

FILED & ENTERED  
Family Court State of New York  
County of Onondaga

DATE:

6/6/18

At a term of the Family Court of the State of New York, held in and for the County of Onondaga, at Onondaga County Courthouse, 401 Montgomery St., Syracuse, NY 13202, on June 6, 2018

**PRESENT:** Hon. Julie A. Cecile

In the Matter of a **Support** Proceeding

**Angela C Gasparini**, SSN: XXX-XX-4051,  
Petitioner,

- against -

**Michael J Rotondo**, SSN: XXX-XX-2736,  
Respondent.

**File #:** 24816

**Docket #:** F-00090-11/17C

**CSMS #:** BS03926P1

**ORDER DENYING  
MOTION TO DISMISS**

On May 25, 2017, Michael J. Rotundo, hereinafter referred to as Father, was ordered by Support Magistrate Susan Hamlin Nasci to pay \$56.00 per week for child support, based on a determination that he has the ability to earn \$400.00 per week. Father filed an objection to this order of support, which this Court denied and dismissed on September 26, 2017. On October 19, 2017, Father filed a notice of appeal from the denial of the objection. The appeal is still pending. Because the filing of the notice of appeal does not stay the order from which the appeal is taken, the order of support issued on May 25, 2017, remains in effect. FCA § 1114.

On August 2, 2017, Angela C. Gasparini, hereinafter referred to as Mother, filed a petition alleging Father had violated the order of support. On January 2, 2018, upon Father's default, Support Magistrate Nasci determined Father had willfully violated the order of support. Father has not filed a motion to vacate the default.

On February 27, 2018, the finding that Father had willfully violated the order of support was transferred to this Court for confirmation and imposition of a penalty. FCA § 439 (a), FCA § 454. Father failed to appear, and the matter was adjourned to March 20, 2018. On that date, Father appeared and made several oral motions challenging the order of support and the determination that he had willfully violated such order. These oral motions were not considered by this Court because

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his objection to the order of support had already been denied, the determination that he had willfully violated the order of support had been upon his default, and the time for objecting to the determination that he had willfully violated the order of support had expired on February 26, 2018. Father stated he wished to file written motions, and, out of solicitude to him as a pro se litigant, the matter was adjourned to April 30, 2018.

On April 30, 2018, Father filed this motion to dismiss. Father submitted no proof that the motion was served upon Mother, and she has not submitted a response. This Court will not await a response from Mother because the motion to dismiss must be denied as a matter of law for the following reasons.

First, Father cannot challenge the finding that he willfully violated the order of support by way of this motion to dismiss. The willful violation was found upon his default, and he can challenge that finding only by moving to vacate the default, wherein he would be required to show a reasonable excuse for failing to appear for trial, and a meritorious defense. He has not filed such motion. Notably, the meritorious defense must include a showing that Father made “reasonable efforts to obtain gainful employment.” (*Roshia v Thiel*, 110 AD3d 1490, 1492 [4th Dept 2013].) Should the motion to vacate the default be denied, Father may file an objection to that denial, and, should the objection be denied, he may then file an appeal. (*Reaves v Jones*, 110 AD3d 1276 [3d Dept 2013][holding that Family Court properly denied father's objections to Support Magistrate's default order finding him in willful violation of his child support obligation, where father failed to utilize the proper remedy of moving before the Support Magistrate to vacate the default].)

Further, were this Court to reach the merits of Father’s motion to dismiss, the Court would deny the motion for the following reasons.

In his motion to dismiss, Father challenges the nature of the evidence on which the support

magistrate determined that he had the ability to earn \$400.00 per week, resulting in his obligation to pay \$56.00 per week for child support. Father argues that his income is only \$100.00 per month. Purported defects in the May 25, 2017, order of support can be addressed only by way of the appeal which is currently pending, and, as noted above, the appeal does not stay the effectiveness of the order. Therefore, the foregoing arguments fail because the order of support remains in effect despite the pending appeal.

Father's final argument is that "he isn't required to look for work," and that, because he is unemployed and has no income, he can not be found to be in violation of his support obligation for failing to pay support. Father's argument is fundamentally flawed, because, as a matter of public policy, FCA § 413 requires him to support his child until he is twenty-one years old, and the law also presumes that you will employed as necessary to enable you to pay child support. Most importantly, the proper amount of child support is not determined "by the parent's current economic situation, but by the parent's assets and earning capacity." (*Gillison v Penepent*, 156 AD3d 697, 698 [2d Dept 2017].) Finally, it is well settled that "[i]ncome may properly be imputed when there are no reliable records of a parent's actual employment income or evidence of a genuine and substantial effort to secure gainful employment." (*Muok v Muok*, 138 AD3d 1458, 1459–60 [4th Dept 2016][internal citation omitted].)

If Father's position is that he cannot pay \$56.00 per week because he cannot earn \$400.00 per week, he must file a petition alleging a substantial change in circumstances warranting a downward modification of his child support obligation. One possible basis for such petition would be that, despite his reasonable and diligent efforts, he has not been able to secure employment earning \$400.00 per week. If he files such a petition, and presents sufficient evidence of his reasonable and diligent efforts to secure employment commiserate with his education and abilities, and if such efforts

result in employment earning less than \$400.00, his obligation could be lowered to the statutory percentage of whatever amount he actually earns. But unless and until the appellate court reverses the order of support of May 25, 2017, or until he prevails on a motion to modify his support obligation, Father is legally required to make a reasonable and diligent job search, and faces penalties if he does not do so.

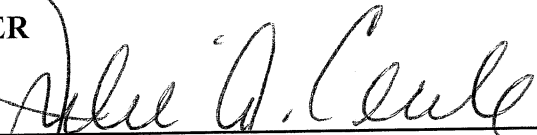
In support of this argument that he is not required to look for a job, Father cites to *Fusco v. Fusco*, 134 AD3d 1112 (2d Dept 2015), which he reads as standing for the principle that a parent can be found in violation of his support order only if he has income, and if, rather than pay child support, he uses that income for other expenses. However, the primary holding of *Fusco* is that a parent who is not paying child support as ordered must “demonstrate that he actively sought employment” in order to avoid a determination that he had violated the support order. The fact that the parent in *Fusco* had funds available to pay support, but simply chose not to, was only one of several factors the appellate court relied on to affirm that the parent had willfully violated his support obligation, and it is not a necessary factor in this case. (*See also Girasek-Brick v Girasek*, 127 AD3d 861, 861 [2d Dept 2015][holding “Although the father testified that he was unemployed and had no money to pay child support, he did not present evidence that he had made a reasonable and diligent effort to secure employment so as to sufficiently rebut the evidence that he had not paid support as ordered.”].)

If Father had been able to meet his support obligation despite being unemployed, he would not be before any court for inquiry into his efforts to find employment. But he did not pay child support as ordered. Therefore, in order to avoid the available statutory penalties for willfully violating a child support order, which include jail, probation, or required participation in a rehabilitative program, he was required as a matter of law to have made a reasonable and diligent effort to secure employment, which he has not done.

Therefore, based on the foregoing, it is hereby  
ORDERED that the Motion to Dismiss filed on April 30, 2018, by Michael J. Rotondo is  
denied.

Dated: 6/5/18

ENTER



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Hon. Julie A. Cecile

CC: Dana Grillo, Esq.  
Michael J Rotondo, Respondent