

<b>Juergens v Juergens</b>
2008 NY Slip Op 30991(U)
March 31, 2008
Supreme Court, Nassau County
Docket Number: 8659-07/
Judge: Antonio I. Brandveen
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

DIANE NOTTI JUERGENS,  
Plaintiff,  
  
- against -  
  
JENNIFER G. JUERGENS, Individually and as  
the Temporary Guardian of the Person and  
Property of James Joseph Juergens, Sr.,  
  
Defendant.

TRIAL / IAS PART 32  
NASSAU COUNTY  
  
Index No. 18659/07  
  
Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits . . . . .	<u>1</u>
Answering Affidavits . . . . .	<u>2</u>
Replying Affidavits . . . . .	<u>3</u>
Briefs: Plaintiff's / Petitioner's . . . . .	_____
Defendant's / Respondent's . . . . .	_____

The defendant moves for an order pursuant to CPLR 3211 (a) (1), (3), and (7) dismissing the verified complaint on the grounds there is a defense based upon documentary evidence, the plaintiff lacks standing to bring this action, and the plaintiff fails to state a cause of action. The defendant also seeks a hearing to assess attorney fee sanctions by reason of the commencement by the plaintiff of a frivolous action within the meaning of 22 NYCRR 103.1.1. The plaintiff opposes the motion.

The defendant states, in a supporting affidavit dated November 21, 2007, the summons and the verified complaint were left with the doorman of the building where the

defendant resides. The defendant states the plaintiff, the second wife of the defendant's father who married the defendant's father on December 4, 1999, but they separated in or about August 2003, claims being damaged by reason of the defendant's alleged abuse of the position of the father's temporary guardian under Article 81 proceeding by using the father's funds in an unspecified improper manner. The defendant also reports the father and his spouse are presently engaged in a divorce action under Nassau County Supreme Court index number 202927/2007 where the defendant here is a named defendant. The defendant counters plaintiff's allegations, in detail, in the supporting affidavit to the instant motion.

The defense attorney states, in a supporting affirmation dated November 23, 2007, the plaintiff lacks standing here because the wrong sought to be vindicated must be personal to the plaintiff, which it is not. The defense attorney points out incapacitated father has a permanent guardian, the defendant, who was appointed by the Supreme Court, 9<sup>th</sup> Judicial District, in Westchester County which vests the defendant with the sole right to seek legal redress. The defense attorney notes the plaintiff and the plaintiff's counsel knew of that judgment since they participated in the proceedings in the Supreme Court, 9<sup>th</sup> Judicial District, in Westchester County, and consented to the appointment of the guardian and the powers invested in the guardian by the Court. The defense attorney asserts that judgment does not grant the plaintiff any power to pursue any perceived civil claim against any individual. The defense attorney avers the plaintiff's second cause of

action for breach of fiduciary duty is devoid of specificity which would support allegations of breach of trust or the defendant's fiduciary duties. The defense attorney contends, even if the plaintiff had standing to assert this claim, there is no claim stated. The defense attorney maintains, assuming the plaintiff had standing, the complaint nevertheless fails to state a cause of action for conversion. The defense attorney states the complaint does not state any allegation the plaintiff had an immediate possessory right to any of the property of the defendant's father nor a right superior to the defendant. The defense attorney retorts the plaintiff interposed a cross petition to be appointed the guardian in the Article 81 proceeding in the Supreme Court, 9<sup>th</sup> Judicial District, in Westchester County, so the plaintiff could, if the plaintiff prevails in the Supreme Court, 9<sup>th</sup> Judicial District, in Westchester County, gain control of the incapacitated individual's assets. The defense attorney point outs the defendant did not exercise unauthorized dominion over those assets is established by the Court's appointment of the defendant as her father's temporary Article 81 guardian subject to the order of the Court. The defense attorney contends the plaintiff's cause of action for *prima facie* tort is flawed because there is no showing of an intentional infliction of harm, without excuse or justification, by the acts or series of acts of the defendant. The defense attorney contends, in order to recover for an alleged *prima facie* tort, malevolence, must be the sole motive for the defendant's otherwise lawful act. The defense attorney notes the complaint negates the element of intent by alleging the defendant was negligent, and fails to show the

defendant's alleged actions were solely the product of malevolence. The defense attorney contends the plaintiff's demand for counsel fees is unsupported by law. The defense attorney points out the Court is empowered to award costs, attorney fees and sanctions where it is determined a party commenced a merit less lawsuit asserted for no legitimate purpose, and designed to cause harm to the party against whom the suit is brought under 22 NYCRR 130.1.1 (a). The defense attorney argues the actions of the plaintiff and plaintiff's counsel are wrong, and the plaintiff apparently has pursued impotence litigation here.

The plaintiff contends, in specific detail, in an opposing affidavit dated December 27, 2007, the defendant is motivated by resentment and anger as shown in the defendant's supporting affidavit, and the defendant wasted the assets of the plaintiff's spouse, and has been negligent in regard to his medical care. The plaintiff's counsel states, in specific detail, in an opposing affirmation dated December 28, 2007, the documentary evidence submitted by the defendant does not support a dismissal of the complaint, and the affirmation by defense counsel contains inaccurate factual information based upon hearsay. The plaintiff's counsel contends the plaintiff has standing to bring the underlying action, and supports that assertion with specific points. The plaintiff's counsel argues service was proper upon the doorman.

The defense attorney states, in a reply affirmation dated January 2, 2008, the defendant claims the plaintiff has no standing to bring this lawsuit. The defense attorney

reiterates there is lawful guardian appointed for the defendant's father, who is the plaintiff's husband, in the Article 81 proceeding that terminated in a judgment of the Supreme Court, Westchester County, so any cause of action, while still belonging to the now judicially declared incompetent, must be pursued by the guardian. The defense attorney specifically points out the inconsistencies and legal impotence in the plaintiff's assertions regarding this matter.

This Court has reviewed and considered all of the parties' papers with respect to this motion. This Court finds the defendant has met the burdens required pursuant to CPLR 3211 (a) (1), (3), and (7), to wit there is a defense based upon documentary evidence, the plaintiff lacks standing to bring this action, and the plaintiff fails to state a cause of action. 22 NYCRR § 130-1.1 (a) provides:

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part.

Under 22 NYCRR § 130-1.1 [c], conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

This Court has considered "(1) the circumstances under which the conduct took place,

including the time available for investigating the legal or factual basis of the conduct; and


(2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party” (see 22 NYCRR § 130-1.1 [c]. This Court finds the plaintiff’s conduct was frivolous as required in 22 NYCRR § 130-1.1.

Accordingly, the motion is granted. A hearing is directed to assess attorney fee sanctions by reason of the commencement by the plaintiff of a frivolous action within the meaning of 22 NYCRR § 130-1.1. A copy of this order shall be served by the defense and accompany the note of issue when filed to add this matter to the Calendar Control Part of the New York State Supreme Court, Nassau County for that hearing.

So ordered.

Dated: March 31, 2008

ENTER:

  
\_\_\_\_\_  
HON. ANTONIO I. BRANDVEIN

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

**ENTERED**

APR 03 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**