

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

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CA 09-01722

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND GREEN, JJ.

JONATHAN C. REYNHOUT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DEBORAH HUESTON, FORMERLY KNOWN AS DEBORAH
REYNHOUT, DEFENDANT-RESPONDENT.

DAVID C. LAUB, BUFFALO, FOR PLAINTIFF-APPELLANT.

JAMES P. RENDA, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered April 30, 2009. The order, insofar as appealed from, denied the motion of plaintiff seeking, inter alia, to modify the judgment of divorce.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Supreme Court properly denied the motion of plaintiff husband seeking, inter alia, to modify the judgment of divorce, which incorporated but did not merge the terms of the parties' separation agreement, by reducing the amount of maintenance paid by him. In support of that part of his motion, plaintiff was required in accordance with the case law in effect at the time of entry of the judgment to "present evidence that there has been a substantial change in financial circumstances between the time of entry of the judgment of divorce and the time of the [motion] for modification" (*McCarthy v McCarthy*, 214 AD2d 1000, 1000; see *Matter of Downer v Downer*, 199 AD2d 1092; *Kurtz v Kurtz*, 58 AD2d 1006, lv denied 43 NY2d 641). Plaintiff submitted no evidence of his financial situation at those relevant times and thus failed to meet his burden with respect to that part of the motion (see *McCarthy*, 214 AD2d 1000; *Klapper v Klapper*, 204 AD2d 518, 519). The contention of defendant wife that the court erred in denying her application for attorney's fees is not properly before us inasmuch as she failed to take a cross appeal from the order (see generally CPLR 5515; *Andritz v Andritz*, 131 AD2d 529).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court