

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

1029

CA 11-00003

PRESENT: CENTRA, J.P., FAHEY, SCONIERS, GREEN, AND MARTOCHE, JJ.

JAMES R. MYERS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DIANE C. MYERS, DEFENDANT-RESPONDENT.

MERKEL AND MERKEL, ROCHESTER (DAVID A. MERKEL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered March 29, 2010 in a divorce action. The judgment, among other things, awarded defendant spousal maintenance in the amount of \$1,000 per month for a period of seven years.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the ninth decretal paragraph and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Ontario County, for further proceedings in accordance with the following Memorandum: Plaintiff husband contends on appeal in this divorce action that Supreme Court erred in awarding maintenance to defendant wife. We note at the outset that the husband's notice of appeal recites that he is appealing from a portion of the decision of the Special Referee incorporated in a "Decree of Divorce." Although the husband instead should have taken his appeal from the judgment of divorce, in the exercise of our discretion we treat the notice of appeal as valid and deem the appeal as taken from the judgment (*see* CPLR 5520 [c]; *Francis v Francis*, 72 AD3d 1594, 1595).

We conclude that the court erred in awarding maintenance without setting forth all relevant factors enumerated in Domestic Relations Law § 236 (B) (6) (a) considered by the court in awarding such maintenance and the reasons for its decision (*see* § 236 [B] [6] [b]; *Hartog v Hartog*, 85 NY2d 36, 51-52; *Mayle v Mayle*, 299 AD2d 869). In particular, although the court granted the wife a substantial distributive award, we are unable to discern from the record whether the court considered that award in determining the amount and duration of maintenance (*see* § 236 [B] [6] [a] [1]; *Reed v Reed*, 55 AD3d 1249, 1251). Likewise, despite evidence that the wife had a degree in accounting, marketable skills and an extensive employment history, the court failed to set forth a determination whether the wife was or

could be self-supporting (see § 236 [B] [6] [a] [4]; see generally *Reed*, 55 AD3d at 1251; *Lo Maglio v Lo Maglio*, 273 AD2d 823, 824, appeal dismissed 95 NY2d 926). Although there was also conflicting evidence presented on the issue whether the wife contributed to the household as "a spouse, parent, wage earner and homemaker" (§ 236 [B] [6] [a] [8]), the court failed to make any factual or credibility determinations concerning that issue. Indeed, the court failed to provide any reason for the amount and duration of maintenance awarded, but merely set forth the ages, health and incomes of the parties (see § 236 [B] [6] [b]; *Hartog*, 85 NY2d at 51). Based on the foregoing, we are unable to determine whether the amount and duration of the maintenance awarded " 'reflects an appropriate balancing of [the wife's] needs and [the husband's] ability to pay' " (*Burns v Burns*, 70 AD3d 1501, 1503). We therefore modify the judgment by vacating the amount awarded for maintenance, and we remit the matter to Supreme Court to determine the amount and duration of maintenance, if any, after setting forth all relevant factors enumerated in Domestic Relations Law § 236 (B) (6) (a) that it considered and "the reasons for its decision" (§ 236 [B] [6] [b]).

We also agree with the husband that the court erred in awarding the wife retroactive maintenance without providing him with a credit for the carrying costs he paid on the marital home during the pendency of the action (see *Skladanek v Skladanek*, 60 AD3d 1035, 1037; *Southwick v Southwick*, 214 AD2d 987, 987-988; *Petrie v Petrie*, 124 AD2d 449, 451, lv dismissed 69 NY2d 1038), and we therefore further modify the judgment accordingly. Thus, upon remittal, the court must also determine the amount of those payments made during the pendency of the action and the amount of retroactive maintenance, if any, to be awarded to the wife (see *Petrie*, 124 AD2d at 451).