

**1181 Members for Change v Nero**

2011 NY Slip Op 34283(U)

April 3, 2011

Supreme Court, New York County

Docket Number: 102390/2011E

Judge: Paul G. Feinman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

3

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
1181 MEMBERS FOR CHANGE, JOSEPH ALCENAT,  
MARC CLERGEAU, OTHELIA COLLINS, GLORIA  
RODRIGUEZ FLAHERTY, PEGGY HATZIDAKIS,  
MARIO JEAN, BERLOT JEAN BAPTISTE, SIMON  
JEAN BAPTISTE, REINA MARTINEZ, ERIC  
MCCARTHY, EDDY MEGIE, JULES SERAPHIN,  
JEAN SEREME, FILIUS SUFFY, and WARREN  
ZAUGG,

Index No. 102390/2011E  
Mot. Seq. No. 001  
Submission Date March 23, 2011

**DECISION, ORDER &  
JUDGMENT**

Petitioners,

- against -

THOMAS NERO,

Respondent.

-----X  
**For Petitioners:**  
Levy Ratner, P.C.  
By: Dana E. Lossia, Esq.  
80 Eighth Avenue  
New York, New York 10011  
(212) 627-8100

**For Respondent:**  
Barnes, Iaccarino & Shepherd, LLP  
By: Lauren Kugielska, Esq.  
258 Saw Mill River Road  
Elmsford, New York 10523  
(914) 592-5740

**Papers considered in review of this petition:**

**Papers**  
Notice of Petition, Petition, Affs. of Dana E. Lossia, Warren Zaugg and Exhibits  
Respondent's Response, Affs. of Thomas Nero, Maureen Henry and Exhibits  
Petitioners' Reply Memorandum of Law

**E-Filing Document Number**  
1  
2  
Hard Copy<sup>1</sup>

**PAUL G. FEINMAN, J.:**

In this special proceeding, petitioners seek, among other relief, a permanent injunction prohibiting respondent from using the name "1181 Members for Change." More specifically, petitioners commenced this special proceeding pursuant to Section 133 of the General Business

<sup>1</sup> Petitioners' are directed to upload a copy of their Reply Memorandum of Law into the New York State Courts Electronic Filing System forthwith in order to create a complete record for this file in the County Clerk's file.

Scanned to New York EF on 4/11/11  
*[Signature]*

Law seeking to prohibit respondent Thomas Nero from improper use of petitioners' alleged trade name in the upcoming 2011 elections for the Executive Board of the Amalgamated Transit Union, Local 1181 ("the Union"). The first nominations meeting for the upcoming election cycle has been scheduled by the Union for May 3, 2011. For the reasons set forth below, the petition is granted to the extent it seeks a permanent injunction against respondent Nero's use of the name "1181 Members for Change," but denied to the extent it seeks money damages.

### ***Background***

According to the petition, petitioner 1181 Members for Change ("MFC") is an unincorporated labor organization formed in 2004 by workers who were dissatisfied with their representation by the Amalgamated Transit Union, Local 1181 (Petition ¶ 5). Individual petitioners are current or retired bus drivers and members of the collective bargaining unit represented by the Union, as well as active members of MFC (*id.*). Respondent Nero is also a bus driver and member of the Union and, at various times, has been involved with MFC (Petition ¶ 6).

The mission of MFC has been "to encourage membership involvement in the Union, to democratize the Union and rid it of corrupt leaders associated with organized crime, and to obtain genuine member representation among the officers on the executive board of Local 1181, ATU" (*id.* ¶ 5). Decisions within MFC have "always been made democratically. When an action is proposed by a member, [they] discuss it at a meeting and, if there is no consensus, [they] hold a vote among those who are present at the meeting. Decisions are made by majority rule" (Zaugg Aff. ¶ 15).

In 2005, MFC ran a slate of candidates for leadership positions in the Union's internal elections (Petition ¶ 10). Nero was MFC's pick for Union president (*id.*). Three of the petitioners

in this proceeding, Simon Jean-Baptiste, Eddy Megie and Warren Zaugg, also appeared on the ballot (Zaugg Aff., Ex. B). Neither MFC's slate, nor any of its members, were elected that year. Over the next few years, Nero had an on-again/off-again relationship with MFC until he publicly quit the group at a meeting in mid-2007 (Zaugg Aff. ¶ 7). According to Nero, MFC had split into two factions, both of which acted under the MFC name (Nero Aff. ¶ 4).

In March 2009, MFC again ran a slate of candidates in Union elections (*id.* at ¶ 8). Six of the petitioners herein were included in this slate, including Simon Jean-Baptiste, Warren Zaugg, Eddy Megie, Mario Jean, Gloria Rodriguez Flaherty and Jules Seraphin (*see* Zaugg Aff., Ex. C, Official Union Ballot). Nero was not part of the MFC slate, and he instead ran for Union president on his own slate, called "Tommy Nero C.P.R." (*id.* at ¶ 8; Ex. C). He claims he used his own name for his slate because the other MFC faction submitted its slate under the MFC name first (*id.* at 5). Neither slate won the presidency, but three MFC candidates were elected to seats on the Union executive board, including petitioner Simon Jean-Baptiste (Zaugg Aff. ¶ 11).

In mid-2009, Nero apparently sought to re-join MFC. According to petitioners, MFC held an open vote on the question and decided to allow Nero to return to MFC, subject to two conditions: (1) the group would decide whether to permit him to run as part of any future MFC slate; and (2) he would not seek a nomination from MFC to any of the top four Union officer positions (Zaugg Aff. ¶ 16). In October 2010, MFC decided to explore forming a not-for-profit corporation (*id.* at 18). MFC's organizer, Edward L. Kay ("Kay"), worked with MFC's counsel, Levy Ratner, P.C., to undertake this process (*id.*). On October 25, 2010, counsel faxed a certificate of incorporation and credit card authorization form to the Division of Corporations, New York State Department of State (Lossia Aff., Ex. 1). This form sought expedited handling within

twenty-four hours (*id.*). The filing fees and an additional fee for expedited service was paid for by Kay, who was listed as an initial director of the corporation (*id.*). Petitioner Gloria Flaherty was also listed as an initial director (*id.*). The next day, an official from the Division of Corporations responded, informing counsel that they were unable to file the document as requested because incorporation would first require approval from the Industrial Board of Appeals (Lossia Aff., Ex. 2). Then, on November 5, 2010, counsel was informed by the Division of Corporations that respondent Nero had registered a for-profit business corporation with the name "1181 Members For Change, Inc." (Lossia Aff. ¶ 5). The certificate of incorporation indicates it was filed on behalf of Nero on November 2, 2010, by David J. Gold, P.C. (Lossia Aff., Ex. 4).

On November 24, 2010, Levy Ratner, P.C. sent a letter on behalf of four individual petitioners in this action, Gloria Rodriguez Flaherty, Berlot Jean-Battiste, Jules Seraphin and Mario Jean, to the Union president, Michael Cordiello, and the Union's executive board (Lossia Aff., Ex. 5). The letter explains their belief that Nero is unlawfully infringing upon the name "1181 Members for Change" and asked the Union to "issue a directive to Mr. Nero, and any other members who may be working with him, to cease and desist from representing himself/themselves as part of 1181 Members for Change" (Lossia Aff. ¶ 10; Ex. 3). No response was received from the Union's executive board (*id.* at ¶ 11). However, on December 7, 2010, David Gold, Esq., claiming to be "legal counsel for 1181 MEMBERS FOR CHANGE, INC.," sent a letter to Kay demanding that he and his "company" cease and desist in using his client's name and likeness (Lossia Aff. ¶ 12; Ex. 6). Levy Ratner responded on behalf of Kay on December 14, 2010, claiming that it was their client's interest that had been infringed upon and demanded Nero cease and desist his use of their name (*id.* at 13; Ex. 7).

On January 6, 2011, Gold told Levy Ratner that he no longer represented Nero with respect to the corporation at issue. He further stated that he had forwarded the December 14 letter to Nero, and Levy Ratner should contact Nero directly (*id.* at 14). On January 10, 2011, a new letter was sent directly to Nero again explaining that petitioners view his actions as infringement and demanding that he cease and desist from using the name “1181 Members For Change” (*id.* at 15; Ex. 8). This letter also warned that they were in the process of preparing to file in the instant petition based on Nero’s violation of General Business Law § 133 (*id.*). Petitioners claim they never received any response from Nero (*id.* at 16).

The petition asserts two causes of action: (1) violation of New York General Business Law § 133; and (2) violations of New York common law against unfair competition. The petition seeks relief in the form of a permanent injunction which: (a) enjoins and restrains respondent from using or causing others to use the name “1181 Members For Change” in any way; (b) orders respondent to dissolve the business incorporation “1181 Members for Change Inc.,” (c) orders respondent to delete and remove said name or any simulation thereof from any listings, pamphlets, petitions, leaflets, flyers, banners, signs, advertisements, and wherever else the same may appear where that name refers to respondents’ entity; (d) declares that petitioners have the sole, exclusive and rightful use of the trade name “1181 Members for Change;” (e) holds respondent liable for a misdemeanor offense; and (f) grants monetary damages to petitioner to offset the losses they suffered through the diminution of the value of their trade name (Petition at 14).

Although respondent Nero has neither filed an answer to the petition nor filed a cross-motion to dismiss it pursuant to CPLR 3211, he has filed an affirmation in opposition which raises, among other issues, the capacity to sue of the petitioners.<sup>2</sup>

---

<sup>2</sup>At oral argument, held on the record on March 23, 2011, counsel for respondent declined the court’s invitation to have the opposition papers converted into a cross motion to dismiss upon payment of the \$45.00 cross motion fee, or to have the court deem the opposition papers an answer to the petition. Counsel chose to rely on the

## *Analysis*

### 1. Petitioners' Capacity to Bring Proceeding

While no formal cross motion to dismiss based on lack of petitioners' lack of capacity to sue pursuant to CPLR 3211[3], because the issue of petitioners' standing has been squarely challenged in the affidavits filed in opposition to the petition, the court will, as a preliminary matter, address respondent Nero's contention that petitioners have no legal capacity to bring this special proceeding.

Unincorporated associations, "which are voluntary congregate entities, are accorded the capacity to bring suit through their presidents or treasurers by statute" (*Community Board 7 v Schaffer*, 84 NY2d 148, 155 [1994]). Section 12 of the General Association Law states, in relevant part, "[a]n action or special proceeding may be maintained, by the president or treasury of an unincorporated association ... upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common." Where there is nothing in the record to indicate that the proceeding was instituted by the president or treasurer of an unincorporated association, the court has no jurisdiction and it may be dismissed (*Intl. Union United Auto. A. & A.I. Workers, C.I.O. v Aircooled Motors, Inc.*, 284 AD 835 [4<sup>th</sup> Dept 1954]). However, the statute's specification of the president and treasurer should not be read as denying a right of action to an association lacking officers bearing those names, so long as the action is brought by an officer who is the functional equivalent (*Locke Assocs. v Foundation for the Support of the UN*, 173 Misc.2d 502, 504 [N.Y. Civ. Ct. 1997]). When an association lacks a president or treasurer, the "court must examine the organization's structure to determine if the person or persons who commenced the action is an elected or de facto officer performing equivalent functions and responsibilities" (*id.* at 505).

---

affirmation in opposition.

Although not having cross-moved for the affirmative relief of dismissal of the petition based on the lack of petitioners' standing, respondent Nero opposes the petition by arguing that petitioners lack standing to bring this special proceeding. Specifically, respondent Nero argues that the petition is defective in that it fails to allege that any individual petitioner occupies the position of president or treasurer of 1181 Members for Change (Resp. at 2-3). Petitioners claim they are "all active leaders within 1181 Members for Change, which has more than 2,000 current members" (Petitioner's Reply Memo. at 3). Even if the petition is defective, petitioners contend that the failure to list a president or treasurer as plaintiff in an action is a mere technical irregularity that may be corrected by the court in the interest of judicial economy (*id.* at 3-4).

The record indicates petitioners have sufficient capacity to bring this proceeding. Several petitioners were included in MFC's slate in the 2005 and 2009 Union elections. One petitioner, Simon Jean-Baptiste, was elected in 2009 to the Union's executive board under the MFC name. Petitioner Gloria Flaherty was listed on MFC's certificate of incorporation as one of three of its initial directors. Warren Zaugg, who submitted an affidavit in support of the petition, was included on MFC's slate in both 2005 and 2009. As such, even if the petition does not indicate whether any of the petitioners are the "president" or "treasurer," at the very least, the petitioners occupy leadership positions within the organization that are the "functional equivalent" (*see Locke Assocs.*, 173 Misc.2d at 504). Thus, petitioners have sufficient capacity to bring this proceeding.

**2. Section 133 of the General Business Law**

Section 133 of the General Business Law provides for a summary proceeding for an injunction to prevent the use or threatened use of a name with intent to deceive or mislead the public. Specifically, the statute provides, in relevant part:

"No person, firm or corporation shall, with intent to deceive or mislead the public, assume, adopt or use as, or as part of a corporate, assumed or trade name, for advertising purposes or for the purposes

of trade, or for any other purpose, any name ... or a part of any name ... which may deceive or mislead the public as to the identity of such person, firm or corporation with any other person, firm or corporation.... Whenever there shall be an actual or threatened violation of this section, an application may be made to a court or justice having jurisdiction to issue an injunction ... without requiring proof that any person has in fact been deceived or misled thereby.”

(General Business Law § 133). Application of this section is not limited to commercial transactions. Like Section 133a’s predecessor statute, Section 964 of the Penal Law, it may be applied where the parties are engaged in noncommercial and non-profit enterprises (*Association of Contracting Plumbers, Inc. v Contracting Plumbers Assn., Inc.*, 302 NY 495, 500 [1951]). It may also be applied to protect a “political trade-mark” (see *William J. Sheldrick Assn. v Robert B. Blaikie Regular Democratic Organization, Inc.*, 17 Misc. 2d 238, 241 [Sup Ct, NY County 1954]).

The summary relief authorized by the statute “should be invoked only when there is conclusive evidence of intent ‘to deceive and mislead the public’” (*Westchester County Realty Bd., Inc. v Landman*, 24 NY2d 750, 753 [1969], quoting *Assn. of Contracting Plumbers, Inc.*, 302 NY 495 at 502). The court “must satisfy itself that ‘the proof by affidavit and absence of factual issue [in the papers presented to it] must be tantamount to that which would authorize a summary judgment in an appropriate case’ if the motion is to be granted” (*Westchester County Realty Bd.*, 24 NY2d at 753, quoting *Matter of Industrial Plants Corp. v Industrial Liquidating Co.*, 286 AD 568, 571 [1<sup>st</sup> Dept 1958]). This does not mean, however, that the right to an injunction may be “defeated by a bare denial of intent to deceive or mislead the public ... and insubstantial or incredible averments will not suffice...” (*Westchester County Realty Bd.*, 24 NY2d at 755 [*internal quotations omitted*]).

a. Adopt an Assumed or Trade Name

Petitioners argue respondent has adopted and used the MFC name improperly, citing at least two specific examples. First, respondent filed a certificate of incorporation for “1181

Members for Change, Inc.” without authorization from MFC’s members (Zaugg Aff. ¶ 17).

Second, petitioners claim respondent disseminated flyers in late 2010, which read “Vote Salerno Slate/1181 Members for Change” (Zaugg Aff. ¶ 24; Ex. F). This flyer provides a list of individuals, along with their phone numbers, including the respondent and several individuals that were included on the “Tommy Nero C.P.R.” slate in the 2009 Union elections (Zaugg Aff., Exs. C & F). The flyer also includes a one-page discussion of election strategy for 2011. The author, John Eadicicco, describes his group’s efforts to unite all slates that ran in the 2009 Union election against the incumbent leadership. He claims MFC’s organizer, Kay, refused to merge a slate with himself, respondent, Tom Salerno and Sal Cirillo. Thus, the flyer claims “[t]o avoid the hostage taking by Mr. Kay of a faction of our union, it was necessary to assert the rightful and legal ownership to the name Members for Change” (Zaugg Aff., Ex. F at 2). Respondent does not deny petitioners’ claim that respondent distributed this flyer nor does he otherwise disclaim affiliation with the Salerno Slate and the views contained in the flyer.

Furthermore, respondent does not claim that he was authorized by MFC’s members to either incorporate the group as a for-profit business corporation, or use its name in flyers distributed to Union members. The closest he comes to addressing the issue of his authority to take these actions is the claim made by his attorney that he “formed the corporation on October 8, 2004[,] in an attempt to challenge the Union’s corruption....” (Resp. at 4-5). This could be construed as implicitly suggesting his role in founding the organization gives him authority to use its name today. Petitioners do not deny that respondent participated in MFC in its early days, but claim “since that time he has completely broken with the group more than once, and he was never authorized to seize control of the name of the organization, particularly for the purpose of forcing a merger with another Union slate” (Zaugg Aff. ¶ 22).

Based on the affidavits and exhibits submitted by the parties it has been conclusively

demonstrated that respondent has adopted and used MFC's name without its authorization. That respondent was one of several founders of MFC does not give him "rightful and legal ownership to the name Members for Change" (Zaugg Aff., Ex. F). Respondent Nero and MFC are not so inextricably linked. Clearly, MFC thrived on its own for years after respondent broke from the group, as demonstrated by the 2009 Union election where MFC members won three Union leadership seats while respondent's Tommy Nero C.P.R. slate won none. These results also suggest that more than a majority of MFC members viewed the MFC slate as the rightful bearer of the MFC name. Because respondent's only claim of authority to use the MFC name is based on his role in founding the organization, he has not raised a triable issue of fact sufficient to defeat petitioners' showing that respondent has adopted or used the MFC name in violation of General Business Law § 133.

b. Intent to Deceive or Mislead the Public

Petitioners argue respondent has adopted and used the MFC name with the intent to mislead or deceive Union members in the 2011 Union elections into believing respondent is affiliated with or has the support of MFC (Zaugg Aff. ¶ 22). They claim respondent's for-profit incorporation under the MFC name was designed to force a merger of MFC with respondent's slate. Respondent claims he decided to incorporate 1181 Members for Change, Inc. "to prevent further confusion in the upcoming election" (Nero Aff. ¶ 6). Apparently, respondent is suggesting he would have filed his slate under the MFC name in 2009, but he could not because the other faction of MFC had already registered the name before he could. Furthermore, he argues that "the use of the name within the Union's small political circle does not rise to the level of wide-spread advertisement and use of the name to the public at large (Resp. at 6).

Respondent's mere self-serving denial of an intent to deceive the public, in light of the entirety of the circumstances, is insufficient by itself to create an issue of fact as to respondent's

intent. The record conclusively demonstrates respondent possessed the requisite intent to deceive. As mentioned above, MFC's internal decisions are made upon the suggestion of a member, with approval of a majority of all members present at the meeting. Petitioners argue respondent circumvented this procedure, which respondent does not dispute. Had respondent had the support of a majority of the members, there would have been no need to go behind their backs and incorporate the MFC as a for-profit corporation.

Respondent admits that he incorporated "1181 Members for Change, Inc." with an eye towards impacting the 2011 election. He explicitly states his intent in his affidavit by declaring that he decided to incorporate in order to "prevent further confusion in the upcoming election" (Nero Aff. ¶ 6). This was apparently based on his belief that incorporating as a for-profit corporation before petitioners could complete their already-filed not-for-profit incorporation gave him superior rights to use the name 1181 Members for Change. Thus, respondent Nero argues, he, and not petitioners, are entitled to use the MFC name in connection with the 2011 Union election. This would give the members of MFC only two options if they wanted to use the MFC name: (1) merge with respondent Nero's group and support them in the election; or (2) remain separate and find a new name. As petitioners point out, other Union voters less intimately involved in the day-to-day developments within the MFC would likely associate the MFC name with the organization that had been active in the Union's politics for several years, regularly distributing flyers, conducting training seminars, and successfully electing three of its members to top positions on the Union executive board in 2009. Respondent Nero's unauthorized use of the MFC name was clearly intended to deceive or mislead MFC members and supporters within the context of the upcoming 2011 elections so that unsuspecting voters would support him instead of petitioners.

Contrary to respondent's contention, the mere fact that he incorporated the for-profit corporation before petitioners had completed the process of incorporating as a non-profit

organization is not dispositive. “[A]lthough a corporation may be legally created, it can no more use its corporate name in violation of the rights of others than an individual can use his name, legally acquired, so as to mislead the public and to injure another” (*William J. Sheldrick Assn.*, 17 Misc. 2d at 241). Furthermore, petitioners had already begun the process of incorporating a non-profit corporation at the time respondent incorporated his for-profit corporation using the MFC name. Finally, the court rejects respondent’s assertion that this court cannot issue an injunction simply because the size of the “public” of which his acts have been aimed is limited to the thousands of voting members of the Union (*c.f. First National City Bank v First National City Bank & Trust Co., Ltd.*, 52 AD2d 776, 776 [1<sup>st</sup> Dept 1976]).

Accordingly, petitioners have conclusively demonstrated that respondent’s actions and threatened actions are in violation of General Business Law § 133 and are entitled to an appropriate remedy in the form of an injunction.

**3. Common Law Action Against Unfair Competition**

Having determined petitioners are entitled to injunctive relief under General Business Law § 133, the court need not address petitioners’ second cause of action alleging violation of New York common law against unfair competition.

**4. Appropriate Relief**

As demonstrated above, petitioners are entitled to injunctive relief pursuant to General Business Law § 133. In order to address respondent’s actual and threatened violations of the statute, respondent must be enjoined and restrained from any future use of the name, “1181 Members for Change,” absent prior, written permission from MFC. Consistent with the goal of General Business Law § 133, the injunction shall go into effect immediately (*see Gallina v Giacalone*, 171 Misc.2d 645, 652 [Sup Ct, Kings County 1997]).

Petitioners’ request for monetary damages is denied. The petition and supporting affidavits

contain no proof of any specific economic harm suffered by petitioners as a result of respondents' violation of General Business Law § 133. Any harm that has been suffered by petitioners is primarily to MFC's reputation. Furthermore, the injunctive relief granted in this decision, order, and judgment will sufficiently prevent future harm. However, petitioner shall be entitled to statutory costs and disbursements as taxed by the Clerk of Court.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted to the extent that respondent Thomas Nero is hereby immediately and permanently restrained from using and employing the name "1181 Members for Change," or any simulation thereof, in any fashion; and is further

ORDERED and ADJUDGED that the branch of the petition which seeks money damages is denied, but petitioner shall be awarded statutory costs and disbursements<sup>\*</sup> as taxed by the Clerk of Court; and it is further

ORDERED that respondent must, within thirty (30) days, delete and remove any reference to "1181 Members for Change," or simulation thereof, from any listings, pamphlets, petitions, leaflets, flyers, banners, signs, advertisements, web pages and wherever else that name refers to petitioners' entity.

This constitutes the Decision, Order, and Judgment of this court.

Dated: April 3, 2011  
New York, New York

ENTER:

Paul H. Feinman  
J.S.C.

Norman Goodman  
Clerk of the Court

**FILED**

MAY 26 2011

COUNTY CLERKS OFFICE  
NEW YORK

\* See Affirmation of  
DANA E. LOSSIA, Esq.  
Waiving costs and disbursements  
NE/CC