

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

D32793
Y/kmb

_____AD3d_____

Submitted - October 14, 2011

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
CHERYL E. CHAMBERS
ROBERT J. MILLER, JJ.

2010-06820
2010-08810
2011-00740

DECISION & ORDER

Eileen Dervisevic, respondent, v Edin Dervisevic,
appellant.

(Index No. 201865/08)

Dai & Associates, P.C., Flushing, N.Y. (George W. Clarke of counsel), for appellant.

Goodman Jurist & Pandolfo, LLP, Garden City, N.Y. (Howard Jurist of counsel), for
respondent.

In an action for a divorce and ancillary relief, the defendant appeals (1), as limited by his brief, from so much of an order of the Supreme Court, Nassau County (Ross, J.), entered June 4, 2010, as denied his motion pursuant to CPLR 5015 to vacate his default in appearing or answering the complaint, (2), as limited by his brief, from so much of a judgment of the same court entered July 2, 2010, as awarded child custody, child support, and maintenance to the plaintiff and equitably distributed the marital property, and (3) from an order of the same court dated November 22, 2010, which denied his motion for leave to renew and reargue his motion to vacate his default.

ORDERED that the appeal from the order entered on June 4, 2010, is dismissed; and it is further,

ORDERED that the appeal from the judgment is dismissed (*see* CPLR 5511), except insofar as it brings up for review so much of the order entered June 4, 2010, as denied the defendant's motion to vacate his default (*see James v Powell*, 19 NY2d 249, 256, n 3); and it is

November 9, 2011

DERVISEVIC v DERVISEVIC

Page 1.

further,

ORDERED that the judgment is affirmed insofar as reviewed; and it is further,

ORDERED that the appeal from so much of the order dated November 22, 2010, as denied that branch of the plaintiff's motion which was for leave to reargue is dismissed, as no appeal lies from an order denying reargument; and it is further,

ORDERED that the order dated November 22, 2010, is affirmed insofar as reviewed; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

The appeal from the order entered June 4, 2010, must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on the appeal from that order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

Although this Court has adopted a liberal policy with respect to vacating defaults in matrimonial actions, it is still incumbent upon a defendant to demonstrate a reasonable excuse for his or her default and the existence of a potentially meritorious defense (*see Ogazi v Ogazi*, 46 AD3d 646; *Atwater v Mace*, 39 AD3d 573, 574; *Faltings v Faltings*, 35 AD3d 350). Here, the defendant failed to submit any competent evidence that his default was excusable. Contrary to the defendant's contentions, the plaintiff properly served the defendant personally with a summons and notice, which had written upon its face that it was an "Action for a divorce," and which specified the nature of the ancillary relief demanded (*see Domestic Relations Law §§ 211, 232[a]*). Having been properly served, the defendant was required to make an appearance.

The Supreme Court properly denied that branch of the defendant's motion which was for leave to renew his motion to vacate his default. "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Elder v Elder*, 21 AD3d 1055, 1055; *see Matter of Allstate Ins. Co. v Liberty Mut. Ins.*, 58 AD3d 727). A motion for leave to renew must be based upon new facts, not offered on the original application, "that would change the prior determination" (CPLR 2221[e][2]; *see Matter of Korman v Bellmore Pub. Schools*, 62 AD3d 882, 884). The new or additional facts must have either not been known to the party seeking renewal (*see Matter of Shapiro v State of New York*, 259 AD2d 753) or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion (*see Cole-Hatchard v Grand Union*, 270 AD2d 447). However, in either instance, a "reasonable justification" for the failure to present such facts on the original motion must be presented (CPLR 2221[e][3]; *see Matter of Korman v Bellmore Pub. Schools*, 62 AD3d at 884). What constitutes a "reasonable justification" is within the Supreme Court's discretion (*Heaven v McGowan*, 40 AD3d 583, 586). Here, the Supreme Court did not improvidently exercise its discretion in denying leave to renew. The "new evidence" offered by the defendant consisted of information which the defendant knew existed at the time of his motion to vacate, and he failed to set forth a reasonable justification as to why he failed to submit this information in the first instance

(see generally *May v May*, 78 AD3d 667; *Huma v Patel*, 68 AD3d 821, 822).

The defendant's remaining contentions are without merit.

DILLON, J.P., DICKERSON, CHAMBERS and MILLER, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court