SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA JAMES** **PART 59**

Justice

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TRUMP FERRY POINT LLC,

Petitioner,

- v -

MITCHELL J. SILVER, in his capacity as COMMISSIONER OF PARKS AND RECREATION, DEPARTMENT OF PARKS AND RECREATION and THE CITY OF NEW YORK,

Respondents.

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INDEX NO. 155933/2021

MOTION DATE 08/06/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 45, 46, 47, 48, 49, 50, 51, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 77

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

ORDER

Upon the foregoing documents, it is hereby

ORDERED that the petition is GRANTED and the respondents' final Appeal Determination dated March 21, 2021, is hereby VACATED; and it is further

ORDERED that this matter is REMANDED to respondents for further proceedings in accordance with the decision herein.

DECISION

At issue in this proceeding is petitioner's challenge to respondents' determination to terminate the petitioner's license to operate the Trump Golf Links at Ferry Point Park in the Throgs Neck section of the Bronx, which includes an 18-hole golf course, driving range, clubhouse and ancillary facilities. The

decade-old License Agreement (Agreement) governing this dispute is dated February 21, 2012.

It is almost certainly the case, as in most long-term relationships, contractual or otherwise, that the parties a decade ago, with a different-- third consecutive term municipal administration-- and underdeveloped parkland, did not foresee the breakdown in such relationship rendered adversarial, which is represented by the dispute herein. In respondents' pre-Christmas press release dated December 23, 2011, prior to the execution of the Agreement, respondents described the Agreement as follows:

> "Parks & Recreation Commissioner Adrian Benepe today announced that the City has negotiated a 20-year license agreement for the operation of the Ferry Point Golf Course to the Trump Organization. The course is a Jack Nicklaus Signature, tournament-quality golf course that will be open to the public and will generate economic activity in the Bronx. The Trump Organization was selected through a public Request for Offers issued by the Parks Department. In addition to the primary responsibilities of maintaining and operating a tournament-quality golf course, the Trump Organization has committed to a minimum $10 million capital investment to design and construct a new, state-of-the-art golf clubhouse - expected to create 100 new construction jobs. The clubhouse will include a cart storage facility, locker rooms and a grill room.
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> "'This new public golf course will be a great amenity for the Bronx, for the City, and for visitors,' said Parks & Recreation Commissioner Adrian Benepe. 'More than $600 million has been invested in parks around the Bronx during Mayor Bloomberg's tenure, and now this long-awaited golf course will soon be among them - bringing more people from across the country and around the world to the Bronx. The Trump Organization is known

> for operating world-class golf courses, and I'm excited to be able to partner with them to build and run the first tournament-quality golf course in New York City.'
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> * * *
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> "At 222 acres, Ferry Point Park East represents one of the largest pieces of previously undeveloped parkland in New York City, and one of the greatest opportunities for augmenting the City's recreational resources. When complete, the new park will contain the golf course, a community park with playgrounds and ballfields, and a waterfront park with rambling trails and scenic overlooks.
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> "Ferry Point Golf Course is an 18-hole, links-style, Jack Nicklaus Signature golf course that will be open to the public. Sitting at the foot of the Whitestone Bridge in the Bronx, it is designed specifically to take advantage of spectacular views of the Manhattan skyline, East River, and Whitestone and Throgs Neck Bridges. In addition to the 18-hole course, the facility also will include a clubhouse, snack bar, comfort station, and driving range. It will be the only tournament-quality course in New York City, giving avid golfers a unique and more challenging alternative to the City's other well-maintained public courses. The golf course is expected to open to the public for play in the spring of 2014.
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> "The Trump Organization has vast experience developing, maintaining, and operating first-class golf venues around the world including a recently completed links-style course in Aberdeen, Scotland. Trump courses have played host to major professional golf tournaments, including the LPGA playoffs in West Palm Beach and the PGA Puerto Rican Open. The Trump Organization is also an experienced Parks concessionaire with background operating the Wollman and Lasker ice skating rinks, and the Central Park carousel."

A little under nine (9) years into the parties' license relationship, respondents served a Default Notice upon petitioner dated January 15, 2021. That Notice stated in pertinent part that

"[T]he City hereby informs you of the occurrence of defaults by Licensee pursuant to Section 3.3(a)(ii) of the License, based upon the actions of Donald J. Trump and Donald Trump, Jr., which actions incited last week's attack on the United Stated Capitol. That attack on our Capitol resulted in five deaths, exposed lawmakers to COVID-19 and threatened the peaceful constitutional transfer of power.

"Following the actions described above, the Professional Golfers' Association ("PGA") has terminated an agreement to play the 2022 PGA Championship at the Trump Bedminster golf course in New Jersey. PGA of America President Jim Richerson stated:

> 'It's become clear that conducting the PGA Championship at Trump Bedminster would be detrimental to the PGA of America brand and would put at risk the PGA's ability to deliver on many programs and sustain the longevity of our mission. ... It was a decision made to ensure that PGA of America and PGA professionals can continue to lead and grow our great game for decades to come.'

"The purported ability of Donald J. Trump and his companies to attract first-class professional championship golf tournaments such as those sponsored by the PGA to the Licensed Premises was a material consideration to the City in entering into the License with Licensee. . . .

"Due to the above-referenced actions by Donald J. Trump and Donald Trump, Jr., Licensee has defaulted under Section 3.3(a)(ii) of the License. The Trump brand is synonymous with Mr. Trump. The actions described above will cause the Licensed Premises to be associated with a violent insurrection against the federal government. The PGA's decision to cancel the 2022 PGA Championship at a Trump-branded golf course demonstrates that a key purpose of the License Agreement has been undermined. The reputation of the Licensed Premises has been dramatically harmed by acts so reprehensible that the City does not believe that Licensee should continue to operate this City-owned property. We believe it is clear that neither the PGA nor any similar tournament event organizer will wish to associate its event with the Licensed Premises as long as it is associated with the

> Trump brand. Accordingly, the obligation to operate a course capable of attracting professional tournament-quality events by the PGA or similar organizations has been breached. Further, the License provisions regarding revenue from PGA tournaments and broadcasting rights are now essentially rendered useless. These material failures and breaches of the License constitute defaults."

By letter dated January 19, 2021, petitioner answered the Default Notice by claiming that it failed to identify any contractual covenant that was breached. Thereafter, respondents issued a Notice of Termination dated February 10, 2021, wherein respondents stated that

> "The actions of January 6 have destroyed Licensee's capability to attract tournament quality events, because the Trump brand is now synonymous with an insurrection against the federal government. It is clear that neither the PGA nor any similar tournament event organizer will associate its event with the Ferry Point course as long as it is associated with the Trump brand -- as demonstrated by the recent actions of both the PGA and R&A [Royal and Ancient Golf Club of St. Andrews]. Accordingly, Licensee has breached its obligation to "operat[e] a first class, tournament quality daily fee golf course, 'as well as obligations implied under the covenant of good faith and fair dealing, and this default is "material under the circumstances"' to the City."

Petitioner, by letter dated February 19, 2021, appealed the Notice of Termination on the grounds that it lacked any rational basis or evidentiary support and was otherwise arbitrary and capricious. By Appeal Determination dated March 21, 2021, respondents denied the appeal and upheld the termination of the Agreement. Respondents stated that "the express terms of the License confirm that Licensee's ability to attract tournament-

quality events to the course was a material aspect of the agreement." The Appeal Determination goes on to state,

> "Licensee's Appeal and the actual grounds for termination are like ships passing in the night. The City has never claimed that the License required Licensee to guarantee PGA-sponsored and similar tournaments. Rather, Parks has asserted that Licensee has so significantly impaired the capability to attract such tournaments, which is evidenced by the responses of two of the world's premier golf associations in the wake of the January 6 events, that Licensee has breached its obligation under the License to operate a 'first class, tournament quality daily fee golf course.'
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> "Although the phrase 'first class, tournament quality daily fee golf course' is not defined in the License, when read in context of the entirety of the License (including the provision granting the City a share of anticipated revenue from tournament events), it is evident that it means much more than merely maintaining the course in a certain physical condition."

The Determination further asserts that "[t]hus, the express provisions of the License itself, as further evidenced by the parties' public statements and negotiations, as well as the implied covenant of good faith and fair dealing, make clear that a material part of Licensee's obligations was the capability of attracting professional tournament quality events to the FPP course." It additionally noted that "Licensee's Appeal also includes a section claiming that termination under Section 3.2 of the License is arbitrary and capricious. This material is irrelevant, because the City is terminating the License pursuant to Section 3.3 [Event of Default] of the License, not Section 3.2 [Terminable at Will, however not arbitrary or capricious]."

Petitioner commences this proceeding seeking annulment of the respondent Commissioner's final determination of breach as well as due process in the form of an unbiased decisionmaker. Respondents oppose the petition asserting that the Agreement imposes a material obligation upon the petitioner to attract professional tournaments, which the petitioner has breached.

In analyzing the parties' dispute the court first must ascertain what is actually in dispute between the parties. Amid all of the charges and counter-charges the scope of this dispute is in reality rather limited.

First, the court notes that in the Appeal Determination, the respondents expressly state that they are not terminating the Agreement under Section 3.2 therein. Section 3.2 states that "this License Agreement (including both the License and the Concession) is terminable at will by the Commissioner in his sole and absolute discretion, at any time; however, such termination shall not be arbitrary or capricious." Therefore, the issue before this court does not concern respondent's contractual right to terminate the Agreement "at will."

Instead, respondents' Notice of Termination and final appeal determination are premised upon an asserted "Event of Default" under Section 3.3 of the Agreement. As stated in the Notice of Termination "Parks is terminating the License under

Section 3.3(b), due to the existence of the uncured Event of Default described above."

Section 3.3 of the Agreement states in pertinent part:

"(a) The occurrence of any of the following events, and the expiration of any applicable notice, grace and cure period set forth herein, shall constitute an "Event of Default" under this License Agreement:

"(i) . . . .

(c) If Licensee fails to maintain the Golf Course to a quality level consistent with the reasonable standards of a Jack Nicklaus Signature golf course, and such failure shall continue for more than twenty-five (25) days after Parks has delivered a Default Notice (as defined below) to Licensee, provided, however, that notwithstanding the foregoing if such failure cannot reasonably be cured within such twenty-five (25) day period, Licensee shall have such additional time as may be reasonably necessary to cure such default, provided that Licensee shall have commenced curing such default within such twenty-five (25) day period and Licensee thereafter diligently prosecutes such cure, to the reasonable satisfaction of Parks and Nicklaus Design, to completion;

"(ii) Should Licensee materially breach or fail to substantially comply with any of the other material provisions of this License Agreement and such default shall continue for more than twenty-five (25) days after Parks has delivered notice thereof to Licensee (such notice a "Default Notice"), provided, however, that notwithstanding the foregoing if such default cannot reasonably be cured within such twenty-five (25) day period, Licensee shall have such additional time as may be reasonably necessary to cure such default, provided that Licensee shall have commenced curing such default within such twenty-five (25) day period and Licensee thereafter diligently prosecutes such cure to completion and, provided,

> further that, notwithstanding the foregoing, if a Default Notice alleges a material breach or failure to substantially comply with any of the material provisions of this License Agreement relating to an alleged failure of Licensee to comply with any Legal Requirements and Licensee challenges (through administrative or judicial process, as applicable) such alleged breach or failure in good faith, Licensee shall not be deemed to have breached or failed to comply with this License Agreement until such time as Licensee's challenge is denied beyond any right of appeal, and if denied (beyond any right of appeal), Licensee shall have the cure periods stated in this paragraph which shall run from the date of such denial, provided, however, that Licensee shall comply with all applicable legal orders requiring action or discontinuance of action during the pendency of such challenge. For purposes of this provision, a "material breach or failure to substantially comply" shall be those breaches or failures specifically identified as such in this License Agreement, any time any of Licensee's representations contained in this Agreement are found to be materially untrue, inaccurate or incorrect, or such other breaches or failures as are material under the circumstances."

Respondents assert in their Notices of Default and Termination that an "Event of Default" under Section 3.3(a)(ii) has taken place wherein the petitioner "materially breach[ed] or fail[ed] to substantially comply" with a material provision of the Agreement, by its failure to fulfill its obligations under the Agreement, including operating a first class, tournament quality daily fee golf course. The default asserted by the respondents is that under the Agreement, petitioner's actions constitute a breach of petitioner's "obligation to operate a course capable

of attracting professional tournament-quality events", as such actions have "destroyed [petitioner's] ability to attract professional tournament-quality events".

Therefore, the only issue before this court is whether the respondents' finding that petitioner's conduct constitutes an "Event of Default" under the Agreement has a rational basis and is not contrary to law. Only evidence relevant to that determination may be considered by the court on this application.

Petitioner first argues that it is not in default under the Agreement. Petitioner's argument is based upon its assertion that the Agreement contains no requirement that petitioner, in operating the premises, attract tournament quality events to the golf course. Petitioner also asserts that respondents' attempts to include such a requirement must fail because the Agreement in Section 35.1 contains a merger clause which states that "This License Agreement constitutes the whole of the agreement between the Parties hereto, and no other representation made heretofore shall be binding upon the parties hereto."

Respondents counter that the phrase "operating a first class, tournament quality daily fee golf course" incorporates the obligation of the operator to be able to attract professional tournament events, and to the extent the parties disagree as to the meaning of that phrase, such phrase is

ambiguous and requires resort to extrinsic evidence to discern the parties' intent as to the meaning of the phrase and the scope of the obligation.

The court here reviews the petitioner's contractual challenge to the respondents' determination under the rational basis standard with the petitioner having the burden of moving forward. See E.W. Tompkins Co., Inc. v State Univ. of New York, 61 AD3d 1248, 1250 (3d Dept 2009). The threshold issue is whether respondents' determination that petitioner has failed to "operate a first class, tournament quality daily fee golf course" under the Agreement has a rational basis. The petitioner argues that the text of the Agreement places no requirement or obligation upon it to attract or host professional tournaments. In denying petitioner's appeal, respondents asserted that there has been no claim by it that the petitioner was required to guarantee such tournaments but that the petitioner has "so significantly impaired the capability to attract such tournaments" as to be in breach of its material obligation.

Instructive as to the method this court should use to ascertain whether the respondents properly interpreted the contractual scope of petitioner's responsibilities is the Court's precedent in interpreting a concessionaire contract at another municipal facility. Therein the Court set forth that

"[I]n order to determine the contracting parties' intent, a court looks to the objective meaning of contractual language, not to the parties' individual subjective understanding of it. As Judge Learned Hand stated:

> 'A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent.'
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> * * *

"According to well-established rules of contract interpretation, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. We apply this rule with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople. In such cases, courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include. Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing. We instead concern ourselves with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote. Accordingly, before assessing evidence regarding what was in the parties' minds at the time of the agreement, we must first look to the agreement itself.

"The primary question here is whether the parties' agreement is ambiguous; specifically, whether the phrase

> . . . is reasonably or fairly susceptible of different interpretations or may have two or more different meanings. Whether a contractual term is ambiguous must be determined by the court as a matter of law, looking solely to the plain language used by the parties within the four corners of the contract to discern its meaning and not to extrinsic sources."

Ashwood Capital, Inc. v OTG Mgt., Inc., 99 AD3d 1, 6-8 (1st Dept 2012) (internal quotations and citations omitted); *see also* Greenfield v Philles Records, Inc., 98 NY2d 562, 569-570 [2002]. "[C]lear contractual language does not become ambiguous simply because the parties to the litigation argue different interpretations." Riverside South Planning Corp. v CRP/Extell Riverside, L.P., 60 AD3d 61, 67 (1st Dept 2008), affd 13 NY3d 398 (2009).

Here, the court agrees with petitioner that there is no ambiguity in the obligation in the Agreement that petitioner is required to "operat[e] a first class, tournament quality daily fee golf course." Although respondents argue that this phrase is ambiguous, when read in the context of the Agreement as a whole, it is not capable of multiple interpretations. Section 3.3(a)(i)(c) requires that the petitioner "maintain the Golf Course to a quality level consistent with the reasonable standards of a Jack Nicklaus Signature golf course." Therefore, in the context of the Agreement, "first-class, tournament quality" has a defined meaning and standard to which the parties can refer. Section 9 of the Agreement entitled "Operations"

contains 41 detailed subparagraphs defining "operations." As an example, Section 9.1(b) sets forth the petitioner's obligation to employ the necessary personnel to "design, construct, operate and maintain the Clubhouse . . consistent with a first class, tournament quality daily fee golf course and to a quality level consistent with the reasonable standards of a Jack Nicklaus Signature golf course[]." Section 9.7 sets forth that "all services provided, merchandise sold and vending operations provided pursuant to the License Agreement shall be of high grade and good quality." Similar binding obligations are found throughout Section 9 of the Agreement. Given the detailed directives as to petitioner's obligations of how to "operate" under the Agreement, there is no evidence within the four corners of the Agreement of any ambiguity and thus the omission of any requirement, or even the term "attract," combined with the express merger clause in the Agreement fails to support the contention that the Agreement imposes such an obligation. *See* W.W.W. Assoc., Inc. v Giancontieri, 77 NY2d 157, 162 (1990) ("A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing."); South Rd. Assoc.,

LLC v Intern. Bus. Machines Corp., 4 NY3d 272, 277 (2005) ("It is also important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases."); Shionogi Inc. v Andrx Labs, LLC, 187 AD3d 422, 424 (1st Dept 2020) ("Far from seeking to merely interpret the licensing agreement (for which purpose extrinsic evidence might be admissible to resolve ambiguity), [the party] seeks to add to the licensing agreement by adding an affirmative obligation . . . Even assuming ambiguity, the merger clause would preclude resort to course of performance evidence to add an entirely new obligation to the contract").

Respondents offer a contextual rationale, that although the phrase "'first class, tournament quality daily fee golf course' is not defined in the License, when read in context of the entirety of the License, including the provision granting the City a share of anticipated revenue from tournament events)", the Agreement should be interpreted to require the petitioner to maintain the ability to attract professional quality type golf tournaments. Such ground, as an event of default, likewise fails, as contrary to respondents' argument, there is no provision in the Agreement requiring the petitioner to generate revenue from "tournament events." The only provision that "anticipates" any revenue sharing is found in Sections 4, specifically Sections 4.1(a) and 4.5(a), as part of

the definition of "Gross Receipts," upon which the License Fee under the Agreement was to be based that includes therein certain "Net Receipts" from "broadcasting of on-site golf tournaments at the Licensed Premises." This language provides no context that required petitioner to generate professional tournament type quality-level revenue sharing. The only possible interpretation of this contractual provision is that if there were a tournament held for which the petitioner received broadcast revenues, the respondents would be entitled to a portion of those monies as part of the license fee. It does not confer any contractual obligation upon petitioner to hold such tournaments.

In fact, Section 9.3(a)(i) of the Agreement states, in pertinent part, "Licensee shall be entitled . . . to conduct tournaments. . .at the Licensed Premises[.]" This court concurs with petitioner that such "express conferral" of such right upon petitioner, "without mention of any duty" on the part of petitioner, "necessarily implies that [petitioner] has no duty[.]" Port Authority v The Brickman Group, Ltd., 181 AD3d 1, 23 n. 15 (1st Dept 2019), citing Quadrant Structured Prod. Co. v Vertin, 23 NY3d 549, 560 (2014 "'(t)he maxim *expressio unius est exclusio alterius*'" applies to 'the interpretation of contracts'"). Nor does Section 12.16(b) of the Agreement that obligates petitioner to bear the costs of any changes to the

golf course "required to obtain a professional PGA tournament at the License Premises" confer a duty upon petitioner to obtain such a professional PGA tournament.

It follows that respondents' contention that petitioner breached the implied covenant of good faith and fair dealing in connection under the Agreement, arising from petitioner's inability to attract professional quality type golf tournaments, likewise lacks any legal foundation. The absence of any obligation on the part of petitioner to hold professional quality type golf tournament, or any tournament for that matter, under the Agreement means that respondents have not been deprived of the right to receive "the benefits under their agreement" by any actions on the part of the principals of petitioner. *See* Jaffe v Paramount Communications Inc., 222 AD2d 17, 22-23 (1st Dept. 1996).

As the court at the threshold finds that there is no ambiguity in the Agreement's terms as to petitioner's obligation to "operat[e] a first class, tournament quality daily fee golf course," the court holds that the respondents' determination that petitioner breached the License Agreement is contrary to law, as there is no requirement in the License Agreement that petitioner act so as to attract professional golf tournaments.

As the respondents' imposition of such a requirement was based solely on the use of extrinsic evidence to ascertain the

parties' intent, and because there was no basis at law to resort to such extrinsic evidence in the interpretation of the petitioner's obligation under the Agreement, the respondents' determination is contrary to the applicable contractual interpretive legal standard. The court shall therefore vacate the respondents' determination and remand the matter for further proceedings in accordance with this decision. *See* Burke's Auto Body, Inc. v Ameruso, 113 AD2d 198, 201 (1st Dept 1985).

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4/08/2022
DATE

DEBRA JAMES, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE