

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

D21199  
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Submitted - November 3, 2008

PETER B. SKELOS, J.P.  
ROBERT A. LIFSON  
FRED T. SANTUCCI  
EDWARD D. CARNI, JJ.

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2007-07650

DECISION & ORDER

Thomas J. Mitchell, respondent, v Kathleen  
A. Mitchell, appellant.

(Index No. 17329/91)

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Jan Ira Gellis, P.C., New York, N.Y. (Candice D. Aiken and Kenneth J. Katz of  
counsel), for appellant.

Philip M. Chiappone, Brooklyn, N.Y., for respondent.

In a matrimonial action in which the parties were divorced by judgment dated June 29,  
1994, the defendant appeals from an order of the Supreme Court, Westchester County (Scarpino, J.),  
entered July 3, 2007, which denied, without a hearing, her motion for an upward modification of  
maintenance.

ORDERED that the order is reversed, on the law, with costs, and the matter is  
remitted to the Supreme Court, Westchester County, for further proceedings in accordance herewith.

Contrary to the plaintiff's contention, the defendant's motion sufficiently set forth a  
claim for relief on the ground that her inability to be self-supporting entitled her to an upward  
modification of maintenance (*see* Domestic Relations Law § 236 [B][9][b]; *Wyser-Pratte v Wyser-  
Pratte*, 66 NY2d 715; *Wong v Wong*, 300 AD2d 473, 474).

Accordingly, it was not necessary for the defendant to establish a substantial change  
in circumstances in order to be entitled to a hearing on whether modification is warranted (*see Wyser-  
Pratte v Wyser-Pratte*, 66 NY2d at 716-717).

November 25, 2008

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Inasmuch as it cannot be said on this record that the defendant's allegations of her inability to be self-supporting were insufficient as a matter of law, the Supreme Court erred in denying her motion without a hearing. Accordingly, the matter should be remitted to the Supreme Court, Westchester County, for a hearing on the defendant's motion.

The plaintiff's remaining contentions are without merit.

SKELOS, J.P., LIFSON, SANTUCCI and CARNI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer  
Clerk of the Court