

CONCURRING AND DISSENTING OPINION BY MOON, C.J.,  
IN WHICH LEVINSON, J., JOINS

I agree with the majority's opinion that the circuit court's June 22, 2004 final judgment should be affirmed. However, because I believe that Bank's request for sanctions against Cabatu, pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 38 (2003), for filing a frivolous appeal should be granted, I respectfully dissent.

I. DISCUSSION

A. Procedural History

The following table illustrates the procedural chronology relevant to the HRAP Rule 38 sanction issue:

DATE	EVENT	RESULT/OUTCOME
02/16/99	Bank sends Cabatu Notice of Default & Intention to Foreclose Mortgage	---
08/18/99	Cabatu files first Truth in Lending Act (TILA) action against Bank in federal district court	<u>02/23/00</u> : Dismissed for failure to prosecute
08/22/00	Bank sends Cabatu <b>second</b> Notice of Default & Intention to Foreclose Mortgage	---
02/21/01	Cabatu files Chapter 13 bankruptcy petition in bankruptcy court	<u>03/12/01</u> : Dismissed for failure to file required documents
04/23/01	Bank sends Cabatu <b>third</b> Notice of Default & Intention to Foreclose Mortgage	---
05/23/01	<b>Non-judicial foreclosure auction conducted.</b>	<b>Bank acquires property.</b>
05/23/01	Cabatu files second TILA action against Bank in federal district court	<u>11/29/01</u> : Dismissed (Cabatu failed to appear at Rule 16 scheduling conference)

\* \* \* NOT FOR PUBLICATION \* \* \*

DATE	EVENT	RESULT/OUTCOME
05/31/01	Foreclosure conveyance document executed	06/13/01: Foreclosure conveyance document recorded with State of Hawai'i Bureau of Conveyances
09/10/01	<b>Bank files ejectment action against Cabatu in circuit court</b>	10/19/01: Cabatu files answer
10/31/01	Bank files motion for summary judgment (MSJ) in ejectment action	12/05/01 Hearing on MSJ: Cabatu <b>did not appear</b> ; also <b>did not oppose the motion in writing</b>
12/05/01	Cabatu files Chapter 7 bankruptcy petition in bankruptcy court <b>NOTE: Filed same day as hearing on MSJ</b>	12/28/01: <b>Dismissed</b>
12/07/01	Bank files motion for relief from bankruptcy stay in bankruptcy court	12/27/01: Granted; Cabatu <b>did not oppose</b> the motion
01/28/02	Circuit court enters order granting <b>Bank's MSJ and writ of ejectment</b>	Cabatu <b>did not appeal</b> the order
06/12/02	<b>Cabatu files instant action (Counts I-VIII) seeking, <u>inter alia</u>, to quiet title of property</b>	08/07/02: Bank files motion to dismiss and/or for summary judgment
09/19/02	Cabatu files motion for partial summary judgment (MPSJ) for, <u>inter alia</u> : (1) title to be quieted to her property; (2) order declaring Bank's non-judicial foreclosure sale and later acts void; and (3) judgment granting Cabatu possession of property	10/18/02: Cabatu <b>withdraws</b> her MPSJ
01/23/03	<b>Circuit court enters order dismissing Counts I, II, III, IV, and VI on res judicata grounds</b>	---
08/13/03	Cabatu files motion to certify Estate of Warren Mijo as "Doe Entity 1"	---
12/05/03	Cabatu moves to amend complaint to add Mijo as a defendant and to file an additional equity claim against Bank (motion to amend complaint)	12/22/03: Cabatu <b>withdraws</b> her motion to amend complaint that included her request to add Mijo as a defendant
04/07/04	Bank files motion to expunge notice of action and lis pendis (motion to expunge)	05/19/04: Order <b>granting</b> motion to expunge filed
05/05/04	<b>Circuit court enters order dismissing Count VII on compulsory counterclaim ground</b>	---

DATE	EVENT	RESULT/OUTCOME
05/11/04	Circuit court enters order dismissing Counts V and VIII on res judicata and failure to state a cause of action grounds, respectively	---
06/22/04	Circuit court enters final judgment in favor of Bank	<u>07/21/04</u> : Cabatu files notice of appeal

B. The Instant Appeal Warrants Sanctions Under HRAP Rule 38

Under HRAP Rule 38, "[i]f a Hawai'i appellate court determines that an appeal decided by it was frivolous, it may, after a separately filed motion or notice from the appellate court and reasonable opportunity to respond, award damages, including reasonable attorneys' fees and costs, to the appellee." This court has previously defined a frivolous claim as one "so manifestly and palpably without merit . . . as to indicate bad faith on the pleader's part such that argument to the court was not required." Rhoads v. Okamura, 98 Hawai'i 407, 414, 49 P.3d 373, 380 (2002) (quoting Coll v. McCarthy, 72 Haw. 20, 29, 804 P.2d 881, 887 (1991) (internal quotation marks omitted) (ellipses points in original)). This court has previously imposed HRAP Rule 38 sanctions where the "appellant has engaged in a pattern of frivolous and vexatious litigation," Abastillas v. Kekona, 87 Hawai'i 446, 449, 958 P.2d 1136, 1139 (1998), or where the "appellant has continued to acknowledge controlling authority contrary to her assertions." Rhoads, 98 Hawai'i at 414, 49 P.3d at 380 (citing Gold v. Harrison, 88 Hawai'i 94, 962 P.2d 353 (1998), cert. denied, 526 U.S. 1018 (1999)).

Although this court has stated that

[w]e are mindful of the argument that allowing the assessment of attorneys' fees may have a chilling effect in deterring the filing of law suits based on innovative theories or to modify, extend, or reverse existing law[,] . . . we are reluctant to adopt a rule that accords the appellate courts no discretionary leeway in the assessment of attorney's fees pursuant to the provisions of HRAP Rule 38. However, awards of attorneys' fees induce people to reconsider and ensure that refusals to surrender do not burden the innocent. They also protect the courts -- and derivatively parties in other cases -- from impositions on their time . . . . The court has an interest in the orderly conduct of business, an interest independent of the opposing party. . . .

Abastillas, 87 Hawai'i at 449, 958 P.2d at 1139 (internal quotation marks, citations, and some brackets omitted) (some ellipses points in original) (emphasis added).

In considering whether Cabatu should be sanctioned for filing a frivolous appeal, the majority simply concludes that "Cabatu's actions do not warrant sanctions pursuant to HRAP Rule 38 because the necessary requisite of bad faith is not evident." Summary Disposition Order at 7. In my view, however, Cabatu's actions and inactions demonstrate a pattern of frivolous and vexatious litigation that was apparently designed to forestall the foreclosure and ejectment proceedings.

First, during and subsequent to the foreclosure and ejectment proceedings, Cabatu had initiated and then essentially abandoned four proceedings in other courts, to wit: two TILA actions and two bankruptcy actions. The record indicates that, in both TILA actions, the federal district court entered orders to show cause as to why the TILA actions should not be dismissed. The record also reveals that both bankruptcy actions were

dismissed soon after they were filed by Cabatu. Moreover, when Bank filed a motion for relief from the bankruptcy stay in Cabatu's chapter 7 action, Cabatu did not oppose the Bank's motion and, consequently, the motion was granted by the bankruptcy court.

Second, with the commencement of the instant action, Cabatu continued to engage -- with the assistance of counsel -- in a pattern of frivolous and vexatious litigation. In the instant action, Cabatu sought, inter alia, to quiet title to her property even though she had already lost the property through the non-judicial foreclosure that was instituted because she had defaulted on her mortgage payments. Moreover, Cabatu had already acquiesced in Bank's ejectment action inasmuch as she never opposed Bank's MSJ in writing nor did she attend the hearing on the motion. Cabatu also never appealed the order granting summary judgment and writ of ejectment in favor of Bank in the ejectment action. Inasmuch as Bank had already proven, without objection, that it owned the property at issue in the ejectment action, Cabatu's primary contention in the instant case that title to the property should be vested in her was "manifestly and palpably without merit." See State v. Magoon, 75 Haw. 164, 175, 858 P.2d 712, 718-19 (1993) (noting that, "in order for the [plaintiff] to maintain its ejectment action in the circuit court against the landowners, the [plaintiff] must necessarily prove that it owns the parcels in issue").

Third, during the course of the instant action, Cabatu exhibited a pattern of initiating and then withdrawing several motions. For example, Cabatu withdrew her MPSJ approximately a month after she had filed it with the circuit court. Then, sometime later, Cabatu moved to amend her complaint in order to add the Estate of Warren Mijo (Mijo) as a defendant and to file an additional equity claim against Bank. However, a few weeks later, Cabatu withdrew her motion to amend complaint that had included Mijo as a defendant.

Fourth, Cabatu, with the assistance of counsel, filed the instant appeal, perpetuating the frivolousness of Cabatu's contentions. For example, Cabatu argues on appeal that her "claim for relief relates in part to the pecuniary injury suffered because of payments made to Warren Mijo who advised [her] to discontinue her mortgage payments and collected fees from her for work he did not perform or did inadequately." However, as previously stated, Mijo was never made a party to the instant case. Moreover, Cabatu ultimately concedes that she "does not contend that her payments to Mijo excuses her failure to make mortgage payments to [Bank]."

Finally, the remainder of Cabatu's contentions were clearly foreclosed on res judicata and compulsory counterclaim grounds, as articulated in the majority's disposition. Thus, based on the foregoing, I believe that the arguments that Cabatu advances in this appeal are "manifestly and palpably without

merit" and that Cabatu's actions and inactions throughout the entire course of the proceedings below reveals a pattern of frivolous and vexatious litigation. Accordingly, I would find that Cabatu's appeal is frivolous and grant Bank's request for HRAP Rule 38 sanctions, including reasonable attorneys' fees and costs, against Cabatu in an amount to be determined "after a separately filed motion . . . and reasonable opportunity to respond[.]" HRAP Rule 38.



Steven A. Levinson