

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

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_____AD3d_____

Submitted - November 10, 2009

STEVEN W. FISHER, J.P.
DANIEL D. ANGIOLILLO
PLUMMER E. LOTT
SANDRA L. SGROI, JJ.

2009-04340

DECISION & ORDER

In the Matter of Malikata Kawaiib Shabazz, respondent,
v Ernest Jahad Johnson, appellant.

(Docket No. U-4634-04)

Christopher J. Robles, Brooklyn, N.Y., for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Francis F. Caputo and
Dona B. Morris of counsel), for respondent.

In a proceeding pursuant to Family Court Act article 5-B, the putative father appeals from an order of the Family Court, Kings County (Olshansky, J.), dated March 25, 2009, which denied his objection to an order of the same court dated January 27, 2009 (Fasone, S.M.), which, after a hearing, denied his motion to vacate an order of filiation and an order of support, both dated February 16, 2005, entered upon his default in answering or appearing.

ORDERED that the order dated March 25, 2009, is reversed, on the law, without costs or disbursements, the objection is granted, the appellant's motion to vacate the orders of filiation and support dated February 16, 2005, is granted, and the proceeding is dismissed.

Contrary to the Family Court's determination, the motion of the putative father (hereinafter the appellant) to vacate an order of filiation and a support order entered upon his default in answering or appearing was properly brought pursuant to CPLR 5015(a)(4) and, thus, was not untimely (*see Matter of H. v M.*, 47 AD3d 629; *State of N.Y. Higher Educ. Servs. Corp. v Sparozic*, 35 AD3d 1069, 1070). Moreover, in view of the testimony and evidentiary submissions presented by the appellant at the hearing, the petitioner failed to establish by a preponderance of the evidence

that the appellant was properly served in the proceeding (*see* Family Ct Act §§ 427, 525; CPLR 308; *Matter of Griffin v Griffin*, 215 AD2d 386). Since the Family Court lacked personal jurisdiction over the appellant, the orders of filiation and support entered upon the appellant's default should have been unconditionally vacated and the proceeding dismissed (*see Delgado v Velecela*, 56 AD3d 515, 516-517; *Matter of H. v M.*, 47 AD3d at 630).

FISHER, J.P., ANGIOLILLO, LOTT and SGROI, 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