Reversed and Remanded and Opinion filed August 23, 2001.

In The

Fourteenth Court of Appeals

NO. 14-98-01148-CV

BAHRAM AGHILI AND MITRA RAFII, Appellants

V.

JOHN R. BANKS, JR., TANGLEWILDE SOUTH SECTION OWNERS ASSOCIATION, INC., ASSOCIATION MANAGEMENT CORPORATION, AND ELBAR INVESTMENTS, INC., Appellees

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On Appeal from the 269th District Court
Harris County, Texas
Trial Court Cause No. 98-01613

O P I N I O N

Appellants, Bahram Aghili and Mitra Rafii, appeal a summary judgment granted against them in a lawsuit they brought to set aside the non-judicial foreclosure of their homes by their condominium owners' association. Although they bring five issues, we address only one: whether the trial court erred in admitting as evidence the affidavit of the lawyer who conducted the non-judicial foreclosure because he appeared in this case as an attorney for the condominium association, management company, himself, and seemingly at times for the buyer of the homes. Because we hold that the trial court erred in admitting the affidavit, and because there is a fact issue without the affidavit, we reverse and remand

for further proceedings.

BACKGROUND[1]

Bahram Aghili and his sister, Mitra Rafii, owned three condominiums in Tanglewilde South, Section II. Part of the obligations of ownership was payment of monthly maintenance fees to the Tanglewilde South, Section II, Owners' Association (the owners' association). Aghili was responsible for these payments for his condominium and as agent for his sister's two units. However, in 1997, he was suffering because of a kidney transplant and related treatment and fell behind on his payments beginning in August. In November, the purported trustee for the owners' association, John Banks, sent Aghili a letter for each condominium to collect the debt. In December, Banks allegedly mailed notices of sale to Aghili by certified mail. However, the letters were returned. Nonetheless, John Banks proceeded with the sale of the homes on January 6, 1998. He sold the homes to Elbar Investments, Inc. ("the buyer"), with whose principal he was on a first-name basis and to whom he sold five such properties in January alone. Although the market value of the condominiums appeared to be $29,000, $29,000, and $39,000, the buyer paid only $2,000, $2,000, and $4,000 respectively. The unpaid owners' maintenance fees on the properties were a total of $5,604.96.

Aghili learned about the sale via his tenants, who had been instructed by the buyer to stop paying rent to him. On January 9, 1998, just three days after the sale, Aghili's attorney contacted Banks, but Banks denied any irregularities in the sale. After Aghili filed suit on January 15 against the owners' association, Banks, the buyer, and Association Management Corporation ("the management company"), Banks filed an answer that stated he was the attorney for all defendants. He also filed a motion to dismiss, again listing himself as attorney for all defendants. He shortly thereafter filed a motion for summary judgment, which he clearly drafted for all defendants and signed on behalf of the owner's association, the management company, and himself and with permission of the buyer.

[1] This background should not be construed as an appellate ruling on what facts were established or controverted by summary judgment evidence.

Three days before the summary judgment hearing, the buyer made its first independent appearance in the case with its own attorney when it filed its original answer. Banks filed a second affidavit, averring he had inadvertently listed the buyer as one of his clients in the previous pleadings.

The motion for summary judgment essentially stated that the foreclosure sale had occurred in accordance with the law. The central proof for the motion was provided by Banks in the form of his own affidavit. In it, he identified various documents, claimed to be the duly-appointed trustee for the owner's association, asserted that he had sent formal written demands and timely notice of sale to Aghili, and explained the details of the sale. Appellants lodged numerous objections to the affidavit, including that it should be struck from evidence because Banks was disqualified from appearing as both witness and advocate for the parties in the proceeding.

DISQUALIFICATION

One of the objections that Appellants raised repeatedly was the appearance of John Banks, the attorney who conducted the foreclosure sale, as a pro se defendant, as attorney for the homeowner's association, as attorney for the management company, as apparent attorney for the buyer, and as the primary witness for appellees' joint motion for summary judgment. Appellants contend that the policies of our courts and bar do not permit attorneys to be witnesses by affidavit in cases in which they are also counsel.

Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct prohibits an attorney from appearing both as a witness and as counsel:

> (a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:
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> > (1) the testimony relates to an uncontested issue;
> >
> > (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

> (3) the testimony relates to the nature and value of legal services rendered in the case;
>
> (4) the lawyer is a party to the action and is appearing pro se;
>
> (5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

"The rule reflects the concern that an opposing party may be handicapped in challenging the credibility of a testifying attorney." *Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 422 (Tex. 1996). Further , the comments to the rule state that if "the lawyer's testimony concerns a controversial or contested matter, combining the roles of advocate and witness can unfairly prejudice the opposing party." TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 4 (1994).

When an attorney who represents a party is an affiant in support of a motion for summary judgment, he or she is a witness. *See Mauze v. Curry*, 861 S.W.2d 869, 870 (Tex. 1993) (per curiam). Although Banks also represented himself, his testimony does not fall within any of the five exceptions enumerated in Rule 3.08(a) for the remaining defendants in the case for whom he appeared as counsel. Consequently, the trial judge abused his discretion when he allowed Banks to appear as both witness and counsel in this case.

Whether the trial court should have excluded Banks's affidavit because of his improper dual role is an issue of first impression for this court. However, the issue has been indirectly raised in the jurisprudence of this state. In *Anderson Producing*, a litigant asked that an attorney for the opposing party be disqualified or, alternatively, prohibited from testifying. *See Anderson Producing*, 929 S.W.2d at 419 & 420 (reversing because attorney-witness had not appeared as advocate at trial, but noting that appellate court was unclear whether it intended to prohibit attorney from testifying on remand). The dissenters in *Anderson Producing* voiced their support for prohibiting a lawyer who appears as an advocate from testifying in the matter. *Id.* at 425 (Phillips, C.J., & Spector, J., dissenting) & at 427 (Owen, J. & Hecht, J., dissenting).

One of the dissenting opinions reasons that "[a]llowing an attorney to ascend the

witness chair to expound the controlling testimony for the client's case blurs the necessary distinction between advocate and witness on which our adversary system depends." *Id.* at 426. Further, the second dissenting opinion advances that "[w]e should not allow attorneys . . . to sign on as counsel, prepare the entire case for trial, and then present the case. . . through their own testimony." *Id.* at 429. We believe this rationale is also applicable to summary judgment proceedings. In this case, especially, it is appropriate: John Banks began the lien foreclosure; set the sale date; sold Appellants' homes to a buyer to whom he has sold other properties and with whom he is on a first-name basis; denied any defect in the sale to Appellants' counsel just three days after the sale; then appeared as counsel for the homeowners' association, management company, and himself; filed a motion to dismiss as the attorney for all defendants (including the buyer), just twenty-one days after the sale; wrote and filed the summary judgment for all defendants; and appeared as the central witness through his affidavit.

One of the dissents also discusses the broader concern for loss of public confidence in the administration of the justice system when an attorney also testifies for his clients. *Id*. at 430. We agree that the appearance of a testifying advocate tends to cast doubt on the ethics and propriety of our judicial system. "[T]he preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar is paramount . . ." *Warrilow v. Norrell*, 791 S.W.2d 515, 523 (Tex. App.—Corpus Christi 1989, writ denied). Moreover, "[t]he practice of attorneys furnishing from their own lips and on their own oaths the controlling testimony for their client is one not to be condoned by judicial silence. . . . nothing short of actual corruption can more surely discredit the profession." *Id.*

Additionally, other participants in a case are not permitted to blur their roles by appearing as witnesses. Prohibiting an attorney from testifying is akin to the rule that judges are incompetent to testify as witnesses in trials over which they preside. TEX. R. EVID. 605; *see Bradley v. State ex rel. White*, 990 S.W.2d 245, 248 (Tex. 1999) (citing cases that such testimony is an intolerable appearance of partiality, blurs the role of judge,

and amounts to a "spectacle"). Similarly, a juror cannot testify as a witness in a case in which the juror is sitting. TEX. R. EVID. 606(a). Thus, a lawyer who represents clients as an advocate before a court should be incompetent to provide evidence in the matter unless one of the exceptions to Rule 3.08 applies.

Accordingly, we hold that the trial court had the authority to strike Banks's affidavit as incompetent. Given Banks's extensive role in selling Appellants' homes and in appearing as an advocate for the homeowners' association, management company, and at times (arguably) for the buyer, he should not have been permitted to testify by affidavit in the summary judgment proceeding. The trial court abused its discretion in overruling Appellants' objection to the affidavit. Further, because the affidavit was the central evidence in the summary judgment, without it, fact issues exist about Banks's authority to act as trustee, notice about the sale, and whether he conducted the sale according to the strict dictates of the law.

Finally, Appellants filed a motion to disregard comments made by John Banks during oral argument before this court based on the conflict between appearing as an advocate and as a witness. Given our disposition of this appeal, we overrule the motion as moot.

We reverse and remand to the trial court for further proceedings.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed August 23, 2001.
Panel consists of Justices Sears, Draughn, and Andell (Justice Andell not participating).[*]
Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Ross A. Sears and Joe L. Draughn sitting by assignment.