St. John's Law Review

Volume 53
Number 1 *Volume 53, Fall 1978, Number 1*

Article 6

CPLR 217: Four-Month Limitation Period Governing Article 78 Proceeding to Review Results of Civil Service-Type Examination Held to Begin Running When Final Eligibility List Published

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apply *Simcuski* on a case-by-case basis. It is submitted that, in defining the boundaries of the equitable estoppel doctrine, the courts will have to be particularly careful to preserve the requirement of intentional concealment. In the absence of such a requirement, the application of the *Simcuski* reasoning could result in the evolution of a rule resembling a "date of discovery" accrual rule. Since the legislature apparently rejected the "date of discovery" theory when it enacted CPLR 214-a,[30] it would be inappropriate for the courts to adopt it indirectly through the use of equitable estoppel principles.

Alan Sorkowitz

CPLR 217: Four-month limitation period governing article 78 proceeding to review results of civil service-type examination held to begin running when final eligibility list published

CPLR 217 requires that an article 78 proceeding[31] "be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner."[32] Generally, a determination is considered to be final and binding, and the 4-month limitation period begins to run, only when the petitioner is actually

[30] As early as 1942, the legislature rejected a proposal to establish a "discovery rule." *See* [1942] N.Y. LAW REV. COMM'N REP. 141, 167-74. Were it not for the requirement of intentional concealment, the determinative date in applying the statute of limitations would be the date of plaintiff's discovery of the negligence. CPLR 214-a continues the judicially created exceptions to the accrual rule in limited form but does not establish a general date-of-discovery rule. *See* Memorandum of State Executive Department on Medical Malpractice, *reprinted in* [1975] N.Y. Laws 1599 (McKinney).

[31] CPLR 7801-7806 provide the statutory framework for bringing a special proceeding against a judicial, quasi-judicial or administrative officer. In general, article 78 encompasses remedies previously available through the common-law prerogative writs of certiorari, mandamus and prohibition. CPLR 7801-7802 (1963). The proceeding is usually brought at a special term of the supreme court. CPLR 7804(b) (1963). Article 78 proceedings against a justice of the supreme court or a judge of the county court, however, are brought in the appellate division. CPLR 506(b)(1) (1976). *See generally* D. SIEGEL, HANDBOOK ON NEW YORK PRACTICE §§ 557-561 (1978); 8 WK&M ¶¶ 7801.01, .04, 7802.01.

[32] CPLR 217 (1972) provides in pertinent part:

> Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty . . . .

See Verbanic v. Nyquist, 41 App. Div. 2d 466, 344 N.Y.S.2d 406 (3d Dep't 1973); J. Hungerford Smith Co. v. Ingraham, 32 App. Div. 2d 188, 301 N.Y.S.2d 266 (3d Dep't 1969) (per curiam).

aggrieved by the agency decision.[33] Recently, in *Martin v. Ronan*,[34] the Court of Appeals held that a proceeding to review the results of a civil service-type examination is timely if commenced within 4 months of the publication of a final eligibility list reflecting the disposition of all appeals submitted.[35]

The petitioners in *Martin*, employees of the Manhattan and Bronx Surface Transit Operating Authority (MBSTOA), had taken an examination[36] designed to determine a list of qualified applicants for the position of senior dispatcher.[37] On April 18, 1972, a tentative eligibility list was published and the candidates were informed of their right to appeal their grades.[38] The petitioners were notified of

[33] *See* O'Neill v. Schecter, 5 N.Y.2d 548, 159 N.E.2d 146, 186 N.Y.S.2d 577 (1959); Smith v. Hoyt, 59 App. Div. 2d 1058, 399 N.Y.S.2d 818 (4th Dep't 1977); Kordal v. Niesley, 66 Misc. 2d 781, 322 N.Y.S.2d 189 (Sup. Ct. Nassau County 1971); Christ v. Lake Erie Distrib., Inc., 51 Misc. 2d 811, 273 N.Y.S.2d 878 (Sup. Ct. Erie County 1966), *modified*, 28 App. Div. 2d 817, 282 N.Y.S.2d 728 (4th Dep't 1967).

In order to ascertain the accrual date under CPLR 217, it is necessary to determine whether the article 78 proceeding in question is in the nature of mandamus or certiorari. *See* Nelson v. Kelly, 4 App. Div. 2d 596, 168 N.Y.S.2d 74 (1st Dep't 1957); *In re* Walter, 25 Misc. 2d 616, 207 N.Y.S.2d 811 (Sup. Ct. Sullivan County 1960). In a true mandamus proceeding to compel performance of a legally imposed duty, accrual occurs at the time the respondent-official refuses a demand by the petitioner to take the appropriate action. Flomenbaum v. Drug Abuse Control Comm'n, 50 App. Div. 2d 20, 377 N.Y.S.2d 211 (3d Dep't 1975). If, on the other hand, the proceeding is brought to secure judicial review of an agency's quasi-adjudicative determination, the 4-month limitation period begins to run when the determination becomes "final and binding" upon the petitioner. Verbanic v. Nyquist, 41 App. Div. 2d 466, 344 N.Y.S.2d 406 (3d Dep't 1973). In practice, it is difficult to make a distinction between the two types of proceedings since many article 78 proceedings in the nature of mandamus are actually petitions for review. *See* CPLR 217, commentary at 507 (1972); D. SIEGEL, *supra* note 31, § 561. Finally, CPLR 217 may be inapplicable when the petitioner seeks to enjoin an official from exceeding his authority by bringing an article 78 proceeding analogous to a common-law writ of prohibition. Some commentators have argued that, since such proceedings usually involve allegations of an ongoing wrong, there should be no objection to the institution of a suit at any time during the continuance of the offending conduct. *See* CPLR 217, commentary at 508 (1972); D. SIEGEL, *supra* note 31, § 566; note 43 *infra*. *But see* Feldman v. Matthews, 32 Misc. 2d 996, 223 N.Y.S.2d 604 (Sup. Ct. Monroe County 1962).

[34] 44 N.Y.2d 374, 376 N.E.2d 1316, 405 N.Y.S.2d 671 (1978), *rev'g* 57 App. Div. 2d 514, 393 N.Y.S.2d 403 (1st Dep't 1977).

[35] 44 N.Y.2d at 381, 376 N.E.2d at 1320, 405 N.Y.S.2d at 675.

[36] The test consisted of two parts, beginning with a written examination on Dec. 16, 1972. An oral examination was administered on Feb. 17, 1973 for candidates whose names began with the letters A-M, and on Feb. 24, 1973, for the remaining applicants. The results of the written test were sent to the candidates on Feb. 1, 1973. *Id.* at 377, 376 N.E.2d at 1318, 405 N.Y.S.2d at 673.

[37] *Id.* Although MBSTOA is not directly subject to the Civil Service Law, it follows the same procedure as the Civil Service Commission in administering and grading examinations. *See id.*, 376 N.E.2d at 1317-18, 405 N.Y.S.2d at 672-73. *See generally* [1969] 4 N.Y.C.R.R. §§ 3.1-.4.

[38] 44 N.Y.2d at 378, 376 N.E.2d at 1318, 405 N.Y.S.2d at 673. The examination grades were sent to the candidates 1 week after the tentative eligibility list was published.

the disposition of their appeals on August 31, 1973, and a final eligibility list, indicating adjustments made as a result of the appeal determinations, was published on October 10, 1973.[39]

On February 8, 1974, the petitioners commenced an article 78 proceeding[40] seeking judicial review of the senior dispatcher examination.[41] MBSTOA moved to dismiss the petition, arguing that the challenge was time barred since the petitioners had failed to commence the proceeding within 4 months of completion of the examination.[42] The Supreme Court, New York County, denied the mo-

[39] *Id.* One petitioner was notified of the result of his appeal on July 26, 1973, but this did not affect the Court of Appeals' decision. *Id.* at 378 n.*, 376 N.E.2d at 1318 n.*, 405 N.Y.S.2d at 673 n.*.

[40] Since MBSTOA is a public corporation, resort to an article 78 proceeding is the proper vehicle through which judicial review may be obtained. *See* CPLR 7802 (1963); D. SIEGEL, *supra* note 31, § 564.

[41] 44 N.Y.2d at 378, 376 N.E.2d at 1318, 405 N.Y.S.2d at 673. The petitioners initially sought review on the ground that the examiners failed to use objective standards in grading the tests. Specifically, the petitioners alleged that certain candidates were questioned about their religious and social backgrounds, although such information was irrelevant to their qualifications as senior dispatchers. *Id.* New York law requires that "[a]ppointments and promotions in the civil service . . . be made according to merit and fitness," which must be measured by objective standards. N.Y. CONST. art. 5, § 6; *see* Jackson v. Poston, 40 App. Div. 2d 19, 337 N.Y.S.2d 108 (3d Dep't 1972); Parser v. Krone, 41 Misc. 2d 1063, 247 N.Y.S.2d 168 (Sup. Ct. Albany County 1964), *rev'd per curiam*, 23 App. Div. 2d 516, 255 N.Y.S.2d 430 (3d Dep't 1965), *aff'd mem.*, 21 N.Y.2d 1002, 238 N.E.2d 325, 290 N.Y.S.2d 923 (1968). Absent an arbitrary and capricious determination, however, the court generally will not disturb administrative findings. *See* Acosta v. Lang, 13 N.Y.2d 1079, 196 N.E.2d 60, 246 N.Y.S.2d 404 (1963) (mem.); Francis v. Colucci, 49 App. Div. 2d 1009, 374 N.Y.S.2d 78 (4th Dep't 1975); Button v. Rockefeller, 76 Misc. 2d 701, 351 N.Y.S.2d 488 (Sup. Ct. Albany County 1973); Parolisi v. Board of Examiners, 55 Misc. 2d 546, 285 N.Y.S.2d 936 (Sup. Ct. Kings County 1967).

The *Martin* petitioners also alleged that the use of the same questions in both oral examinations and the dissemination of these questions to some examinees prior to their taking the test impaired the validity of the test. 44 N.Y.2d at 378, 376 N.E.2d at 1318, 405 N.Y.S.2d at 673. Mere utilization of questions appearing on a prior examination, however, does not render a test invalid. *See* Clare v. Kirwan, 50 App. Div. 2d 1034, 376 N.Y.S.2d 701 (3d Dep't 1975). In order to succeed, the petitioner must prove that certain candidates knew the questions to be asked and thus had an unfair advantage over the others. *See* Bruns v. Suffolk County Civil Serv. Comm'n, 56 Misc. 2d 925, 290 N.Y.S.2d 595 (Sup. Ct. Suffolk County 1968). The remedy in such instances would be rescission of the appointments of those who had prior access to the questions. *See* Fitzgerald v. Conway, 275 App. Div. 205, 88 N.Y.S.2d 649 (3d Dep't 1949); Mangan v. New York State Civil Serv. Comm'n, 60 Misc. 2d 481, 303 N.Y.S.2d 113 (Sup. Ct. Nassau County 1969).

[42] 44 N.Y.2d at 379, 376 N.E.2d at 1318, 405 N.Y.S.2d at 673. MBSTOA urged that, since the petitioners were challenging the conduct of the examination and not the specific results, accrual occurred upon completion of the examination. *Id.* at 378-79, 376 N.E.2d at 1318, 405 N.Y.S.2d at 673.

[43] *Id.* The supreme court concluded that the petitioners were free to bring suit without regard to CPLR 217 since they alleged "the continuing wrong of promulgation and utilization of an unlawful eligibility list." 44 N.Y.2d at 379, 376 N.E.2d at 1318, 405 N.Y.S.2d at 673. In

tion[43] and ultimately invalidated the test.[44] The Appellate Division, First Department, reversed, ruling that the proceeding was time barred since the right to bring suit accrued on August 31, when most of the competitors were informed of the dispositions of their appeals.[45]

The Court of Appeals reversed and held that the limitation period did not begin to run until October 10, 1973, when the final eligibility list was published.[46] Writing for the majority,[47] Judge Gabrielli stated that the issue turned on what constituted the determination to be reviewed.[48] The *Martin* Court reasoned that neither

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any event, the Court noted that accrual did not occur until Oct. 10, 1973, when the final eligibility list was issued. *Id.* It is submitted, however, that MBSTOA's actions did not constitute the type of continuing wrong which bars application of the statute of limitations under CPLR 217. A continuing wrong may be found to exist where the article 78 proceeding is in the nature of mandamus alleging that the administrative body refused to perform its duty after a proper demand had been made on it. *See* McNamara v. City of Syracuse, 60 App. Div. 2d 753, 400 N.Y.S.2d 604 (4th Dep't 1977); Kolson v. New York City Health & Hosp. Corp., 53 App. Div. 2d 827, 385 N.Y.S.2d 302 (1st Dep't 1976). *See generally* D. SIEGEL, *supra* note 31, § 566; 8 WK&M ¶ 7804.02. Similarly, CPLR 217 may not bar a proceeding which is brought to compel an agency to hold a hearing before taking adverse action against the petitioner. *See* Durham v. Amico, 52 App. Div. 2d 724, 382 N.Y.S.2d 169 (4th Dep't 1976); Lippold v. Board of Educ., 67 Misc. 2d 499, 324 N.Y.S.2d 650 (Sup. Ct. Kings County 1971); Hansen v. McNamara, 196 Misc. 561, 92 N.Y.S.2d 616 (Sup. Ct. N.Y. County 1949). Where the proceeding is one to review an administrative determination, however, accrual occurs when the decision becomes final and binding. *See* Mundy v. Nassau County Civil Serv. Comm'n, 44 N.Y.2d 352, 357, 376 N.E.2d 1305, 1307, 405 N.Y.S.2d 660, 662 (1978) (companion case to *Martin).*

[44] 44 N.Y.2d at 379, 376 N.E.2d at 1318, 405 N.Y.S.2d at 674. The supreme court submitted the question whether the examination was fair to a special referee who concluded that the test was unfair and therefore invalid. *Id.* The referee found that the competitiveness of the examination was impaired because some examinees had prior access to the questions and a review session was held during the week between the two oral examination dates thus giving some applicants an unfair advantage. *Id.*, 376 N.E.2d at 1318-19, 405 N.Y.S.2d at 674. *See generally* note 41 *supra.* The supreme court entered judgment in accordance with the referee's findings. 44 N.Y.2d at 379, 376 N.E.2d at 1319, 405 N.Y.S.2d at 674.

[45] 57 App. Div. 2d 514, 515, 393 N.Y.S.2d 403, 404 (1st Dep't 1977). The appellate division in *Martin* distinguished between complaints challenging the validity of the examination itself and those alleging errors in the grading of individual examination papers. *Id.* In the latter instance, according to the court, the right to bring suit might accrue when the final eligibility list was published. Where the examination is challenged as invalid for all examinees, however, the court reasoned that postponement of accrual to the date the list was promulgated "would result in the incongruous conclusion that the examination was invalid for the purposes of appointing those who have in fact been appointed as a consequence of taking the examination, but would not of necessity be invalid for the purposes of appointing [the] petitioners." *Id.* This analysis was rejected by Justice Kupferman, who noted that "[i]t was not until they received notice of their final . . . standing that [the petitioners] were able to determine that they were aggrieved." *Id.* (Kupferman, J., dissenting).

[46] 44 N.Y.2d at 381, 376 N.E.2d at 1320, 405 N.Y.S.2d at 675.

[47] Judges Wachtler, Fuchsberg and Cooke concurred with Judge Gabrielli. Chief Judge Breitel, joined by Judges Jasen and Jones, dissented.

[48] 44 N.Y.2d at 380, 376 N.E.2d at 1319, 405 N.Y.S.2d at 674.

the last date of the examination[49] nor the promulgation of the tentative eligibility list could be considered a final and binding determination.[50] In addition, the date on which the petitioners were notified of their appeal determinations was rejected as the appropriate time of accrual[51] since whether they were aggrieved by their revised positions on the list was unknown at that time. Instead, Judge Gabrielli found that the petitioners were not actually aggrieved until the final list was published and they had knowledge of their revised status with respect to the other candidates and the consequences of the examination were clear.[52]

Chief Judge Brietel authored the dissenting opinion and analogized the accrual question in *Martin* to the well-established rule for accrual of tort actions.[53] Taking this approach, the dissent found that the limitation period set forth in CPLR 217 should begin to run upon occurrence of the alleged wrong, the denial of the petitioners' appeals, even though the consequences of that determination were not fully realized until a later date.[54]

It is submitted that the conclusion reached by the *Martin* majority is consistent with the traditional view that the right to bring an article 78 proceeding accrues when the petitioner becomes aware that he has been aggrieved[55] by an administrative determination. Earlier decisions holding that a "final and binding" determination

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[49] The *Martin* Court observed that "[t]he test, standing by itself, gives rise to no cause of action." *Id.*

[50] *Id.* According to the majority, a tentative list was "far from a final and binding" determination since each candidate still had the right to appeal his grade. *Id.*

[51] *Id.; see* Chavich v. Board of Examiners, 43 Misc. 2d 1090, 252 N.Y.S.2d 718 (Sup. Ct. Kings County 1964), *rev'd on other grounds,* 23 App. Div. 2d 57, 258 N.Y.S.2d 677 (2d Dep't), *aff'd mem.,* 16 N.Y.2d 810, 210 N.E.2d 359, 263 N.Y.S. 2d 7 (1965); *cf.* Furman v. Marsh, 185 Misc. 209, 56 N.Y.S.2d 690 (Sup. Ct. N.Y. County 1945) (examination grades were final and binding upon disposition of appeal only for candidates who actually appealed).

[52] 44 N.Y.2d at 381, 376 N.E.2d at 1320, 405 N.Y.S.2d at 675; *cf.* O'Connell v. Kern, 287 N.Y. 297, 39 N.E.2d 246 (1942) (right to initiate proceeding arose when petitioner entitled to position learned of coemployee's appointment).

[53] 44 N.Y.2d at 381, 376 N.E.2d at 1320, 405 N.Y.S.2d at 675 (Breitel, C.J., dissenting). A cause of action in tort accrues when the injury first occurs, regardless of when the injured party discovers the wrong. Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936).

[54] 44 N.Y.2d at 381, 376 N.E.2d at 1320, 405 N.Y.S.2d at 675. Chief Judge Breitel stated that "when the fairness of an examination is challenged, [CPLR 217] should begin to run, at the very latest, at the time a list is first promulgated." *Id.* (Breitel, C.J., dissenting) (citations omitted). Conceding that the statute might be tolled during any administrative appeals, Chief Judge Breitel asserted that the limitation period should begin to run again as soon as such appeals are decided. *Id.* at 382, 376 N.E.2d at 1320, 405 N.Y.S.2d at 675 (Breitel, C.J., dissenting).

[55] *See* note 33 *supra.*

occurs at the time a petitioner is notified of the results of an appeal[56] are inapposite, since, in those cases, the individual petitioner knew that he was "aggrieved" immediately upon notification without reference to his status in relation to other appellants.[57] In *Martin*, however, the purpose of the senior dispatcher examination was to determine a list of promotable employees, and a "final and binding" result could not be reached until the list was issued. Thus, the *Martin* decision represents an application of traditional article 78 principles to those narrow circumstances in which the effect of an appeal determination on the petitioner depends upon the disposition of other appeals.

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ARTICLE 10—PARTIES GENERALLY

CPLR 1012: Stockholder allowed to appeal dismissal of derivative action although not a party to action at trial stage

CPLR 1012 grants a nonparty the right to intervene in an action "[u]pon timely motion, . . . when the representation of [his] interest is or may be inadequate and [he] is or may be bound by the judgment."[58] While the statute has been construed to give courts

[56] Munice v. Board of Examiners, 31 N.Y.2d 683, 289 N.E.2d 179, 337 N.Y.S.2d 258 (1972) (mem.); Presti v. Board of Examiners, 71 Misc. 2d 232, 336 N.Y.S.2d 171 (Sup. Ct. Kings County 1968); Chavich v. Board of Examiners, 43 Misc. 2d 1090, 252 N.Y.S.2d 718 (Sup. Ct. Kings County 1964), *rev'd on other grounds*, 23 App. Div. 2d 57, 258 N.Y.S.2d 677 (2d Dep't), *aff'd mem.*, 16 N.Y.2d 810, 210 N.E.2d 359, 263 N.Y.S.2d 7 (1965); Furman v. Marsh, 185 Misc. 209, 56 N.Y.S.2d 690 (Sup. Ct. N.Y. County 1945).

[57] In the typical situation, when a terminated employee learns that his appeal for reinstatement has been denied, he is clearly aware that he has been aggrieved. *See, e.g.*, McGirr v. Division of Veterans Affairs, 43 N.Y.2d 635, 374 N.E.2d 123, 403 N.Y.S.2d 212 (1978); Walling v. Schechter, 9 Misc. 2d 621, 167 N.Y.S.2d 861 (Sup. Ct. N.Y. County 1957), *aff'd mem.*, 8 App. Div. 2d 605, 185 N.Y.S.2d 735 (1st Dep't), *aff'd mem.*, 7 N.Y.2d 814, 164 N.E.2d 716, 196 N.Y.S.2d 695 (1959); *cf.* Bishop v. Allen, 5 Misc. 2d 676, 165 N.Y.S.2d 813 (Sup. Ct. Albany County 1956) (action final when agency denied appeal of decision placing petitioner at lower pay scale). Similarly, dismissal of an appeal challenging an administrative determination which denies the petitioner an opportunity to take a promotional examination immediately informs the petitioner that he has been adversely affected. *See, e.g.*, Mallen v. Morton, 199 Misc. 2d 805, 99 N.Y.S.2d 521 (Sup. Ct. N.Y. County 1950); Hecht v. Kern, 178 Misc. 571, 34 N.Y.S.2d 794 (Sup. Ct. N.Y. County 1942). Even where an appeal is brought seeking review of a civil service examination, denial of such appeal is considered a final and binding determination if the petitioner knows at the time that the grade he received will not qualify him for the position being offered. *See, e.g.*, Greenbaum v. Ingraham, 48 App. Div. 2d 969, 369 N.Y.S.2d 556 (3d Dep't 1975); Keays v. Conway, 105 N.Y.S.2d 944 (Sup. Ct. Albany County 1951); *cf.* Abramson v. Commissioner of Educ., 1 App. Div. 2d 366, 150 N.Y.S.2d 270 (3d Dep't 1956) (order became final and binding when persons affected by rescission of 5% credit were notified).

[58] CPLR 1012 (a)(2) (1976). *See generally* 2 WK&M ¶¶ 1012.01-.08.