issue whether GGYC's purported challenge was deficient.

Accordingly, the orders of the Supreme Court, New York County (Herman Cahn, J.), entered March 18, 2008 and May 13, 2008, which, inter alia, declared CNEV's challenge invalid and GGYC the Challenger of Record under the Deed of Gift, should be reversed, on the law, with costs, CNEV declared the Challenger of Record, and, in keeping with the Deed of Gift's requirement that the defender be given at least 10 months' written notice to prepare for the challenge, the 10-month notice period should be tolled until service of a copy of this order.

All concur except Saxe, J.P. and Nardelli, J. who dissent in an Opinion by Nardelli, J.

NARDELLI, J. (dissenting)

Because I find, inter alia, that the motion court properly concluded that the relevant wording of the Deed of Gift is unambiguous and, therefore, that the challenge of Club Naútico Español de Vela is invalid, I respectfully dissent.

The America's Cup[1] is a silver trophy which is the corpus of a charitable trust, having derived its name from the schooner *America*, which won a yacht race around the Isle of Wight against six British challengers in 1851. The six owners of the *America* and the Cup donated it to the New York Yacht Club in 1857, but it was twice returned to George Schuyler, the sole surviving Cup donor, when questions arose regarding the terms of the trust under which the Cup was to be held. In 1887, Schuyler again donated the Cup to the New York Yacht Club pursuant to the current Deed of Gift (Deed), dated October 24, 1887,[2] "upon the conditions that [the Cup] shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries."

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[1]The following historical background of the America's Cup has been gleaned from the decision of the New York State Court of Appeals in *Mercury Bay Boating Club v San Diego Yacht Club* (76 NY2d 256 [1990]), as well as from those parts of the parties' submissions which are undisputed.

[2]The Deed was amended by two orders of the New York State Supreme Court, dated December 17, 1956 and April 5, 1985.

The Deed provides that the holder of the Cup is its sole trustee until such time as a successful challenge is mounted by a qualified challenger.[3] The Deed specifically delineates what criteria must be met for a yacht club to be considered an eligible challenger, and therefore entitled to challenge for the Cup, and it is that provision, which follows, that is at the core of the current controversy:

> "*Any organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea,* or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match of this Cup, with a yacht or vessel propelled by sails only and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup" (emphasis added).

The first club that issues a challenge provides the defender with 10 months' written notice ("Notice of Challenge"), names the days for the proposed race in accordance with the Deed restrictions,[4] and provides certain technical information about

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[3]The Deed also provides a mechanism for the transfer of the Cup "[s]hould the Club holding the Cup be for any cause dissolved."

[4]Pursuant to the terms of the Deed, races must be scheduled between May 1 and November 1 if they are to be held in the Northern Hemisphere, and between November 1 and May 1 in the Southern Hemisphere.

the challenging vessel, becomes the Challenger of Record. As noted by the Court of Appeals in *Mercury Bay* (76 NY2d at 261), there is nothing in the Deed which limits the design of the defending club's vessel other than the length on water-line limits applicable to all competing vessels. Further, the vessels are not limited to monohulls, and there is no requirement that the vessel defending the Cup have the same number of hulls as the challenger, or even that the competing vessels be substantially similar.

The Deed gives the defending club and the Challenger of Record the freedom to promulgate all of the particular details of the races, and states that the parties "may, by mutual consent, make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match, in which case also the ten months' notice may be waived." Historically, the defender and the Challenger of Record have, pursuant to the foregoing provision, come to terms and issued an agreed upon protocol which, inter alia, allows for other yacht clubs, as "Mutual Consent Challengers," to participate in an elimination regatta for the right to race the defender. In the event the parties

cannot mutually agree upon the terms of a match,[5] "then three races shall be sailed, and the winner of two of such races shall be entitled to the Cup." The Deed provides the terms and conditions for such a one-on-one match.

Finally, the Deed provides that "when a challenge from a Club fulfilling all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided."

Defendant Société Nautique de Genève (SNG) is a Swiss yacht club and the Cup's current defending club and trustee, having, through its Team Alinghi, initially won the 31st America's Cup on March 2, 2003, and thereafter successfully defended its title in the 32nd America's Cup match on July 3, 2007. Plaintiff Golden Gate Yacht Club (GGYC) was the Challenger of Record for the 32nd America's Cup in which 12 yacht clubs raced, although it was eliminated in the challenger series and did not compete in the final match.

Initially, Real Federacion Espanola de Vela (RFEV), a Spanish sailing federation, contemplated becoming the Challenger

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[5]Since 1970, a multi-challenger match race has been conducted every three to four years, with the defending club and the Challenger of Record agreeing on a protocol, except for the 27th America's Cup match, held in 1988, which resulted in a two-boat match and which eventually led to the Court of Appeals' decision in *Mercury Bay*.

of Record for the 33rd America's Cup, but was advised by its lawyers that because it was a federation of yacht clubs, and not a yacht club itself, its status of Challenger of Record could be disputed. Accordingly, in an attempt to sidestep controversy, RFEV incorporated defendant Club Naútico Español de Vela (CNEV) on June 19, 2007[6] as a private Spanish sports club, with unlimited duration, for the purpose of promoting sailing practices through the organization of national and international regattas and to organize at least one regatta per year in the open sea.

On July 3, 2007, CNEV tendered a formal Notice of Challenge for the 33rd America's Cup, asserting that it was a valid challenger under the terms of the Deed, in that it was a foreign yacht club organized under Spanish law and that it agreed to hold two annual regattas prior to the racing of the 33rd America's Cup match. SNG accepted CNEV as the Challenger of Record on the same day, and on July 5, 2007, the parties publicly released "The Protocol Governing the Thirty-Third America's Cup" (Protocol).

While a number of international yacht clubs signed onto the

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[6]CNEV was registered with the Registro de Entidades Deportivas de la Comunitat Valenciana (Registry of Sports Organizations of the Valencian Community) on June 28, 2007.

Protocol shortly after its publication,[7] an equal or greater number of clubs signed a letter which not only condemned the Protocol as "the worst text in the history of the America's Cup and more fundamentally [because] it lacks precisely the mutual consent items which are required," but also questioned the legitimacy of the "newly created and purely instrumental entity" CNEV "to advance a Challenge under the provisions of the Deed of Gift." The letter further propounds that the Protocol so heavily favors the Defender by shifting the balance of the competition in its favor, that it "jeopardises [*sic*] the ... survival of the event."

GGYC, on July 11, 2007, issued its own formal Notice of Challenge, noting that it:

> "(a) is incorporated in the United States of America, in the State of California;
>
> (b) maintains a membership of more than 200 members;
>
> (c) operates as a yacht club and has objectives consistent with the furtherance of yachting activities;
>
> (d) is a member of our national sailing authority, US SAILING; and
>
> (e) has an annual regatta, the Sea Weed Soup

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[7]SNG maintains that additional qualified yacht clubs have signed onto the Protocol since the summary judgment motions were filed in Supreme Court.

> Perpetual Trophy that, among other GGYC regattas, is and has been held annually on an arm of the sea, namely San Francisco Bay."

Accordingly, GGYC contended that it is an organized yacht club that fulfills all of the conditions of a Challenger of Record under the terms of the Deed.

SNG, by letter dated July 23, 2007, formally rejected GGYC's challenge, stating that it had already received a valid challenge from CNEV and that the Deed barred consideration of GGYC's challenge until the pending challenge of CNEV has been decided. In the interim, on July 20, 2007, SNG commenced an arbitration proceeding pursuant to the arbitration provisions of the Protocol,[8] seeking a ruling as to the validity of CNEV's challenge. The arbitration panel invited GGYC's participation in the proceedings, but GGYC, by letter dated July 27, 2007, declined to do so, poignantly stating, inter alia, that:

> "It is subterfuge to have SNG and CNEV's hand picked arbitrators, replaceable at [] their whim, sitting in a forum and under rules wholly controlled by SNG and CNEV, and judging an issue that the parties to the

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[8]Part D of the Protocol, entitled "Dispute Resolution and Enforcement," provides, in relevant part, that "[a]ny dispute, protest or claim arising out of or in relation to this Protocol and/or the Applicable Documents ... shall be resolved by arbitration in accordance with the provisions of this Protocol ..." The Protocol further allows SNG and CNEV to privately select the arbitration panel members and to "dismiss and replace them ... at their discretion at any time."

> arbitration do not dispute. The disgrace and shame brought upon the America's Cup by this charade threatens to inflict a crippling blow to the sport. This arbitration, if it chooses to proceed, will not and cannot have any involvement from GGYC, and will be viewed with the same disdain by the public and sailing community as CNEV's sham regatta."

On September 10, 2007 the panel ruled that CNEV qualified as a valid Challenger of Record and that the Deed did not require that an annual regatta have been held prior to the issuance or acceptance of a newly formed yacht club's notice of challenge.

GGYC, on the same date that SNG had initiated the arbitration proceeding, commenced the within action against SNG by the service of a summons and verified complaint, which interposed two causes of action. The first cause of action sounds in breach of fiduciary duty and asserts that SNG, as trustee of the Cup, has a duty to enforce the terms of the Deed and that it breached that duty and engaged in self-dealing when it accepted CNEV's challenge, and when it entered into the Protocol without engaging in the process set forth in the Deed's "mutual consent" clause. The second cause of action, which alleges breach of the Deed, states that CNEV's Notice of Challenge and challenges were invalid in that they failed to

conform to the terms of the Deed. The complaint seeks[9] a declaration that the purported challenger and the Protocol are void; a declaration that GGYC's challenge is valid; judgment enjoining SNG from promulgating rules and regulations pursuant to the Protocol and directing SNG to reject CNEV's challenge; and judgment enjoining SNG to accept GGYC's Notice of Challenge and to implement the terms of the Deed by participating with GGYC in the establishment of a protocol through a consensual process or, failing that, to proceed with a match under the express rules of the Deed.

SNG subsequently moved for summary judgment dismissing the complaint on the ground that CNEV satisfied all of the requirements of the Deed. GGYC opposed the motion and cross-moved for summary judgment in its favor, arguing that CNEV is not an "organized" yacht club and has not held an annual regatta[10] as required by the terms of the Deed. GGYC contends that CNEV is controlled by RFEV, and that it is a shell entity that has refused to identify its members, has no vessels, no telephone

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[9]CNEV subsequently sought, and was permitted, to intervene in this action. However, CNEV has made no submissions in connection with this appeal.

[10]Initially, SNG maintained that CNEV had held two regattas, one of which turned out to have been held for children, and the other of which SNG no longer argues qualifies under the Deed.

number other than that of the base facility of its racing team, and no web site.

The motion court, in a memorandum decision dated November 27, 2007, dismissed GGYC's cause of action for breach of fiduciary duty, but granted it summary judgment on its cause of action for breach of the terms of the Deed. The court found that the wording in the Deed, "having for its annual regatta," requires that the challenging yacht club must have had one or more regattas in the past, and will continue to have them in the future. Since CNEV had not yet held an annual regatta at the time it issued its challenge, the court ruled that CNEV was not a qualified challenger under the terms of the Deed. Having reached that conclusion, the court did not reach GGYC's alternative argument that CNEV is not an "organized" yacht club as prescribed by the Deed. Furthermore, the court ruled that GGYC's Notice of Challenge comported with the requirements of the Deed and, therefore, that GGYC was the Challenger of Record. The court rejected SNG's argument that GGYC should be denied such a declaration under the doctrine of unclean hands.

SNG subsequently moved for leave to renew and reargue the court's decision on the grounds that the court improperly

adjudicated the validity of GGYC's challenge, as that issue was not properly before the court, and that in any event, GGYC's challenge and certificate did not meet the requirements of the Deed. The court thereafter issued an order to show cause why GGYC's challenge should not be declared invalid and noncompliant with the Deed. After conducting a hearing on the validity of GGYC's challenge, the court consolidated SNG's motion for renewal and reargument with its motion to declare GGYC's Notice of Challenge invalid and denied both motions. On or about May 12, 2008, the court issued an order reflecting the foregoing decisions, as well as a separate order directing that the 10-month notice period provided for in the Deed, which is designed to allow the defender to prepare for the race, should commence at the time the order was signed.

SNG appeals and I vote to affirm.

Clearly, the lynchpin on which this appeal turns is the interpretation to be afforded the phrase "having for its annual regatta" as it is used in the Deed. Our analysis, then, begins with the well established proposition that the settlor's intent controls, and that "[l]ong-settled rules of construction preclude an attempt to divine a settlor's intention by looking first to

extrinsic evidence. Rather, the trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself" (*Mercury Bay*, 76 NY2d at 267 [citations omitted]; *see also Matter of Piel*, 10 NY3d 163, 166 [2008] [it is a "fundamental premise that a court must first look within the four corners of a trust instrument to determine the grantor's intent"]; *Central Union Trust Co. v Trimble*, 255 NY 88, 93 [1930] ["We are to search, not for the probable intention of the settlor merely, but for the intention which the trust deed itself, either expressly or by implication, declares. We are to ascertain the intention from the words used and give effect to the legal consequences of that intention when ascertained."]).

As previously noted, the Deed sets forth an explicit framework within which a yacht club must fall to be considered an eligible challenger for the Cup. That provision expressly states:

> "Any organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, *having for its annual regatta an ocean water course on the sea*, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match of this Cup, with a yacht or vessel propelled by sails only and constructed in the country to which the Challenging Club belongs, against any one

yacht or vessel constructed in the country of the Club holding the Cup" (emphasis added).

Giving the phrase, "having for its annual regatta an ocean water course," its "plain and natural meaning" (*Mercury Bay*, 76 NY2d at 267), I am in agreement with Justice Cahn that such phrase plainly means that the organization must be in possession[11] of an annual regatta or, stated another way, that it has held one or more annual regattas in the past and will continue to do so in the future. Indeed, in order to realize the interpretation propounded by SNG, the Deed would have had to state "having, or intending to have, for its annual regatta" but it does not, and to extrapolate that interpretation from the current language, in my view, strains its meaning beyond reason.

Moreover, taking into consideration the language of the foregoing provision in its entirety, it is clear that the donor's intent was to allow for challenges for the Cup from established yacht clubs that regularly hold annual regattas and not from a club merely organized just for the purpose of challenging for the Cup, without any experience in holding a regatta of this magnitude. While, as a sailing federation, RFEV may very well be capable of organizing and carrying out such an event as a Cup

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[11]*See generally* Webster's Third New International Dictionary (1039, __ ed 2002).

race, that is simply not what the Deed requires and, in my view, it is error to hold otherwise.

To the extent that SNG argues custom and practice in that other challengers which had never held annual regattas were permitted to sail for the Cup in the past,[12] while this is so, those clubs were Mutual Consent Challengers that qualified under the Protocol promulgated by the defender and the Challenger of Record at that time and, thus, fall outside the requirements of the Deed, which only delineates the criteria for the Challenger of Record and leaves "any and all other conditions of the match" to the Challenger of Record and the current trustee. Indeed, the elimination series, which allows for challengers in addition to the Challenger of Record, appears to be a relatively recent development in the history of the Cup, having been instituted in the late 1950s by the New York Yacht Club (*see Mercury Bay*, 76 NY2d at 262).

I am also in agreement with the motion court that GGYC's Notice of Challenge is in compliance with, and therefore valid under, the provisions of the Deed. In *Mercury Bay*, the Court of Appeals noted that the Deed "broadly defines the vessels eligible

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[12]The Mercury Bay Boating Club, which was a Challenger of Record, was apparently incorporated only nine months prior to its challenge, but was an established yacht club for approximately 40 years which held approximately 25 races per year.

to compete in the match" (76 NY2d at 266), and "permits the competitors to both construct and race the fastest vessels possible so long as they fall within the broad criteria of the deed... [which document makes it] clear that the design and construction of the yachts as well as the races, are part of the competition contemplated" (*id.* at 269).

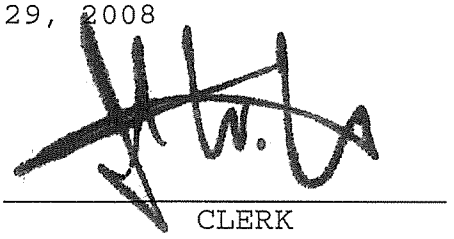
Here, GGYC's notice and certificate contain all the information required by the Deed, although SNG takes issue with GGYC's description of the challenging vessel in the certificate as a "keel yacht" while specifying dimensions suggestive of a multi-hulled vessel, such as a catamaran, thereby creating an ambiguity and rendering the challenge invalid. It is clear, however, that even if the certificate contained a possible ambiguity, SNG was not at any time actually confused or misled by the Certificate, as the record indicates that SNG fully understood that GGYC was going to race a catamaran. The general counsel of SNG's representative racing team, in an affidavit submitted in support of SNG's motion for summary judgment, averred that the dimensions delineated in the certificate "can only be for a multi-hulled vessel - presumably a catamaran," while not referring to any confusing or inconsistent language on

that point. Moreover, SNG's protestations of confusion are belied by its own reply brief in which SNG acknowledges that GGYC has proposed to compete with a "catamaran goliath."

Accordingly, since SNG has failed to raise any material issues of fact, I find GGYC's Notice of Challenge valid.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 29, 2008



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