

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

D25857
Y/hu

_____AD3d_____

Argued - December 22, 2009

FRED T. SANTUCCI, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
CHERYL E. CHAMBERS, JJ.

2009-04324

DECISION & ORDER

In the Matter of Jean Flynn Scala, respondent, v
Kenneth J. Wilkens, appellant.

(Index No. 4650/08)

Levinson, Reineke & Ornstein, P.C., Central Valley, N.Y. (David L. Levinson and
Justin E. Kemple of counsel), for appellant.

Carla S. Wise, Goshen, N.Y. (Geoffrey Chanin of counsel), for respondent.

In a proceeding to enforce certain provisions of a judgment of divorce entered September 3, 1991, the father appeals from a money judgment of the Supreme Court, Orange County (Lubell, J.), entered March 31, 2009, which, upon an order of the same court (Giacomo, J.), dated July 21, 2008, granting that branch of the mother's petition which was to direct him to pay one half of the college expenses of the parties' child, is in favor of the wife and against him in the total sum of \$30,338.90.

ORDERED that the judgment is affirmed, with costs.

The mother correctly asserts that a previous appeal by the father from the underlying order was dismissed by this Court for lack of prosecution. Ordinarily, the dismissal of that appeal would be ground for the dismissal of the instant appeal from the money judgment entered upon that order, since the dismissal constituted an adjudication of the merits of any issue which properly could have been raised on that prior appeal (*see Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750; *Bray v Cox*, 38 NY2d 350; *Cardo v Board of Mgrs.*, 67 AD3d 945; *Graziano v Graziano*, 66 AD3d 835; *Catalano v City of New York*, 63 AD3d 979). However, we exercise our discretion to review

the issue raised by the father on this appeal (*see generally Neuburger v Sidoruk*, 60 AD3d 650).

Contrary to the father's contention, the Supreme Court properly determined that he was obligated to pay one half of the college expenses of the parties' daughter. The parties' separation agreement, which was incorporated but not merged in their judgment of divorce, expressly required the father and the mother "to split equally any costs for college expenses" for their daughter, without any conditions or limitations (*see e.g. Goldberg v Baard*, 134 AD2d 566). While the father contends that his obligation to pay college expenses was not triggered because the mother failed to consult with him regarding their daughter's college plans (*see e.g. Matter of Beichman-Saul v Loglisci*, 40 AD3d 1085, 1086; *Frydman v Frydman*, 32 AD3d 455, 456-457; *Matter of Sebastiani v Locatelli*, 11 AD3d 701; *Dierna v Dierna*, 11 AD3d 426; *Matter of Levenson v Levenson*, 166 AD2d 592), the consultation provision upon which the father relies is inapposite. Indeed, that provision appeared in a completely different section of the separation agreement governing visitation with the minor child, contained no requirement that the parties consent to the selection of a school for the child, and was inapplicable to the parties' shared obligation to pay the college expenses of their adult daughter.

SANTUCCI, J.P., DICKERSON, ENG and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court