

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

D33807
Y/ct

_____AD3d_____

Submitted - January 9, 2012

REINALDO E. RIVERA, J.P.
RANDALL T. ENG
PLUMMER E. LOTT
SANDRA L. SGROI, JJ.

2011-03162

DECISION & ORDER

Susan Schwaber, respondent, v Marc Schwaber, appellant.

(Index No. 06-201282)

Michael S. Cox, Lindenhurst, N.Y., for appellant.

Del Vecchio & Recine, LLP, Garden City, N.Y. (Charlene Malone of counsel), for respondent.

In a matrimonial action in which the parties were divorced by judgment entered November 14, 2008, the defendant appeals from an order of the Supreme Court, Nassau County (Maron, J.), dated February 17, 2011, which denied, without a hearing, his motion for a downward modification of his child support and maintenance obligations set forth in a settlement agreement dated July 1, 2008, which was incorporated but not merged into the judgment of divorce.

ORDERED that the order is affirmed, with costs.

The Supreme Court properly denied, without a hearing, the defendant's motion for a downward modification of his child support and maintenance obligations set forth in a settlement agreement which was incorporated but not merged into the judgment of divorce. The defendant failed to make a prima facie showing that his loss of employment constituted the substantial, unanticipated, and unreasonable change in circumstances necessary to warrant a downward modification of his child support obligation because he did not demonstrate that he diligently sought re-employment commensurate with his earning capacity (*see Baker v Baker*, 83 AD3d 977, 978; *Conway v Conway*, 79 AD3d 965; *Barson v Barson*, 32 AD3d 872, 873). Moreover, the defendant's statement of net worth indicated that despite his loss of employment, he had sufficient means to

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provide child support at the level set by the parties in their settlement agreement (*see Matter of Kalarickal v Kalarickal*, 89 AD3d 846; *Jelfo v Jelfo*, 81 AD3d 1255, 1257; *Matter of Fragola v Alfaro*, 45 AD3d 684, 686; *Matter of Talty v Talty*, 42 AD3d 546, 547). The defendant also failed to make a prima facie showing that continued enforcement of his maintenance obligation would result in the extreme hardship necessary to warrant a downward modification (*see Capozzoli v Capozzoli*, 81 AD3d 584, 585; *Klein v Klein*, 74 AD3d 753; *DiVito v DiVito*, 56 AD3d 601, 602; *Mahato v Mahato*, 16 AD3d 386).

RIVERA, J.P., ENG, LOTT and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court