

**Concepcion v 469 W. 166th St. Hous. Dev.
Fund Corp.**

2009 NY Slip Op 30891(U)

March 24, 2009

Supreme Court, New York County

Docket Number: 602492/08

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

AWILDA CONCEPCION, et al

Plaintiff,

- v -

469 West 166th Street Housing
Development Fund Corp. Defendant.

INDEX NO.: 602492/08

MOTION DATE:

MOTION SEQ. NO.: 001

MOTION CAL. NO.:

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|-----------------|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____ | _____ |
| Answering Affidavits — Exhibits _____ | _____ |
| Replying Affidavits _____ | _____ |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross-motion* are decided in accordance with *the annexed memorandum decision/order.*

FILED
MAR 31 2009

Dated: March 24, 2009

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART II

-----X
AWILDA CONCEPCION and QUIRICO GUERRERO,

Plaintiffs,

-against-

469 WEST 166TH STREET HOUSING DEVELOPMENT
FUND CORPORATION, BARBARA MOORE, SHEILA
SAM, DOLLIE GREEN and JASON SWANSTON,

Defendants.

-----X
MADDEN, J.:

Index No. 602492/08

FILED
MAR 31 2009
COUNTY CLERK'S OFFICE
NEW YORK

This is a derivative action brought for the benefit of nominal defendant 469 West 166 Street Housing Development Fund Corporation (the Co-op) against the members of the Co-op's Board of Directors, seeking to recover on behalf of the Co-op for alleged breaches of fiduciary duty and misappropriation.

Plaintiffs Awilda Concepcion and Quirico Guerrero, residents of the building located at 469 West 166th Street, New York, New York (the Building) now move, by order to show cause, for a preliminary injunction staying all eviction proceedings currently pending against plaintiffs and all present tenants, and enjoining defendants Barbara Moore, Sheila Sam, Dollie Green and Jason Swanston, members of the Board of Directors¹, from taking any further action with respect to the management or operation of the Co-op. Plaintiffs also seek, in the alternative, an order appointing a trustee to manage and administer the Co-op, pending a new election of directors.

Defendants cross-move, pursuant to CPLR 3211 and Business Corporation Law

¹ Defendants allege that Jason Swanston is not a member of the Board of Directors, but rather, is the managing agent of the Co-op.

(BCL) § 626 (b), for an order dismissing the complaint for lack of standing, and, pursuant to BCL § 627, directing plaintiffs to deposit security to cover the reasonable expenses of the corporation on whose behalf they are suing.

On August 27, 2008, this court granted a temporary restraining order enjoining defendants from commencing or prosecuting any landlord/tenant proceedings against plaintiffs, or from disposing of any assets of the Co-op, except as is necessary in the ordinary course of business.

Background

On July 22, 2003, the Building was converted from city-owned public housing to private housing under the New York City Department of Housing Preservation and Development's (the HPD) Tenant Interim Lease (TIL) Program (Complaint, ¶ 1). TIL is a self-help tenant ownership program administered by the HPD (*id.*, ¶ 13). This program allows the HPD to sell certain city-owned buildings to housing cooperatives formed by a building's tenants, who then purchase shares of the cooperative (*id.*, ¶ 13). Under the TIL Program, the Building was sold to a housing cooperative formed by the Building's tenants, who purchased shares of the corporation. As part of this process, a Board of Directors (the Board) was established (*id.*, ¶ 1).

TIL works with organized tenant associations in City-owned buildings to develop economically self-sufficient low-income cooperatives called Housing Development Fund Companies (HDFCs) (*id.*, ¶ 13). If a building meets the TIL Program's requirements for participation, the tenant association then enters into an interim lease with the City, through HPD, to manage and maintain the building. During this interim lease period, the building is rehabilitated. If, after rehabilitation, the tenants meet all of the programs' requirements, the City

will sell the building to the tenants. The tenants may purchase the building as a cooperative for approximately \$250.00 per apartment (*id.*, ¶ 14).

In order to purchase the building, at least 80% of the tenants must sign a “Subscription Agreement,” and agree to pay the purchase price for their apartments before the building is sold to the tenants (*id.*, ¶ 15). When 80% of the tenants have signed the Subscription Agreement and submitted the signatures to HPD, HPD notifies all tenants (the Notification Date). Tenants are eligible to purchase shares 15 days after the Notification Date, if the tenant is current in rent, or has committed to pay the arrears under a signed payment agreement with the tenant association. After the building is sold to the cooperative, each shareholder is issued a lease known as a Proprietary Lease, which supersedes any pre-existing lease (*id.*, ¶ 16).

The Building first became involved in the TIL Program in August 1998. In July 2002, a complete rehabilitation of the Building was completed (*id.*, ¶ 17). The Building was scheduled for sale at the time of the completion of the renovation. However, due to certain problems, the closing was delayed, and ultimately took place on July 30, 2003. In consideration for title to the Building, the City accepted the amount of \$3250.00 paid by the Co-op. This amount represents shares purchased by residents of thirteen apartments (at \$250.00 per apartment) (*id.*, ¶ 18).

The Building was incorporated into a Housing Development Fund Corporation and a New York Domestic Business Corporation on April 16, 2002, and title to the Building was transferred to the HDFC on July 30, 2003 (*id.*, ¶ 21).

On April 5, 2002, plaintiff Concepcion and plaintiff Guerrero’s wife each signed the Subscription Agreement (*see id.*, Exh A) distributed by the HPD, in which they agreed to

purchase the shares of the Co-op allocated to their apartments (*id.*, ¶ 19). Plaintiffs allege that they each purchased the shares to their apartments within the requisite time, and that they are holders of the shares allocated to apartments 1C and 2A of the Co-op. Plaintiffs allege that, on June 15, 2002, Guerrero paid \$250.00 to Dollie Green, a representative of the Co-op Tenant’s Association, to purchase the shares allocated to Apartment 2A (*id.*, ¶ 22; *see* Exh B). Plaintiffs further allege that, on July 22, 2003, Concepcion paid \$250.00 to Sheila Sam, a representative of the Co-op’s Tenant Association, for the purchase of the shares allocated to Apartment 1C (*id.*, ¶ 23; *see* Exh C).

Plaintiffs assert that they were both current on their rent at the time they purchased the shares allocated to their apartments (*id.*, ¶ 24). Plaintiffs also assert that the Co-op and defendants Moore and Sam, in their capacity as managers of the Co-op, failed to deliver to plaintiffs their certificates of shares, or a copy of the Proprietary Lease for their signatures (*id.*, ¶ 25).

Plaintiffs allege that, during the conversion of the Building, a minority of the tenants – the individual defendants – unlawfully or inappropriately seized control of the conversion process, and appointed themselves as directors of the Board of Directors of the Co-op (the Board) (*id.*, ¶ 26).

According to plaintiffs, the Board has breached its fiduciary duties to plaintiffs and other shareholders by refusing to recognize plaintiffs as shareholders, and charging plaintiffs and other occupants rents above the amounts paid by Board members (*id.*, ¶ 27). The Board has also threatened to evict plaintiffs and other occupants for failing to pay this increased rent (*id.*). Finally, plaintiffs allege, the Board has prevented plaintiffs from participating in elections and

meetings, failed to maintain the Building in good condition, and used corporate funds for the Board members' own personal use (*id.*).

Specifically, plaintiffs allege that the Board breached its fiduciary duties by initiating eviction proceedings against Concepcion as a tenant on September 6, 2007, despite her status as a shareholder (*id.*, ¶ 27 [a]). Plaintiffs allege that the Board also breached its fiduciary duty by attempting to raise Guerrero's rent above the amount that the Board members themselves pay, and above the maximum amount allowable under the TIL Program (*id.*, ¶ 27 [b]).

Plaintiffs seek a judgment declaring that they are the holders of shares allocated to Apartments 1C and 2A of the Co-op; a money judgment against the Board for damages for breach of its fiduciary duty; an order enjoining the directors of the Co-op from taking any further action; an order that the remaining shares of the Co-op be offered for sale to the present tenants; and an order for the new election of the Board in which plaintiffs are eligible to vote and be elected.

Discussion

Preliminary injunctive relief is a drastic remedy, which is not routinely granted (*City of New York v 330 Continental, LLC*, ___ AD3d ___, 2009 WL 197556 [1st Dept 2009]; *Peterson v Corbin*, 275 AD2d 35 [2d Dept], *lv dismissed* 95 NY2d 919 [2000]). Entitlement to a preliminary injunction requires a showing of (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor (CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]). If any one of these three requirements is not satisfied, the application must be denied (*Faberge Intl. v Di Pino*, 109 AD2d

235 [1st Dept 1985]).

In support of their motion for a preliminary injunction, plaintiffs contend that they can establish a likelihood of success on the merits. Plaintiffs assert that they are the holders of shares allocated to Apartments 1C and 2A of the Co-op because they signed the Subscription Agreement, paid \$250.00 to the Co-op for the purchase of the shares, and were both current on their rent at the time of the purchase of the shares. Nevertheless, plaintiffs assert, the Co-op and defendants Moore and Sam, in their capacity as managers of the Co-op, failed to deliver to plaintiffs their certificates of shares, or a Proprietary Lease for their signatures. Plaintiffs further assert that they have demonstrated that they have taken all necessary steps to qualify as shareholders, but that defendants have deliberately attempted to deprive them of their legal rights and privileges as shareholders.

In opposition to the motion, and in support of their cross motion to dismiss the complaint, defendants argue that plaintiffs' motion must be denied pursuant to BCL § 626 (b), because plaintiffs are not currently, and never were, shareholders of the Co-op, as they hold neither shares of stock of the Co-op nor proprietary leases. As such, defendants argue, plaintiffs lack standing to bring this derivative action, or to move for injunctive relief, and the complaint must be dismissed.

BCL § 626 (b), which sets forth certain requirements for bringing a shareholder derivative suit on behalf of a corporation, mandates that shareholders instituting a derivative action must demonstrate that they owned stock both when the lawsuit was brought, and at the time of the transaction they are contesting:

[I]n any such action, it shall be made to appear that plaintiff is such

a holder [of shares of the corporation] at the time of bringing the action and that he was such a holder at the time of the transaction of which he complains ...

(BCL § 626 [b]). This rule, known as the contemporaneous ownership rule, is “rigorously enforced” (*Independent Inv. Protective League v Time, Inc.*, 50 NY2d 259, 263 [1980]; *accord Pessin v Chris-Craft Indus.*, 181 AD2d 66 [1st Dept 1992]). Failure to satisfy the contemporaneous ownership requirement routinely results in a dismissal of the complaint for lack of standing and failure to state a cause of action (*see e.g. Schorr v Steiner*, 46 AD3d 435 [1st Dept 2007])[shareholder derivative suit properly dismissed on ground of plaintiffs’ lack of legal capacity demonstrated by their failure to adduce any evidence that they were shareholders]; *Balk v 125 W. 92nd St. Corp.*, 24 AD3d 193 [1st Dept 2005] [complaint dismissed on ground that since plaintiff was no longer shareholder of residential cooperative corporation, he could not pursue derivative claims on its behalf]; *Honzawa Holding Co. v Hiro Enter. USA*, 291 AD2d 318 [1st Dept 2002] [shareholder derivative suit properly dismissed as plaintiffs failed to establish their status as shareholders under the contemporaneous ownership rule]).

In determining whether plaintiffs here have standing, it is well established that “the terms of the controlling documents ... determine whether plaintiffs are holders of ... shares [of stock]” (*Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54, 59 [2005]; *accord IJ Kings, LLC v Woodstock Owners Corp.*, 46 AD3d 321 [1st Dept 2007]). Thus, plaintiffs’ shareholder status “must be decided by applying the usual rules of contract interpretation to those documents” (*Kralik v 239 E. 97th St. Owners Corp.*, 5 NY 3d at 59). Here, the parties agree that the controlling document is the Subscription Agreement.

With respect to Guerrero, defendants have presented conclusive evidence that he

was never a shareholder of the Co-op, and thus has no standing to sue. As plaintiffs admit, Guerrero did not sign the Subscription Agreement. Rather, the Subscription Agreement was signed by Guerrero's wife, Theresa Guerrero. In her October 27, 2008 affidavit, Theresa Guerrero avers that, although she initially gave Green a money order in the amount of \$250.00 on June 15, 2002, for the purchase of the shares to Apartment 2A, she ultimately realized that she did not want to purchase the shares because she was unemployed, and because her disabled son was the only person in the apartment that had a source of income, as he received Social Security Insurance (10/27/09 Theresa Guerrero Aff., ¶¶ 3-4). Ms. Guerrero further states that, in June 2003, she told Green, Sam and Moore that she would not be able to purchase the apartment (*id.*, ¶ 6), and that, on June 16, 2003, Green returned the money order in the amount of \$250.00 to her (10/2/08 Theresa Guerrero Aff., ¶ 3; 10/27/08 Theresa Guerrero Aff., ¶¶ 3, 7; 10/2/08 Green Aff., ¶ 4 and Exh E [copy of receipt for \$250 marked "void return 7/16/03"]). Ms. Guerrero states that "[a]s such, the Plaintiff Quirico Guerrero did not purchase shares in the Co-op and is not a shareholder in the Co-op" (10/2/08 Theresa Guerrero Aff., ¶ 4).

Defendants also present evidence that Guerrero holds a one-year lease for his apartment, beginning September 1, 2008 and ending on September 1, 2009, thus demonstrating his status as a renter, rather than a shareholder (*see* Aff. of James A. English, Esq., Exh D; *see also* 10/27/08 Theresa Guerrero Aff., ¶ 7 ["[f]rom that point on, my husband and I have lived in Apt. 2A as month-to-month renters until September 2008 when we received our one-year lease"]).

It is thus clear that plaintiff Guerrero was never a shareholder of the Co-op, and thus, does not have standing to sue on its behalf, or to seek a preliminary injunction.

Accordingly, with respect to plaintiff Guerrero, the motion for a preliminary injunction is denied, and defendants' cross motion to dismiss the complaint is granted.

However, the parties present completely conflicting evidence as to whether Concepcion is a shareholder of the Co-op, and thus, whether she has standing to sue on behalf of the Co-op. Consequently, with respect to plaintiff Concepcion, plaintiffs' request for a preliminary injunction is factually contested, and must be referred to a Special Referee to hear and report with recommendations.

Defendants argue that Concepcion never became a shareholder of the Co-op, because she was in rent arrears at the time she tendered payment for the shares of her apartment. With respect to rent arrears, the Subscription Agreement provides that:

If I have any rent arrears as of the Payment Due Date, I will not have the right to purchase shares of the Co-op Corporation at the Purchase Price . . .

(Subscription Agreement, ¶ 4).

The issue of whether plaintiff was in arrears on her rent at the time of the purchase, and whether plaintiff was thus eligible to purchase shares in the Co-op, is sharply contested by the parties. In support of their position that Concepcion was merely a renter, defendants present the affidavit of Moore, president of the Co-op, in which Moore states that, in July of 2003, Concepcion could not purchase either her apartment or shares in the Co-op because she was in arrears for back rent (10/2/08 Moore Aff., ¶¶ 10-11). Moore alleges that the Board has repeatedly sent Concepcion notifications about her rent arrears (*id.*, ¶ 19; *see* English Aff, Exh C [2/11/07 letter to Concepcion from the Board stating that "you have ... made no attempt to pay your owed rent since September 1, 2002 to February 1, 2007, totaling to the amount of

\$22,714"), and, as such, any payments by Concepcion which were accepted by Sam were solely for back rent, and not for the purchase of shares (*id.*, ¶ 29).

Likewise, Sam, the Secretary of the Co-op, asserts that, although Concepcion alleges that she paid Sam \$250.00 for the purchase of shares, she was not in good standing in July 22, 2003, and was in rental arrears (10/2/08 Sam Aff., ¶ 3). As such, Sam asserts, any monies received were applied to the rental arrears (*id.*, ¶ 4).

With respect to the receipt for the \$250.00 money order, a copy of which is attached as Exhibit C to the complaint, Sam alleges that she was instructed to give Concepcion a receipt by Williams, the treasurer, contingent upon Concepcion catching up on her rent (10/27/08 Sam Aff., ¶ 15). Williams instructed Sam not to deposit the money order until Concepcion was up-to-date on her rent (*id.*, ¶ 18). However, Sam asserts, Concepcion continued to default on her rent payments and, therefore, the receipt was never honored by the Board (*id.*, ¶¶ 16-17). According to Sam, Williams returned Concepcion's money order to her, in front of Sam, during the month of September 2003 (*id.*, ¶ 17).

Moore also alleges that the Board has recently taken Concepcion to Housing Court for nonpayment of past due rent arrears (10/2/08 Moore Aff., ¶ 12). During that proceeding, Concepcion did not present any documents showing that she was a shareholder of the Co-op, or that she was current on her rent (10/27/08 Sam Aff., ¶ 9).

In a Stipulation of Settlement dated March 18, 2008 (*see* English Aff., Exh A), Concepcion agreed to pay past due rent, and also agreed to a one-year lease (*see id.*: proposed lease commencing 2/1/08 [Exh B]). According to Moore, Concepcion is currently a month-to-month renter, and has yet to sign the court stipulated one-year lease to occupy her apartment

(10/2/08 Moore Aff., ¶¶ 13, 21).

However, Concepcion presents evidence which contests her status as a renter, and raises issues of fact as to whether she was in rent arrears at the time she tendered payment for her shares, and thus, whether she was eligible to purchase shares in the Co-op. In her affidavit dated October 22, 2008, Concepcion alleges that, prior to paying \$250.00 to purchase the shares of her apartment, she tendered checks totaling \$2476.00 to the tenant's association, which represented the balance of her rental arrears (Concepcion Aff., ¶ 4; Exh A [copies of checks dated 2/14/03]). She further alleges that she was given a receipt for this payment by Williams (*id.*, ¶ 5; Exh B [receipt dated 2/24/04 in the amount of \$2476.00 for rent "from July 2002 to Feb 2003"]). Concepcion specifically states that, "[a]t the time I tendered payment of \$250 for the purchase of my apartment," "[I] believed that I was in good standing to purchase the shares," and that this belief "was reinforced by defendants, who accepted by my payment" (*id.*, ¶¶ 6-7). She further states that her payment was not returned to her at any time, and that she was never told that she was not in good standing to purchase the shares for her apartment until the commencement of this action (*id.*, ¶ 8).

She also asserts that she was approved for a Section 8 subsidy based on her status as a shareholder, as opposed to a renter, of the Co-op, but that defendants refused to process her application for a Section 8 subsidy, which was given to her as part of her rights as a shareholder in an HDFC co-op (*id.*, ¶¶ 9-10, Exh C).

Furthermore, Concepcion presents a copy of a rent statement submitted to the New York Commission on Human Rights, which, she asserts, reflects that she was current on her rent at the time she tendered payment for her shares on July 22, 2003 (*see* 10/8/08 Aff. of Adam

Marlowe, Esq., Exh A).

Plaintiff also refers to a provision in the Stipulation of Settlement stating that “this settlement is without prejudice to respondent’s claim that she should be a shareholder in the HDFC Co-op” (Stipulation of Settlement, ¶ 6), which, she asserts, supports her claim that she is a shareholder, as opposed to a renter.

However, on reply, defendants present additional evidence which disputes Concepcion’s assertions she was current on her rent in July of 2003. Sam asserts that the checks totaling \$2476.00 did not cover Concepcion’s rental arrears through July 2003, but rather, only covered the social security insurance portion of the rent up to February 2003 (11/17/08 Sam Affidavit, ¶ 4). Sam further asserts that Concepcion did not pay the portion of the rent that was remaining (*id.*, ¶ 5), and that neither she, nor any of the defendants, ever reinforced Concepcion’s belief that she was in good standing with her rent (*id.*, ¶ 6). In addition, Sam contends that the rent statement submitted by Concepcion does not prove that she was up to date on her rent. Rather, Concepcion was receiving partial rent payments from public assistance in 2003, and that, out of the monthly rent of \$554.00, the Board received only \$107.50 from public assistance, and Concepcion was to pay the remaining balance of \$446.50, but never did so (10/28/08 Sam Aff., ¶ 4). Finally, Sam asserts that Concepcion’s claims that she was approved for Section 8 are untrue (*id.*, ¶ 14).

“While the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that ‘subvert the plaintiff’s likelihood of success on the merits ... to such a degree that it cannot be said that the plaintiff established a clear right to relief’” (*Matter of Advanced Digital Sec. Solutions, Inc. v*

Samsung Techwin Co., 53 AD3d 612, 613 [2d Dept 2008], quoting *Milbrandt & Co. v Griffin*, 1 AD3d 327, 328 [2d Dept 2003]; see also *County of Westchester v United Water New Rochelle*, 32 AD3d 979, 980 [2d Dept 2006] [“When central facts are in dispute, it is more difficult to ascertain whether the movant has shown a likelihood of success on the merits”]; *Eklund v Pinkey*, 31 AD3d 908, 909 [3d Dept 2006] [internal citation omitted] [“While mere issues of fact will not preclude a preliminary injunction, sharp factual issues obscuring the likelihood of success will bar the remedy”]).

Where a defendant has submitted evidence raising an issue of fact as to any of the elements required for issuance of a preliminary injunction, “the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists” (CPLR 6312 [c]; see *Metered Appliances v St. Marks Hous. Assocs.*, 6 Misc 3d 1029(A), 2005 NY Slip Op 50224(U), * 4 [Sup Ct, Kings County 2005] [“Pursuant to CPLR 6312 (c), the court should not deny plaintiff’s request for injunctive relief based on the issues of fact raised ... but rather should determine the issues of fact by a hearing”]).

Here, the record raises issues of fact as to whether Concepcion was in rent arrears at the time she attempted to purchase the shares to her apartment. Specifically, the conflicting evidence in the submissions preclude a determination based on the papers as to whether Concepcion was in rent arrears in July 2003 when she tendered payment for shares to her apartment, and thus, whether she was eligible, under the terms of the Subscription Agreement, to become a shareholder of the Co-op with standing to seek a preliminary injunction on behalf of the Co-op. Accordingly, given these sharply disputed issues of fact, Concepcion is not entitled, at this stage of the action, to a preliminary injunction (see *Gagnon Bus Co. v Vallo Transp., Ltd.*

13 AD3d 334 [2d Dept 2004] [plaintiff failed to prove a likelihood of success on the merits as there were factual issues as to whether it had standing to enforce noncompetition clause at issue]; *see also Pearlgreen Corp. v Yau Chi Chu*, 8 AD3d 460 [2d Dept 2004]). Rather, these disputed issues of fact require a hearing as to whether Concepcion is entitled to be a shareholder of the Co-op, and whether she has standing to maintain this action (*see Sapphire Estate Ltd. v Sun Shan Lee Realty*, 293 AD2d 339 [1st Dept 2002]; *A.D. Bedell Wholesale Co. v Philip Morris Inc.*, 272 AD2d 854 [4th Dept 2000]). Therefore, the issue of whether Concepcion owed rent to the Co-op at the time of the alleged purchase of the shares in July of 2003, and thus, whether was eligible to purchase shares to the Co-op at that time, is referred to a Special Referee to hear and report with recommendations. Concepcion's application for a preliminary injunction, defendants' cross motion to dismiss with respect to Concepcion, and defendants' cross motion for an order, pursuant to BCL § 627², directing plaintiffs to deposit security in connection with their application for preliminary injunction, will be held in abeyance, pending the outcome of the report of the Special Referee.

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is hereby

²Under BCL § 627, a plaintiff in a derivative action is required to deposit security for reasonable expenses unless, *inter alia*, the plaintiff holds shares representing five percent or more of any class of shares or the shares have a fair value of greater than \$50,000. Concepcion asserts that she is not required to deposit security for costs under this provision based on her belief that she owns more than five percent of the shares of the Co-op which is comprised of thirteen apartments.

ORDERED that defendant's cross-motion to dismiss the complaint as to plaintiff Quirico Guerrero is granted and as to plaintiff Quirico Guerrero, the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the issue of whether plaintiff Awilda Concepcion was in rental arrears on July 22, 2003, when she attempted to purchase shares in the Co-op, and thus, whether she is a shareholder of the Co-op who has standing to bring this action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that plaintiff Awilda Concepcion's application for a preliminary injunction, defendants' cross motion to dismiss the complaint as to plaintiff Awilda Concepcion, and defendants' cross motion for an order, pursuant to Business Corporation Law § 627, directing plaintiff Awilda Concepcion to deposit security in connection with her application for preliminary injunction, may be renewed in connection with a motion pursuant to CPLR 4403 upon receipt of the report and recommendations of the Special Referee or upon receipt of the determination of the Special Referee or the designated referee; and it is further


ORDERED that the temporary restraining order issued by this court on August 27, 2008 is continued, pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party,

counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet³ upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (part 50R) for the earliest convenient date.

Dated: March ²⁴, 2009

ENTER:


J.S.C.

FILED
MAR 31 2009
COUNTY CLERK'S OFFICE
NEW YORK

³Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.