

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

718

CA 09-02616

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, SCONIERS, AND PINE, JJ.

---

JAMES W. HILL, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JENNIFER V. HILL, DEFENDANT-RESPONDENT.

---

MICHAEL J. PULVER, NORTH SYRACUSE, FOR PLAINTIFF-APPELLANT.

BARBARA T. WALZER, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

THEODORE W. STENUF, ATTORNEY FOR THE CHILDREN, MINOA, FOR MADISON H. AND KALEIGH H.

---

Appeal from a judgment of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered December 3, 2008 in a divorce action. The judgment awarded counsel fees to defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed in the interest of justice and on the law without costs and the matter is remitted to Supreme Court, Onondaga County, for a hearing in accordance with the following Memorandum: Plaintiff contends that Supreme Court should have conducted an evidentiary hearing before granting that part of defendant's cross motion seeking an award of counsel fees incurred in opposing plaintiff's motion seeking to modify the judgment of divorce. Although plaintiff failed to preserve that contention for our review (*see Petosa v Petosa*, 56 AD3d 1296, 1298), we nevertheless review it in the interest of justice (*see Redgrave v Redgrave*, 304 AD2d 1062, 1066-1067), and we agree with plaintiff that the court so erred (*see Matter of Mina v Weber*, 309 AD2d 1252; *Redgrave*, 304 AD2d at 1066-1067). Absent a stipulation by the parties, "the court should base its determination [to award counsel fees] upon testimonial and other trial evidence of the financial condition of the parties" (*Matter of Cook v Jasinski*, 20 AD3d 869, 870; *see Mina*, 309 AD2d 1252). Here, there is no stipulation in the record permitting the court to determine the issue of counsel fees without conducting a hearing. We therefore reverse the judgment and remit the matter to Supreme Court for a hearing on that issue and thus to decide that part of defendant's cross motion seeking an award of counsel fees.

Entered: June 18, 2010

Patricia L. Morgan  
Clerk of the Court