

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D59023
M/afa

____ AD3d ____

Submitted - January 17, 2019

REINALDO E. RIVERA, J.P.
SHERI S. ROMAN
SYLVIA O. HINDS-RADIX
HECTOR D. LASALLE, JJ.

2017-11890

DECISION & ORDER

AnnMarie Mitarotonda, respondent,
v Frank Mitarotonda, appellant.

(Index No. 14267/11)

Johnson & Cohen, LLP, White Plains, NY (Maureen A. Dunn of counsel), for appellant.

McCarthy Fingar, LLP, White Plains, NY (Kathleen Donelli and Kristen Pennesi of counsel), for respondent.

In a matrimonial action, the defendant appeals from an order of the Supreme Court, Westchester County (Janet C. Malone, J.), dated September 22, 2017. The order denied, without a hearing, the defendant's motion to terminate his child support obligation with respect to the parties' two sons.

ORDERED that the order is affirmed, with costs.

The parties, who divorced in 2013, have two sons and one daughter. Pursuant to the judgment of divorce, which incorporated, but did not merge, the parties' stipulation of settlement and so-ordered parenting agreement, the defendant was obligated to pay child support for all three children. Subsequently, in December 2016, the defendant moved to terminate his child support obligation with respect to both sons on the ground of constructive emancipation. He also alleged parental alienation on the part of the plaintiff. The plaintiff opposed the motion and asked that an attorney be appointed to represent the sons. The Supreme Court appointed an attorney to represent the sons, who opposed the defendant's motion. In an order dated September 22, 2017, the court denied the defendant's motion, determining that the defendant failed to meet his burden of showing constructive emancipation or parental alienation. The defendant appeals.

April 17, 2019

Page 1.

MITAROTONDA v MITAROTONDA


It is fundamental public policy in New York that parents are responsible for their children's support until age 21 (*see* Family Ct Act § 413; *Matter of Jurgielewicz v Johnston*, 114 AD3d 945, 945; *Matter of Barlow v Barlow*, 112 AD3d 817, 818). Nevertheless, under the doctrine of constructive emancipation, a child of employable age who, without cause, actively abandons the noncustodial parent by refusing all contact and parental access may forfeit any entitlement to support (*see* *Diaz v Gonzalez*, 115 AD3d 904, 905; *Matter of Lowe v Lowe*, 67 AD3d 682, 683). However, “[a] child’s . . . reluctance to see a parent is not abandonment” (*Matter of Jurgielewicz v Johnston*, 114 AD3d at 945 [internal quotation marks omitted]; *see* *O’Rourke v O’Rourke*, 139 AD3d 1027, 1028). “The burden of proof as to emancipation is on the party asserting it” (*Matter of Jurgielewicz v Johnston*, 114 AD3d at 945, quoting *Schneider v Schneider*, 116 AD2d 714, 715; *see* *Matter of Barlow v Barlow*, 112 AD3d at 818).

“Child support payments may be suspended where the custodial parent unjustifiably frustrates the noncustodial parent’s right of reasonable access” (*Matter of Jurgielewicz v Johnston*, 114 AD3d at 946 [internal quotation marks omitted]; *see* *Matter of Rivera v Echavarria*, 48 AD3d 578).

Here, we agree with the Supreme Court’s determination, without a hearing, that the defendant’s child support obligation with respect to the parties’ two sons was not terminated on the ground of constructive emancipation or interference with parental access. The defendant did not request a hearing or object to the submission of the issues based on papers, and thus, he waived that right (*see* *Werner v Werner*, 153 AD3d 759, 760; *Mollah v Mollah*, 136 AD3d 992, 994; *Bandler v Bandler*, 58 AD3d 775, 776). In any event, the defendant failed to meet his burden of demonstrating, prima facie, that the sons refused all contact with him (*see* *Werner v Werner*, 153 AD3d at 759; *O’Rourke v O’Rourke*, 139 AD3d at 1028; *Marshall v Marshall*, 1 AD3d 323, 324), or that the plaintiff deliberately frustrated or actively interfered with his relationship with the sons (*see* *Matter of Addimando v Huerta*, 147 AD3d 750, 753; *Matter of Jurgielewicz v Johnston*, 114 AD3d at 946).

RIVERA, J.P., ROMAN, HINDS-RADIX and LASALLE, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court