

**Atkinson v State of New York Attorney General**

2007 NY Slip Op 32207(U)

July 23, 2007

Supreme Court, Albany County

Docket Number: 0004002/0071

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of  
JOHN R. ATKINSON III, 05-A-4828,

Petitioner,

-against-

**DECISION and ORDER**  
**INDEX No. 400-07**  
**RJI NO.: 01-07-ST7695**

ATTORNEY GENERAL, STATE OF NEW YORK,  
ANDREW CUOMO

Respondents.

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Supreme Court Albany County, Special Term, July 12, 2007  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

John R. Atkinson, III  
*Petitioner, Pro Se*  
Bare Hill Correctional Facility  
Caller Box # 20, Cady Road  
Malone, New York 12953

Christina L. Roberts  
Assistant Attorney General  
*Attorney for Respondent*  
Office of the Attorney General  
The Capitol  
Albany, New York 12224

**TERESI, J.:**

Petitioner, John R. Atkinson III, commenced this Article 78 proceeding challenging the State of New York's student loan judgment against him enforced by the New York State Attorney General's Office. Respondent opposes the relief requested by petitioner on the grounds that petitioner fails to state a cause of action.

The Petitioner is currently incarcerated at Bare Hill Correctional Facility. On July 5, 2005, a money judgment was levied against the Petitioner in the amount of \$3,876.44 for fall tuition at the State University of New York, Stony Brook. Petitioner alleges that the judgement was obtained under false pretenses, the venue of Albany County is incorrect and therefore that the judgment is invalid, and that the Attorney General did not provide the Court with the valid bill.

The Respondent opposes, contending that (1) the claims that petitioner makes in this proceeding are not justiciable pursuant to CPLR 3211 (a)(7); (2) the Petitioner has failed to name or obtain jurisdiction over necessary parties and the court should not proceed in the absence of a person who should be a party pursuant to CPLR 3211 (a)(10); and (3) the Attorney General of the State of New York is not a proper party to this proceeding.

First, this proceeding is not a proper proceeding under Article 78 of the Civil Practice Law and Rules. A proceeding brought under Article 78 of the Civil Practice Law and Rules is a special proceeding brought against a body or officer to challenge a final determination. See, CPLR 7801, 7802. A special proceeding shall not be used to challenge a determination “which is not final or can be adequately reviewed by appeal to a court or to some other body or officer...” See, CPLR 7801(1).

Second, the failure to name or obtain jurisdiction over necessary parties renders the Petitioner’s case insufficient. CPLR 1001(a) contemplates the joinder of those who “might be inequitably affected by a judgment.” See, e.g. Matter of Mt. Pleasant Cottage School Union Free School District v. Sobol, 163 AD2d 715 (3d Dept 1990), affd., 78 N.Y.2d 935 (1991)(school principal who would lose his recently acquired post if petitioner was successful is a necessary party); Matter of Civil Service Employees Association v. Pataki, 259 AD2d 826 (3d Dept

1999)(discharged employees obligated to join replacement workers); Ernst v. New York State Executive Department, 246 AD2d 738 (3d Dept 1998). The fundamental purpose of the joinder requirement is to insure the opportunity to be heard before one's rights or interests are adversely affected. Matter of Martin v. Ronan, 47 NY2d 486, 490 (1979); Serth v. NYS Department of Transportation, 79 AD2d 801 (3<sup>rd</sup> Dept 1980)(court had no jurisdiction to order the termination of employees found wrongfully hired where they had not been joined as parties); Kirkland v. Board of Education, 49 AD2d 693 (4<sup>th</sup> Dept 1975)(where plaintiff challenged validity of appointment, incumbent holding position was necessary party as person who would be inequitably affected).

After a full review of the record this Court finds that this Article 78 proceeding is improper and must be dismissed. Further, the Petitioner failed to name the State of New York as a party and improperly included the Office of the Attorney General. As such, the Petitioner's motion is denied.

All papers, including this Decision and Order are being returned to the attorneys for the Respondent. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: July 23 2007

Albany, New York

  
Joseph C. Teresi, J.S.C.

Papers Considered:

1. Petition of John R. Atkinson III dated February 1, 2007
2. Order to Show Cause by Hon. John C. Egan, Jr. Dated April 13, 2007
3. Notice of Motion by Christina Roberts, dated July 6, 2007
4. Affirmation by Christina Roberts dated July 6, 2007
5. Reply Notice of Motion by John Atkinson, dated July 12, 2007