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CPLR 2103(b): Extension of Time for Service by Mail Does Not Apply to Administrative Proceedings

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nicipality's tort liability was addressed in *O'Connor v. City of New York*. In refusing to hold the City liable for the negligent inspection of a building, the *O'Connor* Court adhered to the well-established New York rule that absent a special relationship creating a duty owed to the plaintiff, the City remains immune from liability. In *Goncalves v. Regent International Hotels, Ltd.*, the Court analyzed section 200 of the General Business Law, and concluded that the determination of whether a hotel's security system satisfies the statutory criteria is a question of fact.

In *Fiedelman v. New York State Department of Health*, the Court of Appeals held that CPLR 2103, which extends the time of service when made by mail, does not apply to administrative proceedings, since such proceedings are not considered pending actions within the purview of the statute. Also discussed in the *Survey* is the Court's decision in *In re Estate of Riefberg*, in which a stock buy-sell agreement was held to fall within the statutory definition of a testamentary substitute under section 5-1.1(b) of the EPTL.

Finally, in *People v. McCray*, the Court upheld the constitutionality of the unrestricted use of peremptory challenges, finding that the sixth amendment is satisfied when the venire itself consists of a representative cross section of jurors in a jurisdiction.

It is hoped that the cases presented in *The Survey* will contribute to our readers' understanding of these developments.

CIVIL PRACTICE LAW AND RULES

Article 21—Papers

CPLR 2103(b): Extension of time for service by mail does not apply to administrative proceedings

Section 2103 of the CPLR permits the period during which legal papers must be served to be extended by 5 days if such service is accomplished by mail.[1] Prior to the enactment of the CPLR,

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[1] CPLR 2103(b)(2) (1976 & Supp. 1982-1983). Section 2103(b)(2) provides that papers shall be served upon a party's attorney when an "action" is "pending." *Id.*; *see infra* note 3. Service may be accomplished (1) by personal delivery; (2) by mail to a designated address or to a last known address; (3) by service at the attorney's office; or (4) where service at an office is impossible, at the attorney's residence. CPLR 2103(b) (1976 & Supp. 1982-1983). Any of these methods, except service at an office, may be used instead to serve papers upon the party himself if the party "has not appeared by an attorney or his attorney cannot be served." CPLR 2103(c) (1976). These provisions should be distinguished from those con-

parties to administrative proceedings were able to avail themselves of this time extension.[2] However, many lower courts have held that the applicable CPLR provision applies only to parties involved in ongoing litigation.[3] Therefore, it has become unclear whether the

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cerning the service of summons or subpoena which are governed by rules described elsewhere in the CPLR. 2A WK&M ¶ 2103.02, at 21-28; *see* CPLR 307-316 (1972 & Supp. 1982-1983) (summons); CPLR 2303 (McKinney Supp. 1982-1983) (subpoena). The CPLR provision regarding service by mail states in part that, "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period." CPLR 2103(b)(2) (McKinney Supp. 1982-1983). This section was amended recently to lengthen the extension from 3 to 5 days as of January 1, 1983, ch. 20, § 1, [1982] N.Y. Laws 31 (McKinney), in recognition of the ordinary time necessary for delivery, CPLR 2103(b), commentary at 81 (McKinney Supp. 1982-1983); *see* 2A WK&M ¶ 2103.06, at 21-37 n.28 (90% of papers mailed arrive within 3 days but 99% arrive within 5). This extension provision applies to "both the situation in which there must be a minimum period of notice before an act is to be done and to the situation in which an act is to be done within a maximum period after service." SECOND REP. 178. Section 2103 of the CPLR is the product of the combination of CPA sections 163 and 164. *See* SECOND REP. 177. Section 163 provided for service of papers "in an action" upon the party's attorney and section 164 described the rules for service by post:

> Where it is prescribed by statute or in the general rules of practice that a notice must be given or a paper must be served, within a specified time before an act is to be done; or that the adverse party has a specified time after notice or service within which to do an act; if service is made through the post-office, pursuant to statute or rule, three days shall be added to the time specified . . . .

Ch. 925, § 164, [1920] N.Y. Laws 75. According to the report of the CPA revisors, no substantive change between section 164 of the CPA and CPLR 2103(b)(2) was intended. SECOND REP. 178.

[2] *See* Weingarten v. Cohen, 275 App. Div. 253, 254, 89 N.Y.S.2d 356, 357 (1st Dep't), *aff'd*, 300 N.Y. 528, 89 N.E.2d 251 (1949). In *Weingarten*, although the provision of the Workmen's Compensation Law setting a 6-month limitation on suits by the worker against a third party did not specify that the period began upon notice of the award, the court liberally construed the statute to the advantage of the worker and added the 3 days provided for under Section 164 of the CPA. 275 App. Div. at 254, 89 N.Y.S.2d at 357. The injured party's action was thus timely, although the papers served by mail, from which his period of limitations was measured, were not served in connection with a judicial action. *Id.*; *see* R.E. Assocs. v. McGoldrick, 278 App. Div. 347, 348, 105 N.Y.S.2d 152, 153 (1st Dep't 1951) (State Residential Rent Law requiring CPA article 78 proceeding to be brought within 30 days of order of State Rent Administrator); Doch v. O'Connell, 201 Misc. 80, 82, 107 N.Y.S.2d 348, 350 (Sup. Ct. Bronx County 1951) (institution of article 78 proceeding to review determination by the State Liquor Authority).

[3] *See, e.g.*, Biondo v. New York State Bd. of Parole, 90 App. Div. 2d 943, 944, 457 N.Y.S.2d 946, 947 (3d Dep't 1982), *rev'd on other grounds*, 60 N.Y.2d 832, 458 N.E.2d 371, 470 N.Y.S.2d 130 (1983). The Second Department, in Monarch Ins. Co. v. Pollack, 32 App. Div. 2d 819, 302 N.Y.S.2d 432 (2d Dep't 1969), held that section 2103(b) applied only to the "service of *intermediary* papers once an action or proceeding has been commenced." *Id.* at 819, 302 N.Y.S.2d at 434-35 (emphasis in original). Therefore, the court rejected the argument that 3 days should be added to the petitioner's time to serve notice of an intention to stay arbitration. *Id.*, 302 N.Y.S.2d at 434. Although Special Term had granted the petitioner the benefit of the extension, the Appellate Division held that since this was the petitioner's first application to the court, no judicial proceeding had been commenced. *Id.*, 302 N.Y.S.2d

pre-CPLR rule pertaining to administrative proceedings continues to apply.[4] Recently, in *Fiedelman v. New York State Department of Health*,[5] the Court of Appeals held that section 2103 of the CPLR does not apply to administrative proceedings and, thus does not extend the time within which a party may commence an article 78 proceeding.[6]

In *Fiedelman*, the petitioner, a physician, was charged with dispensing controlled medications without a proper prescription.[7] Following an administrative hearing, the Commissioner of Health fined the petitioner and suspended his right to issue prescriptions.[8] On April 3, 1981, the commissioner's order was sent by certified mail to the petitioner and his attorney[9] in accordance with Public Health Law section 3393(7).[10] Judicial review of the order was available pursuant to article 78 of the CPLR, provided that an ap-

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at 434-35. The Third Department also has applied the *Monarch* rule to the institution of an article 78 proceeding for review of an order of the Department of Transportation. Express Limousine Serv., Inc. v. Hennessy, 72 App. Div. 2d 864, 865, 421 N.Y.S.2d 722, 723 (3d Dep't 1979). Similarly, the First Department affirmed a supreme court ruling that the extension was not to be applied to the 10-day notice mailed by a landlord in a holdover summary proceeding. Trustees of Columbia Univ. v. Bruncati, 77 Misc. 2d 547, 549, 356 N.Y.S.2d 158, 160 (Sup. Ct. App. T. 1st Dep't), *aff'd*, 46 App. Div. 2d 743, 360 N.Y.S.2d 1002 (1st Dep't 1974). The supreme court in *Bruncati* held that the 3-day extension was available only "to service of intermediary papers . . . once a legal action has been duly commenced by service of process." 77 Misc. 2d at 548-49, 356 N.Y.S.2d at 159.

[4] *See, e.g., In re* Moses, 31 App. Div. 2d 772, 772, 296 N.Y.S.2d 274, 275 (3d Dep't 1969) (CPLR 2103 held inapplicable where petitioner sought time extension in appeal to the Unemployment Insurance Appeal Board). The extension also has been sought, with varying degrees of success, by parties involved in arbitration. *Compare In re* Manitt Constr. Corp., 50 Misc. 2d 502, 508, 270 N.Y.S.2d 716, 722 (Sup. Ct. Queens County 1966) (10-day limitation of CPLR 7503(c) held satisfied where motion to stay arbitration was made 13 days after mailing of notice of intention to arbitrate) *with In re* Beverly Cocktail Lounge, 45 Misc. 2d 376, 378, 379, 256 N.Y.S.2d 812, 814-15 (Sup. Ct. Kings County 1965) (CPLR 2103 held inapplicable and motion to stay arbitration held untimely) *and In re* Finest Restaurant Corp., 52 Misc. 2d 87, 88, 275 N.Y.S.2d 1, 3 (Sup. Ct. N.Y. County 1966) (CPLR 2103 held not available to a party mailing a notice of intention to arbitrate).

[5] 58 N.Y.2d 80, 445 N.E.2d 1099, 459 N.Y.S.2d 420 (1983).

[6] *Id.* at 81, 445 N.E.2d at 1099, 459 N.Y.S.2d at 420.

[7] 88 App. Div. 2d 561, 562, 451 N.Y.S.2d 386, 387 (1st Dep't 1982) (Fein, J., dissenting), *rev'd*, 58 N.Y.2d 80, 445 N.E.2d 1099, 459 N.Y.S.2d 420 (1983).

[8] 88 App. Div. 2d at 562, 451 N.Y.S.2d at 387 (Fein, J., dissenting).

[9] 58 N.Y.2d at 81, 445 N.E.2d at 1099, 459 N.Y.S.2d at 420. The commissioner's order was dated March 26, 1981, but was not mailed until April 3, 1981. 88 App. Div. 2d at 562, 451 N.Y.S.2d at 387 (Fein, J., dissenting). The date of receipt by the petitioner was not an issue in the decision. *Id.* at 565, 451 N.Y.S.2d at 390 (Fein, J., dissenting).

[10] N.Y. PUB. HEALTH LAW § 3393(7) (McKinney 1977). Service of an order made pursuant to article 33 of the Public Health Law, governing controlled substances, may be accomplished "in person, by registered mail or by certified mail upon either the party or an attorney who has appeared on his behalf." *Id.*

plication was filed within 60 days of service.[11] Petitioner sought to invoke this right by serving respondents with an order to show cause on June 4, 1981, 62 days after the mailing of the commissioner's order.[12]

Special Term held that CPLR 2103 did not apply to the mailing of the commissioner's decision and dismissed the proceeding as untimely.[13] The Appellate Division, First Department, reversed,[14] holding that the interpretation restricting the statute to judicial actions was inconsistent with precedent.[15] The Appellate Division thus allowed the petitioner to avail himself of the 3-day extension and reinstated the petition.[16]

The Court of Appeals reversed and dismissed the petition.[17] In a per curiam opinion, the Court held that CPLR 2103 is to be applied more restrictively than sections 163 and 164 of the CPA.[18] The Court rejected the petitioner's argument that an administra-

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[11] 58 N.Y.2d at 81, 445 N.E.2d at 1099, 459 N.Y.S.2d at 420. Judicial review pursuant to article 78 is granted in subdivision 1 of section 3394 of the Public Health Law. *See* N.Y. PUB. HEALTH LAW § 3394(1) (McKinney 1977). An application for review may be made by "the person whose license, certificate, right or privilege is affected" by the administrative proceeding, or by the attorney for such person. *Id.* § 3394(2).

[12] 58 N.Y.2d at 81, 445 N.E.2d at 1099-1100, 459 N.Y.S.2d at 420-21.

[13] *Id.* at 82, 445 N.E.2d at 1100, 459 N.Y.S.2d at 421.

[14] 88 App. Div. 2d at 561, 451 N.Y.S.2d at 386. Presiding Justice Murphy and Justices Kupferman and Lynch concurred in the opinion authored by Justice Klein. Justices Fein and Markewich dissented.

[15] 88 App. Div. 2d at 561-62, 451 N.Y.S.2d at 386-87. The court cited Weingarten v. Cohen, 275 App. Div. 253, 254, 89 N.Y.S.2d 356, 356-57 (1st Dep't), *aff'd*, 300 N.Y. 528, 89 N.E.2d 251 (1949), as controlling authority on the issue. 88 App. Div. 2d at 561, 451 N.Y.S.2d at 386. In *Weingarten*, the 6-month limitation on suits brought after notice of an award under the Workmen's Compensation Law was extended 3 days pursuant to section 164 of the CPA. 300 N.Y. at 529, 89 N.E.2d at 251.

[16] 88 App. Div. 2d at 561, 451 N.Y.S.2d at 386. A vigorous dissent urged that judicial interpretations of CPLR 2103's predecessor provisions should be discounted when applying the current statute. *Id.* at 563, 451 N.Y.S.2d at 388 (Fein, J., dissenting). The dissent noted that the phrase "pending action" in the current provision "has *no* identical source in the predecessor statute or rules." *Id.*, 451 N.Y.S.2d at 388-89 (Fein, J., dissenting) (emphasis in original). Noting that CPLR 2103 should be construed literally and not by reference to general statutes for analogy, Justice Fein concluded that the difference in the statutory language precluded reliance upon interpretations under the prior act. *Id.*, 451 N.Y.S.2d at 388 (Fein, J., dissenting). Thus, reasoned the dissent, since the papers were served in an action that was not technically "pending," the time extension provision was not available. *Id.* at 562, 451 N.Y.S.2d at 388 (Fein, J., dissenting). The majority, however, concluded that this statutory language change amounted to "a difference without a distinction." *Id.* at 561, 451 N.Y.S.2d at 387.

[17] 58 N.Y.2d at 83, 445 N.E.2d at 1100, 459 N.Y.S.2d at 421.

[18] *Id.* at 82, 445 N.E.2d at 1100, 459 N.Y.S.2d at 421.

tive proceeding falls within the definition of an "action."[19] The article 78 proceeding, the Court added, was not "pending" prior to the successful service of the order to show cause.[20] The Court concluded that the petitioner could not avail himself of the extension provision in order to satisfy the time limitation under Section 3394(2) of the Public Health Law.[21]

The rules of civil practice and procedure have been held applicable to administrative proceedings where they did not interfere adversely with expeditious decisionmaking.[22] Thus, the Court's construction of the term "action" under the CPA did not restrict application of the statute to judicial actions when a liberal construction would benefit the petitioner seeking to commence an action or special proceeding in court.[23] It is submitted that a similar

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[19] *Id.*

[20] *Id.*; *see* CPLR 7804(c) (1981 & Supp. 1982-1983) (article 78 proceeding commenced by notice of petition or order to show cause).

[21] 58 N.Y.2d at 83, 445 N.E.2d at 1100, 459 N.Y.S.2d at 421. The Court did not decide whether service of the Commissioner's order was complete upon posting or upon receipt since the issue was not raised. *Id.* Generally, however, it is agreed that service, for the purpose of measuring time, is complete upon mailing. *See, e.g.*, 14 Second Ave. Realty Corp. v. Szalay, 16 App. Div. 2d 919, 919, 229 N.Y.S.2d 722, 723 (1st Dep't 1962); Ralston v. Blum, 105 Misc. 2d 357, 361, 432 N.Y.S.2d 46, 49 (Sup. Ct. Tompkins County 1980); 2A WK&M ¶ 2103.06, at 21-40.

[22] *See* Evans v. Monaghan, 306 N.Y. 312, 323-24, 118 N.E.2d 452, 457-58 (1954). Generally, courtroom principles are not applicable to administrative hearings. *See, e.g.*, Benjamin v. State Liquor Auth., 13 N.Y.2d 227, 231, 195 N.E.2d 889, 891, 246 N.Y.S.2d 209, 211 (1963). *Evans* involved a proceeding brought under CPA article 78 to review a police commissioner's dismissal of department personnel. 306 N.Y. at 313, 118 N.E.2d at 453. The Court stated:

> The analogy which exists to a greater or less degree, depending upon the circumstances of the case, between administrative law and court procedure, calls for drawing parallels wherever possible without defeating the essential objects of the administrative law . . . . This tends to assimilate the practice and procedure of administrative bodies to that of the courts.

Id. at 326, 118 N.E.2d at 459. Thus, the *Evans* Court applied the law concerning newly discovered evidence to the administrative determination. *Id.* Similarly, in Bianca v. Frank, 43 N.Y.2d 168, 371 N.E.2d 791, 401 N.Y.S.2d 29 (1977), the Court held that police officers' counsel, rather than the officers themselves, must be served with the administrative determination before the time limitation on institution of a CPLR article 78 proceeding begins, despite the fact that the applicable administrative code provided only for service of the papers upon the officer. *Id.* at 173, 371 N.E.2d at 793-94, 401 N.Y.S.2d at 31. The *Bianca* Court reasoned that "in an action or proceeding, whether administrative or judicial," the "traditional and accepted practice" mandates service upon the party's chosen counsel. *Id.*, 371 N.E.2d at 794, 401 N.Y.S.2d at 31. The Court analogized this situation to the practice required by CPLR 2103(b). *See id.*

[23] *See* Soffer v. MacDuff, 205 Misc. 972, 130 N.Y.S.2d 217 (Sup. Ct. Queens County 1954). In *Soffer*, the Commissioner of Motor Vehicles served by mail an order notifying a motorist that his license had been suspended. The court held that extension was available

construction of the word "action" should have been applied in the present case.[24]

The Court refused to accord precedential value to the interpretations of the predecessor CPA statutes in interpreting CPLR 2103 due to the addition of the word "pending," which forms the phrase "in a pending action."[25] It is submitted that this reasoning deviates from the traditional rule of construction that a minor language change accompanying a complete revision of a code is not deemed a substantive alteration absent a clear manifestation of legislative intent to effect such a change.[26] The revisors of the CPA did not indicate an intention to accord substantive significance to the addition of the word "pending."[27] It is therefore submitted

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under Section 164 of the CPA to the motorist who sought administrative review of the suspension. *Id.* at 973-74, 130 N.Y.S.2d at 218.

[24] The *Fiedelman* Court's ruling that an administrative proceeding is not an "action" is technically correct. The *Fiedelman* decision follows the holding of Luoma v. Spearin, Preston & Burrows, Inc., 282 App. Div. 612, 126 N.Y.S.2d 543 (3d Dep't 1953), *aff'd*, 307 N.Y. 728, 121 N.E.2d 544 (1954), which stated that "[a] proceeding under the Workmen's Compensation Law is not an action or special proceeding under the Civil Practice Act but a statutory proceeding having its own rules as to limitations." *Id.* at 614-15, 126 N.Y.S.2d at 546; *see also In re* Callahan, 262 App. Div. 398, 399, 28 N.Y.S.2d 980, 982 (3d Dep't 1941) ("action" is not synonymous with "proceeding"). An action has been defined as "an *ordinary* prosecution in a court of justice by a party against another party for the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense." Abraham, *A Unitary Approach to Special Proceedings: The New York Proposals*, 9 BUFFALO L. REV. 471, 478 (1960) (emphasis in original). A special proceeding has been defined as "a form of civil judicial proceeding which must be based on specific statutory authorization." Town of Johnstown v. City of Gloversville, 36 App. Div. 2d 143, 144-45, 319 N.Y.S.2d 123, 124 (3d Dep't 1971), *rev'd on other grounds*, 32 N.Y.2d 1, 295 N.E.2d 644, 342 N.Y.S.2d 841 (1973); *see In re* Chariot Textiles Corp., 21 App. Div. 2d 762, 763, 250 N.Y.S.2d 493, 494 (1st Dep't 1964), *rev'd on other grounds*, 18 N.Y.2d 793, 221 N.E.2d 913, 275 N.Y.S.2d 382 (1966). Since administrative proceedings are neither judicial proceedings nor special proceedings pursuant to CPLR 105(b), the *Fiedelman* Court's ruling that an administrative proceeding is not an action comports with the technical distinctions between these terms.

[25] 58 N.Y.2d at 82, 445 N.E.2d at 1100, 459 N.Y.S.2d at 421.

[26] In Schneider v. Schneider, 17 N.Y.2d 123, 216 N.E.2d 318, 269 N.Y.S.2d 107 (1966), the Court of Appeals stated that "where the Legislature votes a general revision of a code with hundreds of changes we will not interpret a minor change in language to indicate a meaning unless legislative purpose so to change the meaning is clear." *Id.* at 127, 216 N.E.2d at 320, 269 N.Y.S.2d at 110 (citing Henavie v. New York Cent. & H.R. R.R., 154 N.Y. 278, 281, 48 N.E. 525, 526 (1897); Lynk v. Weaver, 128 N.Y. 171, 177, 28 N.E. 508, 509 (1891)); *see* Evans v. Gardner, 71 Misc. 2d 283, 285-86, 336 N.Y.S.2d 28, 32 (Sup. Ct. Onondaga County 1972); CPLR 104, commentary at 36 (1972).

[27] *See* SECOND REP. 178; *supra* note 1. Many lower courts, however, have interpreted the language change in CPLR 2103 as a substantive one. *See, e.g.*, Carassavas v. New York State Dep't of Social Servs., 90 App. Div. 2d 630, 630, 456 N.Y.S.2d 217, 218 (3d Dep't 1982); Jackson v. New York, 85 App. Div. 2d 818, 818, 445 N.Y.S.2d 620, 621 (3d Dep't

that by minimizing the precedential value of the decisions under the CPA, the *Fiedelman* Court contravened the legislature's intent in enacting CPLR 2103.[28] The Court also seems to have cast doubt upon the validity of a rule of construction which has long guided the Court's interpretation of statutory recodifications.

It is further contended that the *Fiedelman* Court neglected the broad policy underlying article 78 of the CPLR, which, by simplifying the method of obtaining judicial review, was designed to benefit parties aggrieved by administrative decisions.[29] In addition, the Court's holding that petitoners cannot invoke CPLR 2103(b) before the commencement of a special proceeding under CPLR article 78 denies them the advantages which have been afforded certain other petitioners seeking judicial review of administrative decisions.[30] The Court's rejection of the liberal operation of the CPA

1981), *appeal dismissed*, 56 N.Y.2d 568, 435 N.E.2d 402, 450 N.Y.S.2d 185 (1982); Cosmopolitan Mut. Ins. Co. v. Moliere, 31 App. Div. 2d 924, 924, 298 N.Y.S.2d 561, 562 (1st Dep't 1969).

[28] *See* Syracuse Mortgage Corp. v. Kepler, 122 Misc. 95, 97, 202 N.Y.S. 193, 194 (Sup. Ct. Onondaga County 1923). In construing a provision of the CPA, the court held that "[w]here the new act continues phrases from the old act, which it supersedes, that have been judicially construed, such cases are of value in determining the meaning of those phrases as used in [the current act]." *Id.* If a section of the CPLR has been deemed a "recodification" of a provision in the CPA, without substantive change, cases decided prior to recodification are dispositive. Lunger v. Hartford Accident & Indem. Co., 38 App. Div. 2d 857, 858, 330 N.Y.S.2d 123, 125 (2d Dep't 1972).

[29] Administrative agencies are the "primary target" of CPLR article 78 proceedings against bodies or officers. SIEGEL § 557, at 774. One objective of the revisors was to "simplify and clarify" the procedures to be followed in challenging the orders and determinations of such agencies in court. Hesson, *The Proposed Revision of the New York Law of Civil Procedure*, 25 ALB. L. REV. 1, 14-15 (1961).

[30] Under the Executive Law, parties aggrieved by an order of the State Division of Human Rights may bring a proceeding for judicial review in the appellate division of the supreme court. N.Y. EXEC. LAW § 298 (McKinney 1982). Courts have indicated that a proceeding brought pursuant to this section would not be untimely when service of the order is made by mail if the petition for judicial review is made within the required period of 30 days, plus 3 days for mailing. *E.g.*, Caraballo v. State Div. on Human Rights, 59 App. Div. 2d 871, 871, 399 N.Y.S.2d 238, 239 (1st Dep't 1977); Denson v. Buffalo Evening News, Inc., 45 App. Div. 2d 931, 931, 357 N.Y.S.2d 328, 329 (4th Dep't 1974); State Div. of Human Rights v. Ganley, 37 App. Div. 2d 983, 983, 327 N.Y.S.2d 402, 403 (2d Dep't 1971).

While the courts in *Caraballo*, *Denson*, and *Ganley* applied the CPLR 2103 extension to administrative proceedings involving the State Division on Human Rights, the extension provision has not been applied to other administrative proceedings. *See supra* note 3. Moreover, a number of decisions involving administrative proceedings to which CPLR 2103 has been held inapplicable have been based upon specific statutory regulation of the agency or appeals from the administrative body rather than construction of CPLR 2103. For example, since the labor law explicitly provided for appeal "within twenty days after *mailing* or *personal delivery* of notice," N.Y. LAB. LAW § 621(1) (McKinney 1977) (emphasis added), The Appellate Division, Third Department, held CPLR 2103 inapplicable. *In re* Moses, 31 App.

is a disturbing indication of its desire to construe the CPLR narrowly[31] and to sanction such a restrictive approach by the lower courts.

Jane M. Knight

CIVIL RIGHTS LAW

Civ. Rights Law § 51: An infant may not disaffirm prior parental consent to the commercial publication of her photograph

Sections 50 and 51 of the New York Civil Rights Law[32] establish the right of any living person to prevent the nonconsensual commercial exploitation of his or her name or likeness.[33] The pro-

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Div. 2d 772, 772, 296 N.Y.S.2d 274, 275 (3d Dep't 1969); *see also In re* Berent, 86 App. Div. 2d 764, 766, 448 N.Y.S.2d 282, 285 (4th Dep't 1982) (section 675 of the Insurance Law held controlling).

Section 3394 of the Public Health Law, the statute at issue in *Fiedelman*, provides that review must be made "within sixty days after service of the order" of the Commissioner. N.Y. PUB. HEALTH LAW § 3394(2) (McKinney 1977). There is no mention of the type of service to be made. *See id.* It is submitted that the lack of specificity of this statute distinguishes *Fiedelman* from other decisions holding CPLR 2103 inapplicable to administrative proceedings. Moreover, in light of the lack of clarity in the Public Health Law, it is suggested that consistency with the purposes of the CPLR and administrative law militates in favor of granting a petitioner the benefit of the time extension.

[31]The narrow construction contravenes the CPLR's mandate to construe provisions liberally. *See* CPLR 104 (1972).

[32] N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976). Section 50 of the Civil Rights Law provides:

> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guility of a misdemeanor.

Id. § 50.

Civil remedies for invasion of privacy are provided for in section 51 of the Civil Rights Law:

> Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action . . . against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by section fifty . . . the jury, in its discretion, may award exemplary damages.

Id. § 51 (McKinney Supp. 1982-1983).

[33] A common-law right of privacy was rejected in New York in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 556, 64 N.E. 442, 447 (1902). *See* Kiss v. County of Putnam,