

NO. 29268

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

JOSEPH A. SYLVESTER and FRANCES LEE MOREY-SYLVESTER,  
Plaintiff-Appellee  
v.  
TINA YOUNG, Defendant-Appellant

TINA YOUNG, Counterclaim Plaintiff-Appellant  
v.  
JOSEPH A. SYLVESTER and FRANCES LEE MOREY-SYLVESTER,  
Counterclaim Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT  
(CIVIL NO. 03-1-0151)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Acting Chief Judge, Foley, and Nakamura, JJ.)

Defendant/Counterclaim Plaintiff-Appellant Tina Young (Young) appeals from: 1) the order granting the motion of Plaintiffs/Counterclaim Defendants-Appellees Joseph A. Sylvester and Frances Lee Morey-Sylvester (collectively, the "Sylvesters") to expunge Young's Notice of Pendency of Action (NOPA)<sup>1/</sup> (Expungement Order); and 2) the order denying Young's motion for reconsideration of the Expungement Order (Order Denying Reconsideration). The Expungement Order and Order Denying Reconsideration were filed, respectively, on April 8, 2008, and June 16, 2008, by the Circuit Court of the Fifth Circuit (circuit court).<sup>2/</sup>

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<sup>1/</sup> The terms "notice of pendency of action" (NOPA) and "*lis pendens*" will be used interchangeably in this Summary Disposition Order.

<sup>2/</sup> The Honorable Kathleen N.A. Watanabe presided.

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STATE OF HAWAII

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On appeal, Young argues that the circuit court erred in ordering the expungement of Young's NOPA because Young's counterclaim contained sufficient allegations to warrant the recording of an NOPA under Hawaii Revised Statutes (HRS) § 634-51 (Supp. 2008).<sup>3/</sup> As explained below, we affirm the circuit court's Expungement Order and Order Denying Reconsideration without reaching the merits of the arguments raised by Young in her opening and reply briefs.

While Young's appeal of the Expungement Order and Order Denying Reconsideration was pending, the circuit court held a trial on Young's breach-of-contract counterclaim. The jury found in favor of the Sylvesters on Young's breach-of-contract counterclaim. On September 24, 2008, the circuit court entered Judgment against Young on the breach-of-contract counterclaim and dismissed all other counterclaims.

In TSA International Ltd. v. Shimizu Corp., 92 Hawai'i 243, 265-67, 990 P.2d 713, 735-37 (1999), the Hawai'i Supreme Court held that the expungement of a *lis pendens* is warranted where a trial court grants judgment against a party on a claim on which the *lis pendens* is based. The entry of the adverse judgment extinguishes the claim, and thus the *lis pendens* is no longer based on any action concerning real property. Id. at 267, 990 P.2d at 737. The supreme court further held that the filing of a notice of appeal from the adverse judgment does not save a *lis pendens* from expungement. Id. at 265-67, 990 P.2d 735-37. The court noted that the "position that a losing party should be allowed to encumber the prevailing party's property simply

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<sup>3/</sup> HRS § 634-51 provides in relevant part:

**Recording of notice of pendency of action.** In any action concerning real property or affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and any other party at the time of filing a pleading in which affirmative relief is claimed, or at any time afterwards, may record in the bureau of conveyances a notice of the pendency of the action . . . .

because [the losing party] has appealed from an unfavorable judgment is untenable." Id. at 266, 990 P.2d at 736.

The Judgment entered by the circuit court on Young's counterclaim extinguished any claim that could serve as a basis for Young's NOPA. Accordingly, we affirm the April 8, 2008, Expungement Order and the June 16, 2008, Order Denying Reconsideration.<sup>4/</sup>

DATED: Honolulu, Hawai'i, May 29, 2009.

On the briefs:

Gary Victor Dubin  
Long H. Vu  
(Dubin Law Offices)  
for Defendant/Counter-  
claim Plaintiff-Appellant

Mark R. Zenger  
Donna E. Richards  
for Plaintiffs/Counter-  
claim Defendants-Appellees

*Corinne K A Wetanaka*

Acting Chief Judge

*Deniel R. Foley*

Associate Judge

*Craig H. Makamuna*

Associate Judge

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<sup>4/</sup> We note that Young filed a notice of appeal from the circuit court's Judgment (Second Notice of Appeal) before she filed her opening brief. In her opening brief, which was filed on November 5, 2008, Young stated that she had separately appealed the Judgment and would file a motion to consolidate both appeals. However, Young has not filed a motion for consolidation and has taken no further substantive action with respect to her appeal of the Judgment. The instant appeal (from the Expungement Order and Order Denying Reconsideration) and the Second Notice of Appeal were docketed under the same appeal number.