

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

**987**

**CA 19-01670**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

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ACCADIA SITE CONTRACTING, INC.,  
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

TOWN OF ORCHARD PARK, DEFENDANT-RESPONDENT.

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RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ELIZABETH A. HOLMES OF  
COUNSEL), FOR PLAINTIFF-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (JAMES P. BLENK OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 30, 2019. The order, among other things, denied plaintiff's motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this action arising out of a dispute over the performance of a road reconstruction contract, plaintiff appeals from that part of an order that denied its motion for partial summary judgment on its third cause of action, alleging breach of contract for nonpayment on work performed. We conclude that Supreme Court properly denied the motion inasmuch as plaintiff failed to "make a prima facie showing of entitlement to judgment as a matter of law [by] tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; see *Breeze Natl. v CATI, Inc.*, 292 AD2d 272, 272-273 [1st Dept 2002]). Plaintiff's "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853).

Entered: November 13, 2020

Mark W. Bennett  
Clerk of the Court