

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

987

CA 08-00195

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

JOSEPH GENTILE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CAROL GENTILE, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

MICHAEL W. RICKARD, II, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

PUSATIER, SHERMAN, ABBOTT & SUGARMAN, KENMORE (STEVEN R. SUGARMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 16, 2008 in a postjudgment divorce action. The order, inter alia, awarded defendant attorney's fees in connection with a prior appeal.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part awarding defendant attorney's fees in connection with the prior appeal and by providing that defendant is awarded the amount of \$20,138.06 for attorney's fees and expenses and as modified the order is affirmed without costs.

Memorandum: On a prior appeal, we concluded that one of the issues to be determined at a subsequent hearing to be conducted by Supreme Court was the amount of attorney's fees to be awarded to defendant in this postjudgment divorce action, based on " 'the extent and value of the services rendered' " (*Gentile v Gentile*, 31 AD3d 1158, 1159). We now agree with plaintiff on this appeal following the hearing that the court erred in awarding defendant attorney's fees in connection with the prior appeal inasmuch as the retainer agreement between defendant and her attorney specifically exempted attorney's fees incurred in connection with appellate services (see *Matter of Castellano v Ross*, 19 AD3d 1020, 1021). The record establishes that attorney's fees in connection with the prior appeal total \$3,860, and we therefore modify the order accordingly. We otherwise affirm the order for reasons stated in the decision at Supreme Court.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court