

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

**131**

**CA 19-01532**

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND BANNISTER, JJ.

---

OSVALDO GARCIA, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

TOWN OF TONAWANDA, DEFENDANT-RESPONDENT,  
ET AL., DEFENDANTS.

---

CAMPBELL & ASSOCIATES, EDEN (JOHN T. RYAN OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (MARC SMITH OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

---

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered February 6, 2019. The order, insofar as appealed from, denied the motion of plaintiff to strike the answer of defendant Town of Tonawanda in the event that defendant Town of Tonawanda failed to produce requested discovery materials within 30 days.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: Plaintiff appeals from an order insofar as it denied his motion seeking to strike the answer of defendant Town of Tonawanda (Town) in the event that the Town failed to produce certain requested discovery materials within 30 days. After entry of that order and while this appeal was pending, Supreme Court granted the Town's subsequent motion for summary judgment dismissing the complaint against it. The court's order granting summary judgment, however, is not before us on this appeal (*cf. Buffamante Whipple Buttafaro, Certified Public Accountants, P.C. v Dawson*, 118 AD3d 1283, 1284 [4th Dept 2014]). Because the court granted the Town's motion and dismissed the complaint against it, plaintiff's appeal is moot (*see generally Burke v City of Rochester*, 158 AD3d 1218, 1219 [4th Dept 2018]; *Douglas Smith Fabrication & Repair v Gasthaus*, 259 AD2d 515, 515 [2d Dept 1999]).

Entered: July 17, 2020

Mark W. Bennett  
Clerk of the Court