

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D13035  
Y/cb

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Submitted - October 13, 2006

ROBERT W. SCHMIDT, J.P.  
FRED T. SANTUCCI  
ROBERT A. LIFSON  
ROBERT J. LUNN, JJ.

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2005-05627

DECISION & ORDER

Joseph Tommaso, appellant, v Deborah C. Tommaso,  
respondent.

(Index No. 200899/02)

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Richard S. Bonfiglio, Brooklyn, N.Y., for appellant.

Tabat Cohen & Blum, LLP, Garden City, N.Y. (Amel R. Massa of counsel), for  
respondent.

In a matrimonial action in which the parties were divorced by judgment dated April 25, 2002, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Nassau County (Ross, J.), dated May 9, 2005, as denied, without a hearing, those branches of his motion which were for downward modification of his child support obligations and to cancel any arrears.

ORDERED that the order is reversed insofar as appealed from, on the law, without costs or disbursements, and the matter is remitted to the Supreme Court, Nassau County, for a hearing and new determination in accordance herewith.

The Supreme Court denied, without a hearing, those branches of the plaintiff's motion which were for a downward modification of his child support obligations as set forth in the judgment of divorce and separation agreement, which was incorporated but not merged into the judgment, and

to cancel any arrears which may have accrued, on the ground that the agreement was unfair or inequitable at the time it was made. However, there is an issue as to whether the agreement was unfair or inequitable at the time it was made. Accordingly, a hearing should have been held (*see Miller v Miller*, 18 AD3d 629; *cf. Binette v Binette-Acker*, 23 AD3d 324; *Matter of Davis v Davis*, 13 AD3d 623).

SCHMIDT, J.P., SANTUCCI, LIFSON and LUNN, JJ., concur.

ENTER:

  
James Edward Pelzer  
Clerk of the Court