FIRST CONSTITUTION BANK v. CALDRELLO

37 Conn. App. 529 (1995) | Cited 1 times | Connecticut Appellate Court | April 11, 1995

The defendants Joseph M. Caldrello andSandra V. Caldrello[1] (hereafter the defendants) appealfrom the judgment of strict foreclosure rendered bythe trial court as to property they owned. They claimthat the trial court (1) improperly denied Joseph M. Caldrello,appearing pro se, the opportunity to argue atthe trial, (2) improperly failed to admit certain bankdocuments into evidence, (3) improperly failed to permitthe defendants' counsel to testify on behalf of thedefendants despite having permitted the plaintiff'scounsel to testify, and (4) allowed the appearance ofan unfair trial. Because we find the third issue dispositive,we need not address the remaining three.

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The following facts are not in dispute. In November,1988, the defendants executed a note and mortgageto First Constitution Bank (the bank).[2] The bank commencedan action to foreclose the mortgage in September,1989, alleging that the note had not been paidaccording to its terms. The defendants filed an answerand counterclaim, in which they denied that the notewas in default and alleged an improper setoff by thebank against certain certificates of deposit owned bythe defendants.

The trial court heard the foreclosure action on September3, 4 and 8, 1992. Appearing in court for thedefendants on September 3 were Philip Mancini, anattorney, Joseph M. Caldrello, appearing pro se, andGregory McCauley, an attorney appearing pro hacvice.[3] The proceedings on that day consisted solely ofpreliminary matters. When the actual trial commencedon September 4, Mancini was not present. It wasagreed that Joseph M. Caldrello and McCauley wouldrepresent the defendants at the subsequent proceedings.

During the trial, the defendants attempted repeatedlyto introduce documents allegedly prepared by thebank, which purportedly showed that the mortgage wascurrent and that the debt owed by the defendants was

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less than the amount claimed by the bank.[4] The bankobjected to each offer on the ground that the documentshad not been produced in discovery. The court, relyingon Practice Book § 232,[5] ruled each time that thedocuments were inadmissible, but offered the defendantsthe opportunity to prove their claim that Mancinihad given the documents to the bank. On this point,the court heard the testimony of Richard Lanthrop, alay witness who stated that he saw Mancini producethe documents. The court also heard Joseph M. Caldrello'stestimony as to when and where various documentswere produced.

When the defendants attemptedto call Mancini, however, the court refused to permithis testimony, noting that he could not be a counsel ofrecord and a witness.[6] In an oral offer of proof,McCauley stated that Mancini would have testified thatall of the documents, with one exception, had beengiven to the bank long before the trial.

Mancini is not automatically barred from testifyingin the case because of his status as a legal advocate forthe defendants. "An attorney is not disqualified or renderedincompetent to testify when he has participatedin the trial of a case, even though testifying as a witnessunder those circumstances may be violative of the

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rules of professional conduct and may subject him todisciplinary action. State v. Blake, 157 Conn. 99, 102,249 A.2d 232 (1968)." Puglio v. Puglio, 18 Conn. App. 606,608, 559 A.2d 1159 (1989). Although an attorneymay be in violation of Rule 3.7 of the Rules of ProfessionalConduct,[7] "[t]his does not disqualify or renderincompetent, as a witness, an attorney who has participatedin a trial, and it is error to refuse to permithim to offer himself as a witness. Lebowitz v. McPike,151 Conn. 566, 570, 201 A.2d 469 ; Miller v.Urban, 123 Conn. 331, 334, 195 A. 193 [1937]; Sengebushv. Edgerton, 120 Conn. 367, 370, 180 A. 694 [1935];Erwin M. Jennings Co. v. DiGenova, 107 Conn. 491,497, 141 A. 866 [1928]." State v. Blake, supra. Furthermore,when Mancini's testimony was offered, it wasarguable whether he was representing the defendantssince it had been previously agreed that McCauley andJoseph M. Caldrello, pro se, would represent thedefendants.

The bank concedes that it was improper for the trialcourt not to permit Mancini to testify.[8] It argues, however,that the error was harmless. We disagree. In rulingon the admissibility of the documents, the trial courtrelied on representations made by the bank's counselthat the documents had not been timely produced byMancini. Although the trial court held a hearing on the

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admissibility of the documents and heard from a laywitness that Mancini produced the documents, it failedto hear from the person whose responsibility it was tocomply with the discovery requests. We cannot say thatthe result would not have been different had Mancini,the attorney who allegedly produced the documents,been permitted to testify.

Because the ruling of the trial court was improperand not harmless, we must reverse the judgment of thetrial court.

The judgment is reversed and the case is remandedfor a new trial.

In this opinion the other judges concurred.

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1. While not involved in this appeal, the following partieswere also defendants in the underlying action: (1) Donald M.Toresco, (2) Tim Broyles, doing business as Concrete Concepts,(3) Bank of New Haven, (4) Connecticut National Bank, (5) AllenElectric, Inc., (6) United Builder's Supply, Inc., (7) PioneerCredit Corporation, (8) Denrich Leasing Corporation, (9) MasterLease Corporation, (10) Bell Atlantic Tricon Leasing,Corporation, (11) K.L.C., Inc., doing business as KeystoneLeasing, (12) Soneco Service, Inc., (13) Bondi & LenziniEnterprises, Inc., (14) Norman Wood General Contractors, Inc.,(15) Fleet Credit Corporation, (16) Day Publishing Company, Inc.,(17) New England Capital Corporation, (18) TransamericaAutomotive Finance Corporation, (19) Laurence J. Patton, (20)Midatlantic Commercial Leasing Corporation, (21) Capital ResourceLeasing, Inc., doing business as Total Leasing, Inc., (22)Automatic Solar Convers, Inc., doing business as Poolsavers, (23)Monsignor Paul J. St. Onge, (24) Victor Cartier, (25) CathyCartier and (26) Carl Sherman.

2. In December, 1992, First Constitution Bank failed and theFederal Deposit Insurance Corporation became its receiver.

3. In November, 1991, the defendants filed a request for leaveto amend their counterclaim, seeking to add lender liabilitycounts arising from the alleged mishandling by the bank of thedefendants' personal accounts. McCauley, a Pennsylvania attorney,was admitted pro hac vice in this matter to represent thedefendants for the purpose of handling the lender liability issueonly. Although the request for leave to amend had been denied onNovember 6, 1991, McCauley was present on September 3 due to apending motion to reargue the defendants' request for leave toamend the counterclaim. Also, as a nonattorney pro se, Joseph M.Caldrello could represent only himself and not Sandra Caldrello.See General Statutes § 51-88.

4. The documents, all admitted for identification purposesonly, were: (1) an escrow analysis dated August 17, 1992, (2) astatement of mortgage account dated December 31, 1990, (3) astatement of mortgage account dated October 24, 1991, and (4) anescrow analysis dated September 11, 1991.

5. Practice Book § 232 provides: "If, subsequent tocompliance with any request or order for discovery and prior toor during trial, a party discovers additional or new material orinformation previously requested and ordered subject to discoveryor inspection or discovers that the prior compliance was totallyor partially incorrect or, though correct when made, is no longertrue and the circumstances are such that a failure to amend thecompliance is in substance a knowing concealment, he shallpromptly notify the other party, or his attorney, and file andserve in accordance with Sec. 120 a supplemental or correctedcompliance."

6. The court did allow counsel for the bank to represent thatMancini had not given her the documents in question.

7. Rule 3.7 of the Rules of Professional Conduct provides inpertinent part that "(a) A lawyer shall not act as advocate at atrial in which the lawyer is likely to be a necessary witnessexcept where: "(1) The testimony relates to an uncontested issue; "(2) The testimony relates to the nature and value of legalservices rendered in the case; or "(3) Disqualification of the lawyer would work substantialhardship on the client. . . ."

8. Both parties argue at some length about the fairness of thetrial court's permitting the bank's counsel to "testify" whilenot permitting the defendants' counsel to do so. The attorney forthe bank did not testify, but rather made certain representationsin response to a question directed to her by the trial