

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

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CA 15-00968

PRESENT: WHALEN, P.J., LINDLEY, TROUTMAN, AND SCUDDER, JJ.

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PIRRO & SONS, INC., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

THOMAS J. PIRRO, JR. FUNERAL HOME AND THOMAS J.  
PIRRO, JR., DEFENDANTS-RESPONDENTS.

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D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, SYRACUSE (MICHAEL A. OROPALLO OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Onondaga County  
(Deborah H. Karalunas, J.), entered July 25, 2014. The order granted  
defendants' motion to dismiss the petition.

It is hereby ORDERED that the order so appealed from is  
unanimously reversed on the law without costs, the special proceeding  
is converted to an action, the motion is denied and the petition is  
reinstated as a complaint.

Memorandum: Pirro & Sons, Inc. commenced this "proceeding"  
seeking a preliminary and permanent injunction, alleging that Thomas  
J. Pirro, Jr. Funeral Home and Thomas J. Pirro, Jr. violated the terms  
of a settlement agreement in a prior action, which was thereafter  
discontinued, by using language in an advertisement in a church news  
bulletin that indicated an affiliation with Pirro & Sons, Inc. We  
note at the outset that Pirro & Sons, Inc. correctly concedes that it  
improperly commenced a proceeding rather than an action, and we  
exercise our discretion under CPLR 103 (c) to convert this matter to  
an action for breach of contract (*see e.g. Nichols v BDS Landscape  
Design*, 79 AD3d 1690, 1691). We thus deem the petition to be a  
complaint, and we note that Pirro & Sons, Inc. is properly denominated  
as a plaintiff, while Thomas J. Pirro, Jr. Funeral Home and Thomas J.  
Pirro, Jr. are properly denominated as defendants.

We conclude that Supreme Court erred in granting defendants'  
motion to dismiss the complaint pursuant to CPLR 3211. In deciding a  
motion pursuant to CPLR 3211, we must afford plaintiff "the benefit of  
every possible favorable inference, and determine only whether the  
facts as alleged fit within any cognizable legal theory" (*Leon v  
Martinez*, 84 NY2d 83, 87-88). We conclude that plaintiff alleged a  
cognizable claim for breach of contract for which it seeks a permanent

injunction (see generally *Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216-217).

Entered: March 18, 2016

Frances E. Cafarell  
Clerk of the Court