

83 A.D.3d 815
Supreme Court, Appellate Division,
Second Department, New York.

Janet TAYLOR, respondent,
v.
Ian Ross TAYLOR, appellant.

April 12, 2011.

Synopsis

Background: In a matrimonial action in which the parties were divorced, former husband appealed from an order of the Supreme Court, Westchester County, [Tolbert, J.](#), which denied his motion for a downward modification of his maintenance and child support obligations and granted the cross motion of the former wife to hold him in contempt for failure to pay maintenance arrears.

Holdings: The Supreme Court, Appellate Division, held that:

[1] former husband failed to demonstrate that continued enforcement of his obligation to pay maintenance would create an extreme hardship, and

[2] failure to include required language in order holding former husband in contempt was not reversible error.

Affirmed as modified.

Attorneys and Law Firms

****420** Winter & Grossman, PLLC, Garden City, N.Y. (Jerome B. Winter and [Robert S. Grossman](#) of counsel), for appellant.

Cohen Hennessey Bienstock & Rabin, P.C., White Plains, N.Y. (Patricia E. Hennessey of counsel), for respondent.

[WILLIAM F. MASTRO](#), J.P., [CHERYL E. CHAMBERS](#), [PLUMMER E. LOTT](#), and [JEFFREY A. COHEN](#), JJ.

Opinion

***815** In a matrimonial action in which the parties were divorced by judgment dated August 1, 2005, the defendant former husband appeals, as limited by his brief, from stated portions of an order of the Supreme Court, Westchester County ([Tolbert, J.](#)), entered June 29, 2010, which, after a hearing, inter alia, denied his motion for a downward modification of his maintenance and child support obligations, as provided in a stipulation of settlement dated July 14, 2005, which was incorporated but not merged into the judgment of divorce, and granted that branch of the cross motion of the plaintiff former wife which was to hold him in contempt for failure to pay maintenance arrears.

ORDERED that the order is modified, on the law, by adding to the provision thereof holding the defendant in contempt after the words “and past due support arrears to plaintiff” the words, “and that the defendant former husband's conduct was calculated to, or actually did, defeat, impair, impede, or prejudice the rights and remedies of the plaintiff former wife;” as so modified, the order is affirmed insofar as appealed from, with costs to the plaintiff former wife.

The parties were married and have four children. In 2004, the plaintiff former wife commenced this action for a divorce ***816** against the defendant former husband. In 2005, the parties entered into a stipulation of settlement, which provided, inter alia, that the plaintiff would have custody of the children, and that the defendant would pay maintenance and child support in an agreed-upon amount. The stipulation also provided that the defendant waived his right to seek any downward modification of his maintenance obligation until August 1, 2012, “excluding an unforeseen, unanticipated catastrophic event, that so negatively impacts the Husband's health or earning capacity as to result in ‘extreme hardship’ to him as that term is set forth in [\[Domestic Relations Law\] § 236\(B\)\(9\)\(b\)](#).” The stipulation was incorporated but not merged into the judgment of divorce dated August 1, 2005.

After the defendant lost his job at Bear Stearns in 2008 and was hired by Natixis, a French bank, the defendant moved for a downward modification of his maintenance and child support obligations.

[1] After a hearing, the Supreme Court properly denied that branch of the defendant's motion which was for a downward

modification of his maintenance obligation. **421 The evidence at the hearing showed that, although the economic downturn resulted in the defendant losing his job at Bear Stearns and earning a substantially smaller bonus in 2009 than he had received in previous years at Bear Stearns, the defendant's base salary and compensation plan at Natixis were similar to his base salary and compensation plan at Bear Stearns. Moreover, the evidence at the hearing showed that the economic downturn did not result in any appreciable change in the defendant's lifestyle (see *Matter of Sand v. Sand*, 290 A.D.2d 451, 452, 736 N.Y.S.2d 102; *Matter of Westwater v. Donnelly*, 204 A.D.2d 467, 468, 612 N.Y.S.2d 58; *Sofia v. Sofia*, 162 A.D.2d 594, 556 N.Y.S.2d 778). Accordingly, the defendant failed to demonstrate that continued enforcement of his obligation to pay maintenance under the parties' stipulation of settlement would create an "extreme hardship" (Domestic Relations Law § 236[B][9] [b]; see *Schlakman v. Schlakman*, 38 A.D.3d 640, 641, 833 N.Y.S.2d 121; *Norman v. Dykman*, 23 A.D.3d 358, 358–359, 808 N.Y.S.2d 80; *Sofia v. Sofia*, 162 A.D.2d at 594, 556 N.Y.S.2d 778).

The Supreme Court also properly denied that branch of the defendant's motion which was for a downward modification of his child support obligation. The defendant failed to establish a substantial, unanticipated, and unreasonable change of circumstances sufficient to warrant such a modification (see *Schlakman v. Schlakman*, 38 A.D.3d at 641, 833 N.Y.S.2d 121; *Beard v. Beard*, 300 A.D.2d 268, 751 N.Y.S.2d 304; *Matter of Westwater v. Donnelly*, 204 A.D.2d at 468, 612 N.Y.S.2d 58; *Sofia v. Sofia*, 162 A.D.2d at 594, 556 N.Y.S.2d 778).

[2] *817 The Supreme Court also properly granted that branch of the plaintiff's cross motion which was to hold the defendant in contempt for failure to pay maintenance arrears. Contrary to the defendant's contention, the plaintiff demonstrated that the defendant's admitted failure to pay maintenance arrears was willful (see Domestic Relations Law § 245; *Lopez v. Ajose*, 33 A.D.3d 976, 977, 824 N.Y.S.2d 113; *Orlando v. Orlando*, 222 A.D.2d 906, 908–909, 635 N.Y.S.2d 752). The defendant is correct that the order appealed from failed to set forth the required recital that the contemptuous conduct was "calculated to or actually did defeat, impair, impede or prejudice the [plaintiff's] rights or remedies" (*Stempler v. Stempler*, 200 A.D.2d 733, 734, 607 N.Y.S.2d 111 [internal quotation marks omitted]; see *Biggio v. Biggio*, 41 A.D.3d 753, 754, 839 N.Y.S.2d 527; *Lopez v. Ajose*, 33 A.D.3d at 977, 824 N.Y.S.2d 113). However, since the finding of contempt is supported by the record, the omission was a mere irregularity which may be corrected on appeal (see *Biggio v. Biggio*, 41 A.D.3d at 754, 839 N.Y.S.2d 527; *Lopez v. Ajose*, 33 A.D.3d at 977, 824 N.Y.S.2d 113; *Raphael v. Raphael*, 20 A.D.3d 463, 464, 799 N.Y.S.2d 108). Accordingly, we modify the order to add the requisite language.

The defendant's remaining contentions are without merit.

Parallel Citations

83 A.D.3d 815, 920 N.Y.S.2d 419, 2011 N.Y. Slip Op. 03049