

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

D25513
Y/prt

_____AD3d_____

Argued - November 2, 2009

MARK C. DILLON, J.P.
ANITA R. FLORIO
HOWARD MILLER
DANIEL D. ANGIOLILLO, JJ.

2008-11263

DECISION & ORDER

America Gonzalez, respondent, v
William Lawrence Richmond, appellant.

(Index No. 1568/04)

Christopher Riley, White Plains, N.Y., for appellant.

Maffei Maffei & Keating, Yonkers, N.Y. (Matthew J. Keating of counsel), for
respondent.

In a matrimonial action in which the parties were divorced by judgment of the Supreme Court, New York County, dated October 4, 1999, the defendant appeals from an order of the Supreme Court, Westchester County (Jamieson, J.), entered October 27, 2008, which denied his motion, inter alia, to vacate his default in appearing for a hearing on the plaintiff's motion, inter alia, to adjudge him in contempt.

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

The Supreme Court improvidently exercised its discretion in denying the defendant's motion to vacate his default in appearing before the Supreme Court on June 4, 2008 (*see Wong v Wong*, 300 AD2d 473, 474; *Adams v Adams*, 255 AD2d 535, 536). "Although a party seeking to vacate a default must establish a reasonable excuse for the default and a meritorious defense, this court has adopted a liberal policy with respect to vacating defaults in matrimonial actions" (*Wong v Wong*, 300 AD2d 473, 474). Here, the defendant not only presented a reasonable excuse for his and

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his attorney's failure to appear before the Supreme Court on June 4, 2008, he also presented a meritorious defense to the plaintiff's motion, inter alia, to adjudge him in contempt of the child support provisions of the parties' divorce judgment, and a meritorious case in support of his application for a downward modification of his child support obligations (*see Opperisano v Opperisano*, 35 AD3d 686, 687; *Matter of Dellagatta v McGillicuddy*, 31 AD3d 549, 550).

The trial court improperly considered the merits of the defendant's case under the "extreme hardship" standard applicable to spousal maintenance modification, when it should have applied the "unanticipated and unreasonable change in circumstance" standard applicable to requested child support modification (*see Matter of Schlakmon v Schhlakmon*, 66 AD3d 786; *Matter of Ripa v Ripa*, 61 AD3d 766; *Matter of Connolly v Connolly*, 39 AD3d 643).

The defendant is entitled to a hearing, as he raised triable issues of fact regarding his ability to pay and whether there has been a substantial, unanticipated, and unreasonable change of circumstances since the entry of the divorce judgment (*see David v David*, 54 AD3d 714, 714-715; *Opperisano v Opperisano*, 35 AD3d at 688; *see generally Matter of Ripa v Ripa*, 61 AD3d 766).

DILLON, J.P., FLORIO, MILLER and ANGIOLILLO, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court