

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

1448

CA 11-00838

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

ROBERT PETHICK, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ELIZABETH PETHICK, NOW KNOWN AS ELIZABETH
CACCAMISE, DEFENDANT-RESPONDENT.

DAN M. WALTERS, PITTSFORD, FOR PLAINTIFF-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered July 6, 2010. The order, insofar as appealed from, determined that the parties' separation agreement is not an enforceable agreement with respect to college expenses.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: Plaintiff's sole contention on appeal is that the parties' separation agreement, which was incorporated into the judgment of divorce, created a binding obligation on defendant to contribute to the college expenses of the parties' child and thus that Supreme Court erred in refusing to direct defendant to reimburse him for the college expenses that he incurred before he filed his motion seeking, inter alia, that relief. Plaintiff's contention is not properly before us, however, inasmuch as the Support Magistrate determined, after a hearing, that the college education provision of the separation agreement was unenforceable, and plaintiff failed to appeal from that order (*see Matter of Hammill v Mayer*, 66 AD3d 1196, 1197-1198; *Matter of Clark v Clark*, 61 AD3d 1274, lv denied 13 NY3d 702; *Matter of Regan v Zalucky*, 56 AD3d 825, 826-827). We therefore dismiss the appeal (*see generally Abasciano v Dandrea*, 83 AD3d 1542, 1542-1543).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court