

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

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_____AD3d_____

Submitted - October 29, 2009

REINALDO E. RIVERA, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
PLUMMER E. LOTT, JJ.

2008-09620

DECISION & ORDER

In the Matter of Fernando Nuesi, appellant, v
Iradi Gago, respondent.

(Docket No. F-1268-03)

Jay Davis & Associates, PLLC, Garden City, N.Y. (Heather L. Guerin of counsel),
for appellant.

In a child support proceeding pursuant to Family Court Act article 4, the father appeals from an order of the Family Court, Kings County (Hamill, J.), dated October 8, 2008, which denied his objection to an order of the same court (Fasone, S.M.) dated August 12, 2008, which, after a hearing, dismissed his petition for a downward modification of his child support obligation.

ORDERED that the order dated October 8, 2008, is reversed, on the law, without costs or disbursements, the father's objection is granted, the order dated August 12, 2008, is vacated, and the matter is remitted to the Family Court, Kings County, for a new hearing solely on the issue of the father's ability to pay the amount of support in the judgment of divorce and a new determination of the petition for a downward modification.

The father's contention that the Support Magistrate failed to conduct a proper hearing on the issue of emancipation is without merit. The father and mother were sworn and examined, and findings of fact were made regarding emancipation (*cf. Matter of Pringle v Pringle*, 296 AD2d 828; *Waby v Waby*, 143 AD2d 506; *Matter of Reynolds v Reynolds*, 50 AD2d 993). "A hearing need not follow any particular form, but any meaningful hearing must, at least, consist of an adducement of proof coupled with an opportunity to rebut it" (*Waby v Waby*, 143 AD2d 506; *see Matter of Thompson v Thompson*, 59 AD3d 1104).

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Here, the father was given an opportunity to provide the court with proof as to the child's emancipation, but failed to do so (*cf. Matter of Ademovic v Reid*, 1 AD3d 899 [hearing examiner did not allow father to speak in support of his modification petition, and summarily denied the petition]).

However, the Support Magistrate erred in failing to permit the father to submit evidence regarding his current financial situation. The father was not given an opportunity to provide proof that he was unable to pay the current amount of child support. There was no claim that the father's financial records should be excluded on the grounds that he refused to obey a disclosure order, or failed to disclose information that ought to have been disclosed (*see CPLR 3126; Matter of Greenidge v Greenidge*, 56 AD3d 473; *Matter of Pena v Diaz*, 275 AD2d 415). Accordingly, the matter must be remitted to the Family Court, Kings County, for a new hearing on the issue of the father's ability to pay support, followed by a new determination of the petition for a downward modification.

The father's remaining contention is without merit.

RIVERA, J.P., DICKERSON, HALL and LOTT, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court