

## *Pinci v Monaco*

Supreme Court of New York, New York County

December 5, 2018, Decided

654749/2017

### Reporter

2018 N.Y. Misc. LEXIS 5737 \*; 2018 NY Slip Op 51739(U) \*\*; 61 Misc. 3d 1225(A); 2018 WL 6424140

[\*\*1] Bonifacio *Pinci*, Plaintiff, against Livia Monaco and Flushing Bank, Defendants.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

### Core Terms

cause of action, alleges, motion to dismiss, cancel, purchase price, notice, constructive trust, ownership interest, notice of pendency, further order, quiet title, asserts, option period, real property, contributed, declaratory, citations

### Headnotes/Summary

#### Headnotes

Lis Pendens—Cancellation—When Cancellation Appropriate. Quieting Title—Determination of Claim to Real Property—Failure to State Cause of Action.

**Counsel:** [\*1] For Plaintiff: Adam Michael Levy, Cinotti, LP, New York, NY.

For Livia Monaco, Defendant: Andrew Weltchek, Esq., Cohen Hochman & Allen, New York, New York.

**Judges:** Hon. Robert R. Reed, J.S.C.

**Opinion by:** Robert R. Reed

### Opinion

Robert R. Reed, J.

Motions bearing sequence numbers 001 and 002 are consolidated for disposition. In this action, plaintiff Bonifacio *Pinci* (*Pinci*) asserts an ownership interest in a Manhattan brownstone building (Premises), which he alleges he and his mother, defendant Livia Monaco (Monaco), bought together.

### Background

In his verified amended complaint, dated November 9, 2017 (VAC) (NYSCEF Doc No 9), *Pinci* alleges that, in or around 1994, he and Monaco agreed that they would buy the Premises together (*see* VAC, ¶¶ 5-6). Pursuant to their agreement (Agreement), which the parties never reduced to a writing, *Pinci* would receive "a one-half ownership interest in the Premises" in return for his contribution of an unspecified amount of money toward its purchase price (*id.*, ¶ 7).

Monaco thereafter entered a contract for the purchase of the Premises and closed that transaction, using the funds that *Pinci* contributed towards the purchase price (*id.*, ¶ 8). *Pinci* [\*\*2] specifically alleges that he was the signatory [\*\*2]

of the check given to the Premises' seller in down payment (*id.*, ¶ 9). "For the purposes of, among other things, convenience," he further alleges that the deed to the Premises was put in Monaco's name alone and that she remains the sole owner of record of the Premises (*id.*, ¶ 10).

**Pinci** asserts that, since the purchase of the Premises, both he and Monaco have used the Premises as their primary residence and he has "contributed his time and resources toward management of the Premises" (*id.*, ¶¶ 12-13).

In or about September 2015, Monaco obtained a commercial line of credit from co-defendant Flushing Bank, in exchange for which Monaco gave Flushing Bank a mortgage on the Premises (*id.*, ¶ 14).

On or about May 17, 2017, **Pinci** and Monaco entered into a written agreement, which they designated the Letter of Intent (LOI) (*see id.*, ¶ 35, and exhibit B thereto), under which Monaco agreed to sell the Premises to **Pinci** at a price of \$2,250,000, "clean after taxes" (*id.*, exhibit B). The LOI further provided for an 8-month "validation period," during which time Monaco was to take the Premises off the market and **Pinci** was to "come up with the money," and after which time the LOI would expire (*see id.* [\*\*\*3], ¶ 36 and exhibit B).

In his VAC, **Pinci** alleges that he "stands ready, willing and able to perform under" the LOI (*see id.*, ¶ 39). He also specifically alleges that he "is ready, willing and able to tender the purchase price (or will be) during the aforesaid eight (8) month period, but [that] Monaco has disavowed and breached the [LOI] and has refused to make the conveyance" (*id.*, at ¶ 38).

**Pinci** does not allege that he exercised his option under the LOI by tendering to Monaco the purchase price of \$2,250,000, or any other amount, during the option period (*see id.*, *passim*). In his affidavit, sworn to on February 6, 2018, submitted in opposition to Monaco's motions and in support of his cross motions (**Pinci** aff), **Pinci** asserts that at

some time after the LOI was signed, he and Monaco learned that the broker who gave them an informal valuation had purportedly overvalued the Premises, and that its fair value stands at approximately \$3.5 million, rather than the \$4.5 million figure on which the LOI purchase price was based (*see id.*, ¶¶ 11-14).

**Pinci** also alleges in his affidavit that, after execution of the LOI, Monaco informed him that she would not sell the Premises to him unless he "also [\*\*\*4] paid Monaco's income tax liability [*sic*]," which would have increased his costs by more than \$1 million (*id.*, ¶ 13).

**Pinci** asserts four causes of action in his amended pleading.<sup>1</sup> As to his first cause of action, **Pinci** claims that "recently" Monaco indicated to him that, despite the Agreement, she refuses to acknowledge his ownership interest in the Premises. He also alleges that Monaco intends to sell the Premises to a third party, without providing him adequate compensation for his ownership interest. **Pinci** seeks a declaration, pursuant to [CPLR 3001](#), stating that he is the owner of no less than one-half interest in the Premises (*id.*, ¶¶ 15-18).

In his second cause of action, **Pinci** invokes Article 15 of New York's Real Property Actions and Proceedings Law to quiet title to the Premises, asserting that he is entitled to a [\*\*\*3] judgment declaring that he has "contractual, common law, and equitable ownership rights in the Premises," and that all other parties' claims of interests in the Premises are invalid, to the extent that they offend, or are asserted to trump, his interests. In addition, **Pinci** seeks damages, in an amount to be determined at trial, pursuant to RPAPL § 1521 (*id.*,

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<sup>1</sup> In his original verified complaint, e-filed on July 12, 2017 (*see* affidavit of Livia Monaco, sworn to on December 4, 2017 [NYSCEF Doc No 16], exhibit 1 [NYSCEF Doc No 17]), **Pinci** asserted only one cause of action, demanding Monaco's specific performance of the LOI (*see id.*, at 2). **Pinci** did not allege therein that Monaco accepted his money for purchase of the Premises or agreed that he should have an ownership interest in the Premises (*id.*, *passim*).

¶¶ 24-25).

In his third cause of action, *Pinci* alleges that because of their status [\*5] as mother and son, Monaco and he have a "confidential and/or fiduciary relationship" (*id.*, ¶ 27). *Pinci* further alleges that, in consideration of the money he contributed toward the purchase of the Premises, Monaco promised him that he would receive an equal ownership interest in the Premises, even though the deed would only name Monaco as the owner (*id.*, ¶ 28). *Pinci* maintains that, relying on Monaco's promise, he contributed an unspecified amount of money toward the purchase of the Premises and that, by denying *Pinci*'s ownership interest, Monaco has been unjustly enriched (*id.*, ¶¶ 29-30). *Pinci* concludes that it would be against equity and good conscience to allow Monaco to retain the benefits he has conferred upon her without compensating him, and, so, prays to be granted a constructive trust over the Premises.

In his fourth cause of action, *Pinci* alleges that Monaco violated the LOI during its eight-month option period, by listing the Premises for sale and by refusing to sell the Premises to him, even though he was purportedly ready, willing and able to tender the purchase price, or would have been during the option period. *Pinci* asserts he is, therefore, entitled to judgment, directing [\*6] Monaco to specifically perform her duties under the LOI.

In motion sequence number 001, served and e-filed on December 8, 2017, Monaco moves to cancel *Pinci*'s July 12, 2017 notice of pendency (NYSCEF Doc No 4) (NOP) and to dismiss *Pinci*'s amended complaint. In motion sequence number 002, served and e-filed on January 7, 2018, Monaco moves to cancel *Pinci*'s amended notice of pendency, dated December 21, 2017 (amended NOP) (NYSCEF Doc No 24).

*Pinci* opposes both of Monaco's motions and cross-moves with respect to each, requesting that the court so order a subpoena which *Pinci* intends to serve upon Richard R. Moore, Esq., the attorney

who represented Monaco in her purchase of the Premises. Monaco opposes *Pinci*'s cross-motion and, in reply, submits further arguments in support of her motion to dismiss.

### Motion to Cancel

A notice of pendency, or "lis pendens" as it is commonly called,

"is merely a paper that plaintiff files in a county clerk's office, [which] puts the world on notice that the plaintiff has a claim to a described parcel of real property and that anyone who buys it or lends money on the strength of it or otherwise relies on the defendant's unfettered ownership of it does so subject [\*7] to whatever the pending action decides to be the plaintiff's right"

(Siegel, NY Prac § 306 [6th ed]).

[CPLR 6501](#) provides: "A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect title to, or the possession, use or enjoyment of, real property."

"Once properly indexed, the notice acts as constructive notice to all subsequent purchasers or incumbrancers: 'A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as if he were a party' ([CPLR 6501](#)). It is this special consequence, resulting as a matter of law from the filing of the statutory notice of [\*\*4] pendency which is the essence of the remedy afforded by the Legislature"

([5303 Realty Corp v O & Y Equity Corp., 64 NY2d 313, 318, 476 N.E.2d 276, 486 N.Y.S.2d 877 \[1984\]](#)).

When a complaint is amended, the plaintiff may be permitted to file a new notice of pendency to cover any additional realty or additional causes of action

not previously pleaded in the original complaint which fall within the ambit of CPLR 6501 (see Carvel-Dari Freeze Stores, Inc. v Lukon, 219 NYS2d 716, 721 [Sup Ct, Suffolk County 1961], mod on other grounds, 18 AD2d 700, 236 N.Y.S.2d 374 [2d Dept 1962], citing Oster v Bishop, 20 Misc 2d 446, 186 N.Y.S.2d 737 [Sup Ct, Westchester County 1959]; see also Siegel, NY Prac § 335 [court may permit amendment of lis pendens where no prejudice would result]).

Monaco's motion to cancel [\*8] the NOP was mooted by filing of the amended NOP. "In entertaining a motion to cancel" a notice of pendency, "the court essentially is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501" (5303 Realty Corp., supra, 64 NY2d at 320 [citations omitted]). Accordingly, Monaco can only prevail on her motion to cancel the Amended NOP if, upon determination of her motion to dismiss, no cause of action remains in "which the judgment demanded would affect title to, or the possession, use or enjoyment of, real property" (CPLR 6501).

"In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005] [citation omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*id.*).

On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court addresses only the face of the pleading itself, to decide whether the pleader's allegations fit within any cognizable legal theory (Leon v Martinez, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]).

"When considering [] pre-answer motions to dismiss the complaint for failure to state a

cause [\*9] of action," the court "may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint, because the question is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one" (Chanko v American Broadcasting Co., 27 NY3d 46, 52, 29 N.Y.S.3d 879, 49 N.E.3d 1171 [2016] [citation omitted]). Still, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration" (Sud v Sud, 211 AD2d 423, 424, 621 N.Y.S.2d 37 [1st Dept 1995] [citations omitted]).

## Discussion

### Pinci's Cross Motion

Pinci's cross-moves to have the court so order a subpoena which he intends to serve upon Richard Moore, Esq., the attorney who represented Monaco in the purchase of the Premises.

Pinci argues that such subpoena is necessary in opposing Monaco's motion to dismiss because he needs the documents in Mr. Moore's file to provide further support for his allegations that he holds an interest in the Premises by showing that he made a substantial contribution toward its purchase price (see affirmation of Adam Levy, Esq., executed February 6, 2018, ¶ 81). Pinci adds that he has already sought information from his bank about the activity in his account and in his joint account with [\*10] Monaco which would reflect his contribution toward the Premises' purchase price, but he has not yet been able to obtain that information (*see id.*).

At this juncture, Pinci has no need for these documents. For the purposes of Monaco's dismissal motion, all Pinci's allegations are taken as true and he is afforded the benefit of every [\*\*5] possible inference (see EBC I, Inc., supra, 5 NY3d at 19). The only question to be answered on a 3211(a)(7)

dismissal motion is whether the plaintiff has a cause of action, not whether he has artfully stated one (*Chanko, supra, 27 NY3d at 52*). If he has a cause of action, dismissal must be denied (*see Leon, supra, 84 NY2d at 90*). **Pinci**'s cross-motion is therefore denied.

## Monaco's Motion to Dismiss

### Quiet Title

**Pinci** fails to state a cause of action to quiet title because he does not allege that Monaco's interest in the Premises is a removable cloud on its title, or that her deed is invalid (*see, e.g., Zuniga v BAC Home Loans Servicing, L.P., 147 AD3d 882, 883, 47 N.Y.S.3d 374 [2d Dept 2017]*) ("To maintain a cause of action to quiet title [under New York's RPAPL], a plaintiff must allege actual or constructive possession of the property and the existence of a removable cloud on the property, which is an apparent title to the property, such as a deed or other instrument, that is actually invalid or inoperative") [citations omitted]; [\*11] *accord Sheridan Ct. Mews Assoc. v MDR Assoc., LLC, 59 Misc 3d 1233[A], 2018 NY Slip Op 50862 [U] [Sup Ct, Bronx County 2018]*).

Moreover, "[a]s in equitable actions generally, a plaintiff in an action in equity to quiet title must show that he or she has no adequate remedy at law, or that there are special facts or circumstances which require the intervention of a court in equity" (17A Carmody-Wait 2d § 102:7).

Thus, the statutory provisions relating to the recovery of real property and the determination of a claim to real property are exclusive remedies for any issues coming within the scope of their provisions, and an action in equity will not lie to accomplish the purposes for which such statutes were provided, unless special facts are alleged showing that the remedy at law provided by them is not adequate, and that resort must be had to a court in equity to secure proper relief"

(*id., citing Pure Strains Farm Co. v Smith, 99 Misc 108, 163 N.Y.S. 615 [Sup Ct, Monroe County 1917]*).

**Pinci** does not set forth these elements in his VAC nor does he address them in his opposition to Monaco's motion. His cause of action to quiet title must, therefore, be dismissed.

### Specific performance of LOI

**Pinci** also fails to state cause of action for specific enforcement with respect to the LOI. **Pinci** acknowledges that the LOI is an option contract (*see VAC ¶ 36*). "An option contract [\*12] is an agreement to hold an offer open" (*Broadwall Am., Inc. v Bram Will-El LLC, 32 AD3d 748, 751, 821 N.Y.S.2d 190 [1st Dept 2006]*) [internal quotation marks and citation omitted]. "The offer is irrevocable during the bargained-for options period, but the conditional option contract only ripens into an enforceable bilateral contract upon exercise of the option according to its terms" (*id., 32 AD3d at 751* [citation omitted]; *see also Tauber v Bankers Trust Co., 230 AD2d 312, 319, 657 N.Y.S.2d 686 [1st Dep't 1997]*) ["the general principles governing option agreements ... require that their provisions be complied with strictly in the manner and within the time specified"] [ellipsis in original, citation omitted]).

Here, the questions of whether **Pinci** was "ready, willing and able to tender the purchase price (or will be) during the aforesaid" option period and whether Monaco disavowed the LOI during the option period are irrelevant. **Pinci** could only exercise his option to purchase the Premises by tendering the purchase price of \$2,250,000 to Monaco within the eight-month period following May 17, 2017 (*i.e.*, by January 18, 2018), as they had agreed in the LOI (*see VAC, exhibit A*). **Pinci**, however, does not allege that he tendered the agreed purchase price to Monaco, at any time (*id., passim*). By failing "to tender the requisite payment within the options [\*6] period, [**Pinci**] [\*13]

never fulfilled the condition precedent to [Monaco's] performance under the contract and [so] derived no rights thereunder that might be enforced by the courts" (*Broadwall Am., Inc.*, 32 AD3d at 752, citing *J.N.A. Realty Corp. v Cross Bay Chelsea.*, 42 NY2d 392, 397, 366 N.E.2d 1313, 397 N.Y.S.2d 958 [1977]).

Furthermore, considering his February 6, 2018 averment that he had learned, at some unspecified time after he executed the LOI, that the value of the Premises had been overestimated by about one-third (*Pinci* aff at ¶14), *Pinci* cannot be heard to complain that he believed Monaco had sought to sell the Premises to third parties during the option period or had otherwise violated the LOI. *Pinci* avoids stating so overtly, but, clearly, he did not wish to exercise his option because of the allegedly inflated valuation of the Premises. "A party wishing to protect its right to purchase under an option contract has only to exercise the option, which is effective even in the face of repudiation by the grantor" (*id.* [citations omitted]). Having failed to exercise his option, *Pinci* simply has no rights to enforce against Monaco under the LOI.

### Declaratory Judgment

*Pinci* alleges he is entitled to judgment under *CPLR 3001*, declaring that he has part interest in Premises, based on his oral agreement with Monaco. *CPLR 3001* states, in pertinent part: [\*14] "The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed."

Taking all his allegations as true and drawing every inference in his favor (*EBC I, supra*), *Pinci*'s allegations adequately support his cause of action for declaratory relief, showing he may have a justiciable controversy with Monaco regarding their alleged oral Agreement.

*Pinci* alleges that he agreed to contribute money

toward the Purchase of the Premises, in exchange for one-half ownership interest in the Premises (VAC, ¶ 7). The fact that the Agreement was oral does not defeat *Pinci*'s claim. The part performance doctrine takes this alleged oral contract outside the Statute of Frauds, thereby avoiding dismissal under GOL 5-703(4) (*see Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 235, 711 N.E.2d 953, 689 N.Y.S.2d 674 [1999] ["Codified in New York's General Obligations Law, section 5-703 [4], the doctrine of part performance is based on principles of equity, and, specifically, recognition of the fact that it would be a fraud to allow one party to a real estate transaction to escape performance after permitting the other party to perform in reliance on the agreement"]) [citation omitted]).

Monaco contends that the partial [\*15] performance doctrine is inapplicable here because *Pinci*'s performance — contributing an unspecified amount of money toward the Premises' purchase price in exchange for a part interest in the Premises — is not "unequivocally referable to the oral agreement" (*id.*, 93 NY2d at 235 [internal quotation marks and citations omitted]). Monaco suggests that *Pinci*'s contribution could instead be attributable to an agreement that would merely allow *Pinci* to reside at the Premises.

This argument is unavailing. *Pinci*'s affirmative conduct, as pleaded, sufficiently shows his intent to satisfy the terms of the Agreement. Such stated affirmative conduct, when coupled with the element of detrimental reliance, entitles *Pinci* to the protection of the partial performance doctrine (*see id.*, 93 NY2d at 236). Moreover, even if the VAC's failure to state the amount of *Pinci*'s alleged contribution somehow undermined this cause of action, Monaco's motion still fails, because *Pinci* cured this oversight in his affidavit, at ¶ 3, where he stated that he contributed more than \$300,000 to the Premises' purchase (*see Chanko, supra*, 27 NY3d at 52).

## [\*\*7] Constructive Trust

"In order to set forth a valid cause of action to impose a constructive trust, four elements must be alleged: [\*16] (1) a confidential or fiduciary relationship, (2) a promise express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment" (*Gottlieb v Gottlieb*, 166 AD2d 413, 414, 560 N.Y.S.2d 477 [2d Dept 1990], citing *Sharp v Kosmalski*, 40 NY2d 119, 121, 351 N.E.2d 721, 386 N.Y.S.2d 72 [1976]). Monaco does not contest *Pinci's* showing of unjust enrichment. *Pinci* meets his burden with respect to the other three elements.

As to the first criterion, "the relationship between a parent and child will support the imposition of a constructive trust" (*Djamoos v Djamoos*, 153 AD2d 871, 871, 545 N.Y.S.2d 596 [2d Dept 1989], citing *Farano v Stephanelli*, 7 AD2d 420, 424, 183 N.Y.S.2d 707 [1st Dept 1959]). Monaco, citing, *inter alia*, *Carpenter v Soule* (88 NY 251 [1882]), argues that her familial relationship with *Pinci* is not necessarily enough to justify imposing a constructive trust. This is true. Imposition of a trust must turn on whether *Pinci* shows at trial that Monaco abused their confidential relationship sufficiently to justify "call[ing] upon the remedial powers of a court of equity" (*Farano*, 7 AD2d at 424 [citation omitted]).

*Pinci* also alleges that Monaco promised him a half-interest in the Premises, in exchange for his contribution of money toward its purchase (VAC, ¶ 7), but that she now refuses to compensate *Pinci* or acknowledge his ownership interest (*id.*, ¶¶ 16-17). These allegations are sufficient to support the second and third elements (see *Gottlieb, supra*, 166 AD2d at 414, citing *Washington v Defense*, 149 AD2d 697, 540 N.Y.S.2d 491 [2d Dept 1989] and *Lester v Zimmer*, 147 AD2d 340, 542 N.Y.S.2d 855 [3d Dept 1989]). "Finally, we note that the Statute of Frauds is not a defense [\*17] to a properly pleaded cause of action to impose a constructive trust upon real property" (*id.* [citation omitted]), notwithstanding Monaco's assertions to the

contrary.

As any judgment in *Pinci's* favor on his cause of action for imposition of a constructive trust or on his cause of action for a declaratory judgment would necessarily affect his interest in the Premises, *Pinci's* amended NOP should not be cancelled (see *CPLR 6501*). Monaco's motion to cancel the amended NOP must be denied. Monaco's motion to cancel the NOP, filed in connection with the original verified complaint, is also denied as moot.

Monaco has also requested, in the alternative, that the amended NOP be cancelled upon her giving an undertaking, pursuant to *CPLR 6515*, to hold the net proceeds of any sale of the Premises in an interest-bearing escrow account until this action is resolved.

*CPLR 6515*, however, states that a motion to obtain an undertaking must be made upon such notice as the court may require. This indicates that the motion must be made by order to show cause (see Vincent C. Alexander, Practice Commentaries, McKinney's Consol Laws of NY, *CPLR 6515* ["*CPLR 6515* is a complicated provision by which the court, in its discretion, may permit the defendant, upon [\*18] motion by order to show cause, to substitute an undertaking for the notice of pendency with a view toward cancellation of the notice"]). Monaco did not move by order to show cause. Thus, this facet of Monaco's motion is deficient.

## Conclusion

For the foregoing reasons, it is hereby

ORDERED that defendant Monaco's motion to dismiss plaintiff *Pinci's* cause of action for a declaratory judgment for failure to state a cause of action, pursuant to *CPLR 3211(a)(7)*, is **DENIED**; and it is further

ORDERED that Monaco's motion to dismiss

***Pinci***'s cause of action to quiet title under Article 15 of New York's Real Property Actions and Proceedings Law, pursuant to [CPLR 3211\(a\)\(7\)](#), **[\*\*8]** is **GRANTED**; and it is further

ORDERED that defendant Monaco's motion to dismiss plaintiff ***Pinci***'s cause of action for imposition of a constructive trust, pursuant to [CPLR 3211\(a\)\(7\)](#), is **DENIED**; and it is further

ORDERED that defendant Monaco's motion to dismiss plaintiff ***Pinci***'s cause of action for specific performance, pursuant to [CPLR 3211\(a\)\(7\)](#), is **GRANTED**; and it is further

ORDERED that defendant Monaco's motion to cancel plaintiff ***Pinci***'s notice of pendency is **DENIED**, as moot; and it is further

ORDERED that defendant Monaco's motion to cancel plaintiff ***Pinci***'s amended notice of pendency is **DENIED**; and it is further

ORDERED that plaintiff **[\*19]** ***Pinci***'s cross motion for the court to so order a subpoena to Richard R. Moore, Esq. is **DENIED**; and it is further is further

ORDERED that counsel shall appear for a preliminary conference in Part 43 of this Court on January 3, 2019, at 9:30 a.m.

Dated: December 5, 2018

Hon. Robert R. Reed

J.S.C.