

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

**1184**

**CA 19-01833**

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

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OSVALDO GARCIA, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

TOWN OF TONAWANDA, COUNTY OF ERIE,  
DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANT.

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

COLUCCI & GALLAHER, P.C., BUFFALO (RYAN L. GELLMAN OF COUNSEL), FOR  
DEFENDANT-RESPONDENT TOWN OF TONAWANDA.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (KENNETH R. KIRBY OF  
COUNSEL), FOR DEFENDANT-RESPONDENT COUNTY OF ERIE.

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Appeal from a decision of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered October 1, 2019. The decision granted the motions of defendants Town of Tonawanda and County of Erie for summary judgment.

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

Memorandum: Plaintiff purports to appeal from a memorandum decision that granted the motions of defendant Town of Tonawanda and defendant County of Erie for summary judgment dismissing the complaint against them. We dismiss the appeal. “[N]o appeal lies from a mere decision” (*Gunn v Palmieri*, 86 NY2d 830, 830 [1995]; see *Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]). Although the Erie County Clerk’s electronic docket labeled the document as a “decision and order,” the document appealed from is denominated “Memorandum Decision” and, on its face, is a mere decision from which no appeal lies (see generally *Plastic Surgery Group of Rochester, LLC v Evangelisti*, 39 AD3d 1265, 1266 [4th Dept 2007]). Thus, since no order or judgment has been entered pursuant to the decision, the appeal has not been presented to us in a proper manner and must be dismissed (see *Kuhn*, 129 AD2d at 967).

All concur except DEJOSEPH, J., who dissents in accordance with the following memorandum: I respectfully dissent and would not

dismiss the appeal (*see Nicol v Nicol*, 179 AD3d 1472, 1473 [4th Dept 2020]).

Entered: May 7, 2021

Mark W. Bennett  
Clerk of the Court