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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

MILLENNIUM TOYOTA, INC.,

Plaintiff,

-against-

GENERAL LABORERS LOCAL 66 and JOHN AND JANE DOE NOS. 1-10, said names being fictitious and representing persons and entities unknown at this time, but who are made parties hereto to enjoin them from any activity which may constitute a public nuisance or tortiously interfere in Plaintiff's business operations, by reason of the fact that they have participated in unlawful protest or other activity at or around Plaintiff's business address, jointly and severally,

Defendants.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 447-12

MOTION SUBMISSION
DATE: 1-27-12

MOTION SEQUENCE
NO. 1

Plaintiff Millennium Toyota, Inc. (hereinafter "Millennium") has moved by Order to Show Cause for a preliminary injunction to stop members of defendant General Building Laborers' Local 66 (hereinafter "Local 66") and/or others from engaging in alleged unlawful picketing activity and activity not protected by the First Amendment. Defendant Local 66 opposes all requested relief.

Millennium claims it owns and operates two car dealerships at 257 North Franklin Street and 220 North Franklin Street, Hempstead, New York. Millennium alleges that since on or about December 5, 2011, and continuing nearly every day, there have been two giant inflatable rates on the sidewalks adjacent to each of the

dealerships, with at least two individuals preset at all times. There are no signs or affiliations connected with the rats or the individuals. There has been use of a bullhorn and comments such as "Millennium is unfair to the American worker" and "do not patronize Millennium". Plaintiff alleges these individuals make false statements about Millennium's labor practice, without particularizing same other than as above. Plaintiff also claims the individuals "interfere" with people entering the dealerships, that the noise level is excessive, that people have complained, and that the Hempstead Village Police have taken no action.

Millennium believes that the individuals are affiliated with Local 66 "...as Local 66 currently has a dispute with a company [Red Rock Industries, Inc.] performing construction work at a Toyota dealership in Valley Stream, New York". Local 66 has not disputed that (and, in effect, concedes it in their Brief in Opposition).

Local 66 claims that these circumstances are similar to those between the parties in 2008 when Millennium unsuccessfully sought to obtain an injunction against Local 66 when it protested Millennium's building of a new showroom using the same subcontractor (Red Rock Industries Inc.) through use of an inflated rat, picketing, and leafleting. Millennium Superstore Toyota, Inc. v. General Laborers' Local 66, Supreme Court, Nassau County Index No. 11929/08 (hereinafter referred to as Millennium I).

Local 66 argues that, given the similar circumstances, Millennium I should control here and, in any event, that the activities now engaged in are protected by the First Amendment.

Millennium argues that the corporate entities are different and that it has no connection with the dealership in Valley Stream. While counsel for each party has submitted letters with facts alleged upon information and belief, neither party has submitted any evidentiary proof of same. Therefore, the Court cannot determine the relationship if any between Millennium and the dealership in Valley Stream without further proceedings, but for the reasons set forth below finds there is no need for such a hearing or determination herein.

Prior to commencement of this action, Red Rock Industries, Inc. filed NLRB charges against defendant Local 66 alleging that Local 66 violated the National Labor Relations Act (NLRA) by engaging in certain activities at or near the Advantage Toyota dealership in Valley Stream where Red Rock was performing construction work. The Local posted one or more inflatable rats at the dealership, but no leafleting took place. Red Rock was represented by the same counsel that represents plaintiff Millennium herein.

The NLRB Regional Office refused to issue a complaint, holding that:

1. The use of a rat balloon is constitutionally protected symbolic speech that does not constitute picketing. See, Sheet Metal Workers Local 15 (Brandon Regional Medical Center), 356 NLRB No. 162 (2011).
2. There was no evidence of a "recognitial object".
3. There was insufficient evidence of threats or blocking of employee's ingress or egress and no evidence of threats or coercion.

In the field of labor relations, and pursuant to the supremacy clause of the United States Constitution, Congress has created a federal framework where states can regulate only those areas of "traditional [state] sovereignty". Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740, 749 (1942) (a state may

exercise its "historic powers over such traditionally local matters as public safety and order and the use of streets and highways"); accord Garner v. Teamsters, Chauffeurs & Helpers, Local Union No. 776, 346 U.S. 485 (1953); San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 243-44 (1959).

Federal preemption under the NLRA is designed to protect the exclusive and primary jurisdiction of the National Labor Relations Board ("NLRB") and avoid conflicting regulation of matters covered by federal law. See Local 926, Int'l Union of Operating Eng'rs v. Jones, 460 U.S. 669, 681 (1983); Campbell v. McLean Trucking Co., 592 F.Supp. 1560, 1562-63 (E.D.N.Y. 1984).

There are two related principles upon which the NLRA preempts state law – "Garmon Preemption" based on the U.S. Supreme Court decision in Garmon, 359 U.S. at 244, and "Machinist Preemption" based on the Supreme Court decision in Machinists v. Employment Relations Comm., 427 U.S. 132 (1977). In Garmon, the Supreme Court held that states may not regulate conduct which is arguably either protected or prohibited by Sections 7 or 8 of the NLRA, Garmon, 359 U.S. at 244; and in Machinists v. Employment Relations Comm., the Court found that states may not regulate conduct that federal law intentionally leaves unregulated. Machinists, 427 U.S. at 149-50. If either preemption doctrine applies, state courts must defer to the exclusive competence of the NLRB. Id.; see also R. M. Perlman Inc. v. NY Coat, Suit, Etc., Local 89-21-1, I.L.G.W.U., 789 F.Supp. 127, 129 (S.D.N.Y. 1992), aff'd, 33 F.3d 145 (2d Cir. 1994); Wolf St. Supermarkets, Inc. v. McPartland, 487 N.Y.S.2d 442, 446-447 (4th Dept. 1985).

The Garmon Court held that states are permitted to enjoin "conduct marked by violence and imminent threats to the public order," 359 U.S. at 247 (citations omitted). "Policing of actual or threatened violence to persons or destruction of property has been held to be most clearly a matter for the states." Lodge 76, Int'l Assoc. of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 136 (1976); see also Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139-140 (1957) (sustaining state-court power to enjoin striking employees from threatening or provoking violence, and obstructing ingress and egress to and from property, although peaceful picketing could not be enjoined); Int'l Longshoreman's Ass'n, Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970) (holding that any attempt to enjoin peaceful picketing is within the exclusive jurisdiction of the NLRB).

In Billy Jack For Her, Inc. v. New York Coat, Suit, Etc., 511 F.Supp. 1180, 1191 (S.D.N.Y. 1981), a union picketed a company and other companies to which it had "farmed out" work in order both to obtain contracts with the companies. The court found that because "federal labor law provides an arguable basis for finding the Union's alleged conduct unlawful," the state claims were preempted. The court noted that in determining questions of NLRA preemption the issue is whether application of the federal law is "arguable", and, if so, the "balance struck by Congress" between the respective rights of unions and employers must be maintained by preventing state intrusion. See also, Jou-Jou Designs v. ILGWU, Local 23-25, 465 NYS2d 163, 169 (1st Dept.), aff'd, 60 N.Y.S.2d 1011 (1983); Delta-Sonic Carwash System v. Building Trades Council, 168 Misc.2d 672, 640 N.Y.S.2d 368 (Monroe Co. Sup. Ct. 1995).

In Millennium I, the Court (Iannacci, J.) applied the preceding principles to find that Millennium's claims therein were preempted. In Millennium I, plaintiff brought miscellaneous state claims for "misleading or false signs and statements," "interfering with or destroying employer's trade," and "prima facie tort" – all seeking to have the Court regulate, and in fact enjoin, conduct that is arguably protected, arguably prohibited, or intentionally left unregulated by the NLRA. The Court in Millennium I described the facts as follows:

> The Union has erected the large inflatable "Rat" in front of 272 North Franklin Ave. and has been handing our leaflets protesting Millennium's alleged practice of hiring substandard contractors who make a living, [sic] exploiting workers while building their new dealerships. The "Rat" and hand-billing take place across the street from Millennium's construction of its new showroom. Millennium asserts that the alleged basis for the protest is false and that the Union is simply trying to pressure Millennium to hire its members as opposed to another union's members currently working on the construction site.

The significant issues in dispute before this Court have already been presented to the NLRB by Red Rock insofar as similar protests that Local 66 engaged in at the Valley Stream dealership. Region 29 of the NLRB dismissed Red Rock's claim expressly detailing the "protected" status of the Union's conduct. Herein, Millennium has offered insufficient proof that the present case might not be "arguably prohibited or protected" under the NLRA, given that the NLRB has already found similar conduct in Valley Stream was protected.

The significant conduct herein – speech and use of the rat symbol – has specifically been found to be lawful union protest tools under the First Amendment and NLRB precedent, and state law challenges of this activity have been found preempted.

See Edward J. DeBartolo Corp., 485 U.S. 568 (finding leafleting for purposes of soliciting a boycott of a secondary employer lawful); Sheet Metal Workers International Association, Local 15, 356 NLRB No. 162 (2011) (finding use of rat lawful for same reason); Delta-Sonic Carwash System, 168 Misc.2d 672, 640 N.Y.S.2d 368 (applying DeBartolo as a basis for preemption).

The U.S. Supreme Court has flatly prohibited prior restraints in the form of injunctions based on the alleged truth or falsity of speech. According to the Court, in determining whether to enjoin such conduct "[i]t is elementary ... that ... the courts do not concern themselves with the truth or validity of the publication." Organization for a Better Austin v. Keefe, 402 U.S. 415, 418 (U.S. 1971). Accord Metropolitan Opera Ass'n v. Local 100 Hotel Emples. & Restaurant Emples. Int'l Union, 239 F.3d 172, 176 (2d Cir. N.Y. 2001).

The right of free speech includes the right to advocate a consumer boycott. Plaintiff's claim that Local 66 should be enjoined from urging shoppers to go elsewhere is simply a prohibited prior restraint on speech. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982) (reversing injunction against advocacy of boycott, Court holds that "[s]peech does not lose its protected character, however, simply because it may embarrass others or coerce them into action"); see also Keefe, 402 U.S. at 419 (Court holds that business's interest in being free from public criticism did not outweigh the "heavy presumption" under the First Amendment against the prior restraint on expression).

This right of free speech, including advocacy of consumer boycotts, extends to a

union and its members. In Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568 (1988), a union distributed handbills to customers at a shopping mall urging them not to patronize any of the stores at the mall because the union objected to one of the mall's tenants using a non-union contractor that paid its workers substandard wages and benefits. The Court refused to interpret federal labor law as prohibiting the union's conduct, since such a ban would infringe the union members' First Amendment rights.

Finally, it is beyond dispute that the use of an inflatable rat is also protected by the First Amendment. As the court held in Tucker v. City of Fairfield, 398 F.3d 457, 462 (6th Cir. 2005), "there is no question that the use of a rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment." And as earlier explained, in Sheet Metal Workers International Association, Local 15, the NLRB similarly found the rat to be protected by the First Amendment. See also IUOE, Local 150 v. Village of Orland Park, 139 F.Supp.2d 950, 958 (N.D. Ill. 2001) ("[w]e easily conclude that a large inflatable rat is protected, symbolic speech"); Virginia v. Black, 538 U.S. 343 (2003) ("[t]he First Amendment offers protection to symbolic or expressive conduct as well as to actual speech"); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943) ("[s]ymbolism is a primitive but effective way to communicate ideas").

Millennium attempts to argue that the rat and/or protesters are impeding pedestrian traffic and ingress and egress to its stores, as well as that use of a bullhorn creates a public nuisance. No police citations have been issued because of such

alleged blocking. Millennium has not shown that the rat and protesters have attempted to block anyone nor that the police have failed or refused to enforce local laws. Rather, the claim is that protesters are "approximately twenty feet from the dealership entrances," and that "[p]edestrians are forced to walk around the demonstrators", thus interfering with their "ease of access". The NLRB has held that in the absence of proof that leafleters attempted to block pedestrians, leafleters did not violate the NLRA when they attempt to contact members of the public. Local 79, Laborers Int'l Union of N. Am., 2009 NLRB LEXIS 141, 18-19 (2009). In addition, while in Helmsley-Spear, Inc. v. Fishman, 12 Misc.3d 1151(A) (N.Y. Sup. Ct. 2006), plaintiff in a private nuisance action presented to the court noise-levels from "drumming" reading in excess of 95 decibels and no preemption was found, herein the most Millennium can say is that it "believes the noise levels violate Town of Hempstead Noise regulations." These are insufficient bases to turn acts of protected free expression into a public nuisance subject to state law.

Accordingly, any action by this Court is preempted by federal law and, therefore, the motion for a preliminary injunction is denied.

Dated: February 24, 2012

STEVEN M. JAEGER, A.J.S.C.