



INTERIOR BOARD OF INDIAN APPEALS

Raymond L. Cermak, Sr. v. Acting Minneapolis Area Director,
Bureau of Indian Affairs

32 IBIA 77 (02/25/1998)

Judicial review of this case:

Summary judgment for defendants, 322 F. Supp. 2d 1009 (D. Minn. 2004),
affirmed, 478 F.3d 953 (8th Cir. 2007)

Related Board case:
28 IBIA 46



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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RAYMOND L. CERMAK, SR.,	:	Order Dismissing Appeal
Appellant	:	
	:	
v.	:	Docket No. IBIA 97-57-A
	:	
ACTING MINNEAPOLIS AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	February 25, 1998

Raymond L. Cermak, Sr. (Appellant) 1/ seeks review of an October 2, 1996, decision issued by the Acting Minneapolis Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning Indian Land Certificates Nos. 64 and 65 (Land Certificates), which were issued to John Cermak in 1944. Appellant sought possession of the lands covered by the Land Certificates. For the reasons discussed below, the Board of Indian Appeals (Board) dismisses this appeal.

On June 6, 1995, the Board issued a decision in Gitchel v. Minneapolis Area Director, 28 IBIA 46, holding that John Cermak held no interest in the lands covered by the Land Certificates that could be inherited. Gitchel was based on the Board's earlier decision in Brewer v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 10 IBIA 110, 89 Interior Dec. 488 (1982). In Gitchel, the Board stated:

[T]he substantive issue in this appeal was resolved finally for the Department in Brewer. The Board clearly held in that case that land assigned by a land certificate like the ones at issue here "were never personally allotted to" the certificate holder, who was therefore "not * * * the beneficial owner of an interest in allotted Indian trust lands." 10 IBIA at 119, 89 I.D. at 492. Further, as discussed in Brewer, there is simply no question as to the intent of Congress in 1980 to convey the beneficial title to these lands to the [Shakopee Mdewankanton Sioux] Community.
2/

28 IBIA at 48.

By letter dated June 27, 1996, Appellant, purportedly writing on behalf of the "Cermak family," asked the Area Director to reopen the matter. In

1/ Appellant's Reply Brief states that it was filed on behalf of Appellant and Stanley Cermak. The Notice of Appeal and statement that no opening brief would be filed indicated that they were filed only on behalf of Appellant. The Board concludes that Stanley Cermak is not an appellant in this matter.

2/ See Act of Dec. 19, 1980, 94 Stat. 3262.

his October 2, 1996, decision, the Area Director declined to do so, relying in part on the Board's decision in Gitchel.

Appellant states that he is the grandson of John Cermak and that he seeks to obtain the lands covered by the Land Certificates. In Gitchel, the Board found that John Cermak had executed a will which devised to his son Edward "the interest that I may have in the real property granted to me by Indian Land Certificates number 64 and number 65." 28 IBIA at 47, n.1. The Board further found that Edward died on May 21, 1992. 28 IBIA at 47. Appellant does not dispute the accuracy of these statements. He also does not attempt to show that he was named as the devisee to the lands covered by the Land Certificates in a will executed by Edward, that he is Edward's intestate heir, or that he would otherwise be entitled to take this land, if it were devisable and/or inheritable. Thus, Appellant has failed to show that he has even an arguable legal claim to the lands covered by the Land Certificates, and has therefore failed to show standing to bring this appeal. Cf. Candelaria v. Sacramento Area Director, 27 IBIA 137, 142 (1995) (when a tribal member seeks BIA approval of a lease of tribal land allegedly assigned to him/her, that member must begin by showing that he/she is in fact the legally recognized assignee).

However, assuming arguendo that he could show standing, Appellant still could not prevail. Appellant is actually seeking reversal of Gitchel, on which the Area Director relied in reaching his October 2, 1996, decision, and of Brewer, on which the Board based its decision in Gitchel. Based on this fact, the Area Director and the Community argue that this appeal is barred by res judicata and/or collateral estoppel.

"Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action" (emphasis added). Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979). See also Montana v. United States, 440 U.S. 147, 153 (1979); Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 578-79 (1974); Commissioner v. Sunnen, 333 U.S. 591, 597 (1948).

Appellant does not dispute that Gitchel involved a judgment on the merits of the claim that the Land Certificates conveyed an inheritable interest in the lands they covered. Nor does he dispute that he raises the same claim here. However, Appellant contends that his claim is not barred because he did not personally participate in Gitchel. Appellant asserts that the appellants in Gitchel "were the three illegitimate children of the now-deceased Edward Cermak. Such children have quite limited rights to take property from their putative father. There was no reason for * * * [Appellant] to become involved in such litigation." Reply Brief at 12.

The Board agrees that Appellant was not a party in Gitchel. However, this does not end the analysis because res judicata also bars a second suit by a person who was in privity with the prior litigants.

Appellant addresses the question of privity only in footnote 1 of his Reply Brief. Noting that the Community did not cite any Minnesota cases in support of its collateral estoppel argument, he asserts that Minnesota law

"obligates identity of litigants, either the same persons serving as litigants or their direct privities." Reply Brief at 11. Interestingly, Appellant also fails to cite any Minnesota case in support of his argument, and fails to discuss the meaning of "direct privities."

The Board is not aware of any prior case in which it has considered the question of privity for res judicata purposes. From its reading of cases discussing "privy" and "privity" in the context of res judicata and collateral estoppel, the Board concludes that there is no universally applicable definition of these terms. However, it is generally accepted that persons are in privy or in privity if the interests they are attempting to adjudicate are so closely related that the second person can be said to have had his/her day in court through the first litigation. See, e.g., In re Medomak Canning, 922 F.2d 895, 901 (1st Cir. 1990) ("identity of interests is equivalent to privity"); MCA Records, Inc. v. Charly Records, Ltd., 865 F. Supp. 649, 654 (C.D. Calif. 1994); Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 809 F. Supp. 1259, 1266-69 (E.D. Mich. 1992); Satsky v. Paramount Communications, Inc., 778 F. Supp. 505, 509-10 (D. Colo. 1991); Aloha Unlimited, Inc. v. Coughlin, 904 P.2d 541, 551 (Haw. Ct. App. 1995); Steinhoff v. Churchill Truck Lines, Inc., 875 S.W.2d 175, 177 (Mo. Ct. App. 1994); Sun Valley Land and Minerals, Inc. v. Burt, 853 P.2d 607, 614 (Idaho Ct. App. 1993); State Farm Fire and Casualty Co. v. Reuter, 700 P.2d 236, 240 (Or. 1985).

Minnesota law appears to be in accord. See, e.g., Sondel v. Northwest Airlines, Inc., 56 F.3d 934, 938 (8th Cir. 1995):

In Minnesota, "there is no generally prevailing definition of privity which can be automatically applied to all cases." McMenomy v. Ryden, 276 Minn. 44, 148 N.W.2d 804, 807 (1967) (internal quotations and citations omitted). In general, "privity involves a person so identified in interest with another that he represents the same legal right." Id. (internal quotation and citation omitted). Privity also "expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties." Margo-Kraft Distrib., Inc. v. Minneapolis Gas Co., 294 Minn. 274, 200 N.W.2d 45, 47 (1972) (internal quotation and citation omitted). Whether privity exists must be determined by the facts of each case. Johnson v. Hunter, 447 N.W.2d 871, 874 (Minn. 1989). "Privity depends upon the relation of the parties to the subject matter." Porta-Mix Concrete v. First Ins., 512 N.W.2d 119, 122 (Minn. App. 1994) (internal quotations and citation omitted).

There are three generally recognized categories of nonparties who will be bound by a prior adjudication: * * * (2) a nonparty whose interests are represented by a party to the original action * * *. Margo-Kraft, 200 N.W.2d at 48.

See also Nelson v. Butler, 929 F. Supp. 1252, 1258 (D. Minn. 1996).

The Board concludes that Appellant's interests--i.e., his claim that the Land Certificates conveyed an inheritable interest in the lands which they covered--were fully represented by the appellants in Gitchel. Therefore, it concludes that Appellant is in privity with those appellants and that this appeal is barred by res judicata.

Even if the Board had reached the merits of Appellant's arguments, those arguments were either addressed in Gitchel, or are not sufficient to cause the Board to reconsider that decision.

Furthermore, most of Appellant's arguments were raised for the first time in his Reply Brief. The Board has frequently held that it is not required to consider arguments set out for the first time in a reply brief. See Elliott v. Sacramento Area Director, 31 IBIA 287, 291 (1997); Winlock Veneer Co. v. Juneau Area Director, 28 IBIA 149, 157, recon. denied, 28 IBIA 220 (1995), and cases cited therein.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal from the Minneapolis Area Director's October 2, 1996, decision is dismissed for lack of standing and/or on grounds of res judicata.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge