

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

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Submitted - November 6, 2008

WILLIAM F. MASTRO, J.P.  
REINALDO E. RIVERA  
STEVEN W. FISHER  
RANDALL T. ENG, JJ.

2007-06411

DECISION & ORDER

In the Matter of Nancy Heinz, respondent,  
v Mark Faljean, appellant.

(Docket No. F-03744-03)

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Gary R. DeFilippo, Staten Island, N.Y., for appellant.

Lawrence H. Katz, Staten Island, N.Y., for respondent.

In a child support proceeding pursuant to Family Court Act article 4, the father appeals from an order of commitment of the Family Court, Richmond County (DiDomenico, J.), dated July 9, 2007, which, upon two orders of the same court (Weir-Reeves, S.M.), also dated July 9, 2007, finding, upon his failure to appear, that he willfully violated a prior order of support and recommending that he be incarcerated for a term of six months, and upon an order of the same court (Weir-Reeves, S.M.), dated June 28, 2007, denying his motion to vacate the default in appearing, in effect, confirmed the finding of willfulness and committed him to the New York City Department of Corrections for a term of imprisonment of six months with the opportunity to purge the contempt by payment of the sum of \$18,266.98 toward his arrears.

ORDERED that the appeal from so much of the order of commitment as committed the father to the New York City Department of Corrections for a term of imprisonment of six months is dismissed as academic, without costs and disbursements, as the period of incarceration has expired (*see Matter of Greene v Holmes*, 31 AD3d 760; *Matter of Bradley v Beneduce*, 24 AD3d 546); and it is further,

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ORDERED that the order of commitment is affirmed insofar as reviewed, without costs or disbursements.

Contrary to the father's contention, the mother satisfied her burden of presenting prima facie evidence of nonpayment of child support (*see Matter of Powers v Powers*, 86 NY2d 63, 69). The burden then shifted to the father to offer competent, credible evidence of his inability to comply with the support order (*see Family Ct Act § 454[3][a]; Matter of Powers v Powers*, 86 NY2d at 69-70). The father, however, failed to appear for the hearing, and a finding of willfulness was properly entered on default.

Furthermore, the court properly denied the father's motion to vacate the default. "A defendant seeking to vacate a default judgment pursuant to CPLR 5015(a)(1) must demonstrate both a reasonable excuse for the default and the existence of a meritorious defense" (*Dominguez v Carioscia*, 1 AD3d 396, 397; *see Kaplinsky v Mazor*, 307 AD2d 916; *O'Leary v Noutsis*, 303 AD2d 664; *Silverman v Deutsch*, 283 AD2d 478). Here, the father failed to present a reasonable excuse for the default or a meritorious defense.

The father's remaining contentions are without merit.

MASTRO, J.P., RIVERA, FISHER and ENG, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court