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Administrative Law—Unprofessional Conduct Proceeding

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requires that a proceeding to review a determination must be brought within four months after the determination becomes final.[23] An attack based on arbitrariness would be included within this time limitation.

In *Foy v. Schechter*[24] plaintiffs brought such a proceeding against the Municipal Civil Service Commission of the City of New York to determine whether they were to be paid at the prevailing wage after 1943.[25] In a prior action[26] an Article 78 proceeding was brought against city officials to compel payment at the prevailing wage. The Court granted payments to 1943 but held that in 1943 the employees were effectively graded and could only be paid at the graded rate. The Court there determined that the 1938 grading resolution was void on procedural grounds and that an attack based on arbitrariness could not be brought because the civil service commission was not a party.[27]

This proceeding was brought by one of the plaintiffs in the prior action; here the civil service commission was a party and thus an attack on arbitrariness could be made; but since the statute of limitation had run, an attack of this type was precluded. The only valid basis for a proceeding, then, was an attack on the procedure followed in adopting the resolution.[28] The *Corrigan* decision held that the procedure used in adopting the 1943 resolution was proper. Since plaintiff Foy was a party in that action he was barred by res judicata.[29] The other plaintiff, not a party in the prior *Corrigan* decision, was barred on the principle of stare decisis.

Unprofessional Conduct Proceeding

Petitioner, a licensed optometrist, had his license suspended for one year by the Board of Regents for unprofessional conduct in the practice of optometry in that he had become a party to a "Low Cost Optical Plan" sponsored by a local union. The Court, in *Dubin v. Board of Regents,*[30] unanimously reversed the Ap-

23. N. Y. CIV. PRAC. ACT §1286. Unless a shorter time limitation is expressly provided in the law under which the proceeding is authorized, a proceeding under this article to review a determination . . . must be instituted . . . within four months after the determination to be reviewed becomes final and binding, upon the petitioner . . .; *Barbarita v. Board of Estimate,* 62 N. Y. S. 2d 424 (Sup. Ct. 1946).

24. 1 N. Y. 2d 604, 136 N. E. 2d 883 (1956).

25. N. Y. LABOR LAW §220(3). The wages to be paid for a legal days work . . . shall not be less than prevailing rate of wages as hereinafter defined.

26. *Corrigan v. Joseph,* 304 N. Y. 172, 106 N. E. 2d 593 (1952), *reargument denied,* 304 N. Y. 759, 108 N. E. 2d 618 (1952).

27. *Corrigan v. Joseph,* 304 N. Y. 172, 186, 106 N. E. 2d 593, 598 (1952).

28. N. Y. CIV. PRAC. ACT §1284(4). The expression "to restrain a body . . . exercising judicial or quasi-judicial functions from proceeding without or in excess of jurisdiction" refers to the relief heretofore available in a prohibition proceeding.

29. *Hochester v. City Bank Farmer's Trust Co.,* 260 App. Div. 712, 24 N. Y. S. 2d 110 (1st Dept. 1940), *aff'd.,* 288 N. Y. 588, 42 N. E. 2d 600 (1942).

30. 1 N. Y. 2d 58, 133 N. E. 2d 697 (1956).

pellate Division[31] and held that it could not be said as a matter of law that such advertising constituted unprofessional conduct, and that there was no proof that the prevailing professional standards condemned this type of advertising.

Pursuant to the above-mentioned plan, circulars containing the petitioner's name, referring to the cost of lenses, frames and services, and offering discounts to prospective patrons, were distributed by the union, with the petitioner's approval. Petitioner was charged with fraud, deceit, misrepresentation and unprofessional conduct in the practice of optometry within the purview of the N. Y. Education Law section 7108,[32] as defined in the rules of the Board of Regents.[33]

The Court construed section 7108 as a qualification and limitation upon the general rule-making power conferred by sections 211 and 7111 of the Education Law; since this section prohibits only those types of advertising constituting unprofessional conduct or fraud, deceit and misrepresentation, it impliedly permits some type of advertising.[34] What constitutes unprofessional conduct must be established by those standards which are commonly accepted by those practicing the same profession in the same area.[35]

The Court distinguished *Finlay Straus, Inc. v. Board of Regents*[36] on the ground that the practices engaged in by the petitioners there represented a clear danger to the public and that the Appellate Division held the rules of the Board to be valid only insofar as they censured these particular practices.

The result of this case indicates that the Court will not recognize a violation

31. 286 App. Div. 9, 141 N. Y. S. 2d 54 (3d Dep't 1955).

32. N. Y. EDUCATION LAW, §7108: 1. The department shall have power to revoke the license, certificate of registration, or certificate of exemption of any optometrist upon proof that the holder thereof has been guilty of unprofessional conduct, or of any fraud, deceit or misrepresentation in his practice or in his advertising, or has been convicted of crime, or is an habitual drunkard, or is grossly incompetent to practice optometry.

33. 1 N. Y. OFFICIAL COMPLICATION OF CODES, RULES AND REGULATIONS 632, *as relettered in 1950,* SIXTH OFFICIAL SUPP., 140, §70; 1. Unprofessional conduct, fraud, and deceit. Unprofessional conduct, fraud, deceit or misrepresentation in the practice of optometry under sections [7108 and 7111] of the Education Law shall include but shall not be limited to the following: . . .
(f) Advertising of any character which includes or contains any price whatsoever or any reference thereto . . .
(h) Offering for free examination or other gratuitous services, bonuses, premiums, discounts or any other inducements.

34. *Cherry v. Board of Regents,* 289 N. Y. 148, 44 N. E. 2d 405 (1942); When the Legislature places restrictions on certain modes of practice or advertising, the Board of Regents has no power to ban the use of other means which do not violate the restrictions formulated by the Legislature.

35. *Cherry v. Board of Regents, supra* note 34; *Semler v. Oregon St. Board of Dental Examiners,* 294 U. S. 608 (1935).

36. 270 App. Div. 1060, 62 N. Y. S. 2d 892 (3d Dep't 1946). Plaintiffs were engaged in the practice of not charging for eye examinations unless glasses were prescribed, thus presenting the danger that glasses would be prescribed where not needed. The proceeding was one for a declaratory judgment with the Court holding that the rules were valid.

of the rules of the Board, governing the various professions, as sufficient in itself to warrant the revocation of a license. In order to impose such a sanction upon a license holder for the violation of a rule, the Board must show that the conduct which the particular rule seeks to prevent is truly unprofessional; that is, that such conduct is recognized as unprofessional by those practicing the same profession in the same area.

CIVIL PROCEDURE

Liberal Construction of Pleadings

Claimant sought to recover damages for malpractice against defendant-patent attorneys alleging that defendants had fraudulently given him incorrect legal advice, had failed to give him full and accurate information and had neglected to make all claims available as to his invention.[1] The Court held, reversing the Appellate Division,[2] that defendant's motion to dismiss the complaint for legal insufficiency on the grounds that it was inartistically drawn and indefinite in places was properly denied in that the complaint sufficiently charged negligence, breach of implied contract, constructive fraud and damages.

Whereas a complaint challenged for legal insufficiency must be considered in light of Civil Practice Act section 241 which requires that a complaint contain a plain and concise statement of the material facts,[3] section 241 must be read in conjunction with Civil Practice Act section 275. Section 275 provides that a complaint should be construed with a view to substantial justice between the parties.[4] The complaint should be taken as a whole, and viewed as such should be deemed to allege whatever the material facts impute.[5] The primary consideration is whether the complaint sufficiently alleges a cause of action.[6] Whether or not plaintiff will be able to prove his allegations is immaterial at this stage of the pleadings.[7]

If plaintiff is entitled to recover in any aspect on the material facts stated in

1. *Dulberg v. Mock*, 1 N. Y. 2d 54, 133 N. E. 2d 695 (1956).
2. 286 App. Div. 1008, 145 N. Y. S. 2d 533 (1st Dep't 1956). The denial of defendants' motion was reversed because of the generality and indefiniteness of the complaint in view of the fact that it was plaintiff's third attempt to state a cause of action.
3. N. Y. CIV. PRAC. ACT §241. Every pleading shall contain a plain and concise statement of the material facts, without unnecessary repetition, on which the party pleading relies but not the evidence by which they are to be proved.
4. N. Y. CIV. PRAC. ACT §275. Pleadings must be liberally construed with a view to substantial justice between the parties.
5. *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130 (1878); *Howard Stores Corp. v. Pope*, 1 N. Y. 2d 110, 134 N. E. 2d 63 (1956).
6. *Moss v. Cohen*, 158 N. Y. 240, 53 N. E. 8 (1899).
7. *Werle v. Rumsey*, 278 N. Y. 186, 15 N. E. 2d 572 (1938).