

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

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CA 10-00106

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND PINE, JJ.

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PATRICIA J. FALK, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BRUCE R. FALK, DEFENDANT-APPELLANT.

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PALMER, MURPHY & TRIPI, BUFFALO (THOMAS ALLAN PALMER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHERYL A. BERZER, AMHERST (THOMAS R. LOCHNER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 25, 2009. The order denied the motion of defendant to vacate the economic provisions of a judgment of divorce.

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

Memorandum: We affirm the order denying defendant's motion seeking to vacate the economic provisions of the judgment of divorce, but our reasoning differs from that of Supreme Court. The judgment of divorce incorporated but did not merge the parties' stipulation and, because the motion sought to revise the stipulation, the court erred in denying the motion on the merits. The court instead "should have denied the motion on the ground that 'a motion is not the proper vehicle for challenging a [stipulation] incorporated but not merged in[ ] a divorce judgment,' " and defendant should have commenced a plenary action seeking rescission or reformation of the stipulation (*Gartley v Gartley*, 15 AD3d 995, 996).

Entered: June 11, 2010

Patricia L. Morgan  
Clerk of the Court