

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

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C/kmb

_____AD3d_____

Submitted - September 27, 2011

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
LEONARD B. AUSTIN
SANDRA L. SGROI, JJ.

2010-07781

DECISION & ORDER

In the Matter of David Weinschneider, respondent,
v Devorah Weinschneider, appellant.

(Docket No. F-9474-09/09A)

Devorah Weinschneider, Brooklyn, N.Y., appellant pro se.

In a child support proceeding pursuant to Family Court Act article 4, the mother appeals from an order of the Family Court, Kings County (Krauss, J.), dated July 6, 2010, which denied her objections to so much of an order of the same court (Baur, S.M.) dated March 10, 2010, as, after a hearing, granted that branch of the father's petition which was for a downward modification of his child support obligation as set forth in a stipulation of settlement, which was incorporated but not merged into the parties' judgment of divorce dated September 22, 2005, to the extent of reducing his child support obligation from the sum of \$700 per month to the sum of \$74 per month, and, in effect, denied her cross petition for an upward modification of the father's child support obligation.

ORDERED that the order dated July 6, 2010, is reversed, on the law and the facts, with costs, the mother's objections are sustained, so much of the order dated March 10, 2010, as granted that branch of the father's petition which was for a downward modification of his child support obligation to the extent of reducing his child support obligation from the sum of \$700 per month to the sum of \$74 per month and, in effect, denied her cross petition for an upward modification of the father's child support obligation is vacated, that branch of the father's petition which was for a downward modification of his child support obligation is denied, the mother's cross petition for an upward modification of the father's child support obligation is reinstated, and the matter is remitted to the Family Court, Kings County, for a hearing and new determination on the

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mother's cross petition for an upward modification of the father's child support obligation; and it is further,

ORDERED that pending a new determination, the child support provisions of the stipulation of settlement which were incorporated but not merged into the judgment of divorce are reinstated.

"The terms of a stipulation of settlement that is incorporated but not merged into a judgment of divorce operate as contractual obligations binding on the parties. Generally, child support provisions deriving from such an agreement may be modified upon a showing that the agreement was not fair and equitable when entered into, or upon a showing of an unanticipated and unreasonable change in circumstances" (*Martin v Martin*, 80 AD3d 579, 580 [internal citations omitted]). Here, the father did not establish that the parties' stipulation of settlement was not fair and equitable when entered into, and further failed to establish a showing of an unanticipated and unreasonable change in circumstances (*see Matter of Costa v Costa*, 64 AD3d 590, 592; *Matter of Dallin v Dallin*, 250 AD2d 847, 848; *Tuchrello v Tuchrello*, 204 AD2d 1020; *Matter of McMullen v Ambrosiani*, 189 AD2d 973, 974-975). Accordingly, the father was not entitled to a downward modification of his child support obligation as set forth in the parties' stipulation of settlement, and the mother's objections regarding the downward modification should have been sustained.

Additionally, since the support magistrate improperly precluded the mother from providing testimony regarding her cross petition for an upward modification of the father's child support obligation (*see Manno v Manno*, 224 AD2d 395, 398-399), her objections as to that issue should also have been sustained. Accordingly, we reinstate the mother's cross petition and remit the matter to the Family Court, Kings County, for a hearing and new determination on the mother's cross petition for an upward modification of the father's child support obligation.

In light of our determinations, we need not address the mother's remaining contentions.

RIVERA, J.P., FLORIO, AUSTIN and SGROI, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court