

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

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CA 08-02501

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND GORSKI, JJ.

IN THE MATTER OF TOWN OF GENEVA, BY AND ON
BEHALF OF TOWN BOARD, TOWN OF GENEVA, AND ON
BEHALF OF TOWN OF GENEVA SEWER DISTRICT NO. 1,
PETITIONER/PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF GENEVA, STUART EINSTEIN, MAYOR, CITY OF
GENEVA, AND TARA J. CLARK, CITY OF GENEVA
COMPTROLLER, RESPONDENTS/DEFENDANTS-RESPONDENTS.

THE WOLFORD LAW FIRM LLP, ROCHESTER (ELIZABETH A. WOLFORD OF COUNSEL),
FOR PETITIONER/PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (H. TODD BULLARD OF COUNSEL), FOR
RESPONDENTS/DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court,
Ontario County (Frederick G. Reed, A.J.), entered August 8, 2008 in a
CPLR article 78 proceeding and plenary action. The judgment, inter
alia, dismissed the petition/complaint.

It is hereby ORDERED that the judgment so appealed from is
unanimously reversed on the law without costs, the motion is denied,
the petition/complaint is reinstated, and respondents/defendants are
granted 20 days from service of the order of this Court with notice of
entry to serve and file an answer.

Memorandum: Although respondents/defendants (respondents) moved
to dismiss this hybrid CPLR article 78 proceeding and plenary action
against them under various paragraphs of CPLR 3211 (a) and under CPLR
7804 (f), Supreme Court in its decision nevertheless addressed the
burdens of petitioner/plaintiff (petitioner) and granted respondents'
motion to dismiss based on the evidence submitted by respondents in
support of their motion. We agree with petitioner that the court
erred in converting respondents' motion to dismiss to one for summary
judgment. The court did not provide "adequate notice to the parties"
that it was doing so (CPLR 3211 [c]), nor did respondents and
petitioner otherwise receive " 'adequate notice' by expressly seeking
summary judgment or submitting facts and arguments clearly indicating
that they were 'deliberately charting a summary judgment course' "
(*Mihlovan v Grozavu*, 72 NY2d 506, 508; see *Carcone v D'Angelo Ins.*
Agency, 302 AD2d 963; *Pitts v City of Buffalo*, 298 AD2d 1003, 1004-

1005).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court