



INTERIOR BOARD OF INDIAN APPEALS

Estate of Neola Agnes Gardner Lion Shows

2 IBIA 16 (04/26/1973)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

ESTATE OF NEOLA AGNES GARDNER LION SHOWS

IBIA 72-22

Decided April 26, 1973

Appeal from Judge's denial of appellant's petition for rehearing.

Affirmed.

Indian Probate: Administrative Procedure: Applicability to Indian Probate

Judge must conform to the requirements of the Administrative Procedure Act, 5 U.S.C. § 554 (1970) and give adequate notice and afford interested party opportunity to be heard.

Indian Probate: Claims Against Estate: Proof of Claim

When an objection is made to, and evidence is submitted challenging the validity of, a creditor's claim, the creditor must be present at the hearing and the burden is on the creditor to prove his claim.

Indian Probate: Rehearing: Generally

A petition for rehearing, based upon evidence which fails effectively to controvert the basis of the initial decision in the matter, will be disallowed.

APPEARANCES: Bert W. Kronmiller, Esquire, for Appellant.

OPINION BY MR. SABAGH

This matter comes before the Board on appeal from the Administrative Law Judge's denial of appellant's petition for rehearing of his claim against the estate of the decedent.

Neola Agnes Gardner Lion Shows died intestate on April 29, 1971, at the age of 56 years. Appellant filed a creditor's claim on May 28, 1971, in the amount of \$3,866.65 accompanied by a promissory note and a statement of account. The proof of claim, among other things, states that:

George T. Cooley doing business at the town or city of Lodge Grass, Montana, as George's Food Mart * * * has charge of the books and accounts of the said claimant and knows the attached itemized statement of account is a true and correct statement of the account of the claimant for merchandise or services sold or rendered to the decedent and shows all charges and credits and

the dates, thereof: that the prices charged were the fair and reasonable prices therefore at that time; that after allowing all credits and set-offs, there is still due and owing to the claimant a balance of \$3,866.65, now past due and owing from the decedent to the claimant.

No itemized statement of account of the claimant for merchandise or services sold or rendered to the decedent was included with the claim.

The promissory note in the sum of \$2,775.10 and payable to George T. Cooley with interest at 8 percent per annum was co-signed by the decedent and her husband, James Lion Shows. The statement of account includes the principal amount of the note, \$2,775.10, with interest to May 26, 1971, of \$1,091.55, aggregate amount of \$3,866.65.

Notice of Hearing to Determine Heirs or Probate Will and Notice to Creditors was mailed to all interested parties on October 15, 1971, and Notice was posted at the Post Office, Lodge Grass, Montana, on the same date.

Appellant failed to appear at the hearing. The hearing was held pursuant to the notice on November 9, 1971, at which time objection was made to appellant's claim and testimony taken in substantiation

of the objection. The defense against the claim raised at the hearing was that security had been given and had been foreclosed without proper credit; that the note was paid. The Judge issued a decision and order dated January 12, 1972, wherein he denied appellant's claim based on the promissory note. On March 8, 1972, appellant petitioned for rehearing for the following reasons:

1. The claim was for groceries, meat, and other food and supplies furnished by the petitioner and not for money loaned in exchange for certain artifacts pawned with petitioner as testified to at the hearing.

2. The artifacts were pawned with the petitioner for more than three years and had no exceptional value as manifested at the hearing.

3. Testimony at the hearing failed to allude to the true nature of the claim, i.e., for groceries and supplies furnished the decedent.

The Judge issued an order on March 22, 1972, disallowing the petition for rehearing, wherein he found that:

* * * the petitioner failed to sustain the burden of proving his claim and that no valid reason for the failure to appear at the hearing has been presented.

The appellant filed an appeal on May 18, 1972. Several grounds were offered in support thereof, which are substantially as follows:

1. Creditor claim was presented and properly filed which was denied for the failure of the appellant to personally appear and defend same at the original hearing.

2. Evidence exists in the form of oral testimony and written documents to verify the claim.
3. Failure to appear was due to appellant's unawareness of any objections to his claim.
4. Appellant's business necessitated his continuous presence during working hours.
5. He was never required to be present to present similar such claims in 20 years as a business man.
6. Hearing Examiner by his order denying the petition for rehearing has denied him an opportunity of presenting new facts, evidence and information in the form of oral testimony relative to the claim.

Let us now turn to the question of whether the Judge erred in disallowing appellant's petition for rehearing.

Pursuant to long established principles of law, the Judge after proper notice was required to afford a party in interest an opportunity to be heard. 5 U.S.C. § 554 (1970).

The appellant was properly notified that his claim would be considered at a hearing to be held on November 9, 1971, at 2 p.m., and the Notice admonished him to be present in these words:

All persons having an interest in the estate of the above-named decedent, and all creditors having claims against said estate, are hereby notified to be present at the hearing and furnish such evidence as they desire. (Emphasis supplied.)

A rehearing will be granted where the original hearing did not conform with the standards of a full opportunity to be heard embodied in the Administrative Procedures Act, but not otherwise. Estate of Little Toby (Tobin), A-24519 (February 14, 1947).

Appellant states in his appeal that he was not present at the initial hearing because he was not aware of any objections to his claim against the decedent's estate; that his business necessitated his continuous presence; and that in 20 years as a business man filing similar such claims he had never been required to be present to present a creditor's claim.

It may be said that the submission of the Proof of Claim establishes a prima facie right to recover which, in the absence of objections, would afford a basis for allowance of the claim. However, claimant had the burden of proof as to the claim and the person objecting thereto need only rebut the prima facie case made, not disprove the case entirely. Controller v. Lockwood, 193 F.2d 169 (9th Cir. 1951); In re A & G Knitting Mills, 144 F.2d 125 (3d. Cir. 1944); In re George R. Burrows, Inc., 156 F. 2d 640 (2d. Cir. 1946); In re Varney, 22 F.2d 230 (6th Cir. 1927).

Where an interested party rebuts the prima facie case made by the claimant, the Department has consistently held that:

* * * [A] duly filed proof of claim against the estate of a deceased Indian may establish a prima facie right to recovery in the claimant, but where the evidence thereafter submitted to the Examiner in regard to the claim directly challenges the claim's validity, claimant must then go forward with evidence to discharge his burden of proving the claim and unless such burden is sustained the claim cannot be allowed. (Emphasis supplied.) Estate of Louise Sanderville Berrychild Croft, IA-1288, May 16, 1966.

The appellant maintains in his appeal that the order denying his petition for rehearing was erroneously issued though the petition alleged that new facts, evidence and information in the form of oral testimony and written documents would be presented. The nature of the written documents or the oral testimony was not disclosed. However, the original petition for rehearing referred to "original tickets or invoices in the possession of your Petitioner * * *."

New evidence is evidence that was not available to the appellant at the time of the hearing (November 9, 1971) and subsequent thereto became available. Obviously this is not the case here. The evidence and information that he now wishes to submit were peculiarly within the knowledge of the appellant at the time of the hearing and could have been presented had he been present at the hearing. It is not new.

We cannot agree with the appellant and conclude that the Judge did not err in denying the petition for rehearing.

To recapitulate, the appellant was properly notified and afforded an opportunity to be heard. He chose not to. Objection was made and evidence was submitted concerning the validity of appellant's claim. The appellant was not present to defend his claim. In other words, the appellant sat on his rights. He sat silent and took the chance of a favorable decision on the record made. He should not now be permitted to reopen the case for the introduction of evidence long available and susceptible of production at the original hearing.

We find no merit to any of the contentions raised against the decision and order of the Judge denying the petition for rehearing.

NOW THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is DISMISSED, and the order of January 12, 1972, denying the claim of George T. Cooley stands unchanged. This decision is final for the Department.

//original signed
Mitchell J. Sabagh, Member

I concur:

//original signed
David J. McKee, Chairman