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

D32203
W/kmb

_____AD3d_____ Submitted - November 22, 2010

PETER B. SKELOS, J.P.
RANDALL T. ENG
L. PRISCILLA HALL
PLUMMER E. LOTT, JJ.

2010-00731 DECISION & ORDER ON MOTION

In the Matter of Josie May Weintrob,
respondent, v Gary Weintrob, appellant.

(Docket No. F-2244-06)

Motion by the appellant for leave to reargue an appeal from an order of the Family Court, Kings County (Freeman, J.), dated December 18, 2009, which was determined by decision and order of this Court dated February 15, 2011.

Upon the papers filed in support of the motion, and no papers having been filed in opposition or relation thereto, it is

ORDERED that the motion is granted and, upon reargument, the decision and order of this Court dated February 15, 2011 (*Matter of Weintrob v Weintrob*, 81 AD3d 840), is recalled and vacated, and the following decision and order is substituted therefor:

Herman Kaufman, Port Chester, N.Y., 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 (Freeman, J.), dated December 18, 2009, which denied his objections to so much of an order of the same court (Mayeri, S.M.), dated June 8, 2009, as, after a hearing, denied that branch of his motion which was to vacate an order of the same court dated August 14, 2006, which, upon his default in appearing at a hearing, granted the mother's petition and set his child support obligation at the sum of $2,600 per month.

ORDERED that the order dated December 18, 2009, is affirmed, without costs or disbursements.

That branch of the father's motion which was to vacate a child support order dated August 14, 2006, on the basis of excusable default should have been made within one year of service upon him of a copy of the order, with notice of its entry (*see* CPLR 5015[a]; *Matter of Wrighton v Wrighton*, 23 AD3d 669; *Matter of Bykya Minnie E.*, 212 AD2d 365, 366). A party to a Family Court proceeding seeking to vacate an order entered upon default must establish that there was a reasonable excuse for the default and a potentially meritorious defense (*see Matter of Proctor-Shields v Shields*, 74 AD3d 1347, 1348; *Ito v Ito*, 73 AD3d 983; *Diaz v Diaz*, 71 AD3d 947).

Since the father made his motion to vacate the order dated August 14, 2006, more than one year after the service upon him of a copy of that order, with notice of its entry, that branch of his motion which was to vacate that order *on the basis of excusable default* was properly denied as untimely. *Moreover, although the Supreme Court has the inherent authority to vacate an order in the interest of justice even where the statutory one-year period under CPLR 5015(a)(1) has expired, here, the father failed to demonstrate a reasonable excuse for his delay in moving to vacate the order, and failed to demonstrate a reasonable excuse for his failure to appear in court on August 14, 2006, to defend against the mother's petition for an award of child support* (*see Santiago v Honcrat, 79 AD3d 847, 848; Valentin v City of New York, 73 AD3d 755, 756*). Accordingly, the Family Court providently exercised its discretion in denying the father's objection to an order of a Support Magistrate dated June 8, 2009, denying that branch of his motion which was to vacate the child support order dated August 14, 2006, entered upon his default (*see Matter of Proctor-Shields v Shields*, 74 AD3d at 1348; *Diaz v Diaz*, 71 AD3d 947; *Matter of Armstrong v Doby*, 69 AD3d 933, 934; *Matter of Conwell v Booth*, 66 AD3d 773; *Matter of Heinz v Faljean*, 57 AD3d 665, 666).

In addition, and contrary to the father's contention, the Family Court had no authority to reduce or annul child support arrears accrued prior to his submission of an application to modify the order of child support, regardless of whether the father had good cause for having failed to seek modification of his child support obligation prior to the accumulation of those arrears (*see* Family Ct Act § 451; *Matter of Dox v Tynon*, 90 NY2d 166, 173-174; *Matter of Moore v Abban*, 72 AD3d 970, 972-973; *Matter of Mandelowitz v Bodden*, 68 AD3d 871, 875; *Matter of Wrighton v Wrighton*, 23 AD3d at 670).

SKELOS, J.P., ENG, HALL and LOTT, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court