

**Kapitus Servicing, Inc. v Ragtime Gourmet Corp./Joe-
Le Holding Corp.**

2025 NY Slip Op 31927(U)

May 23, 2025

Supreme Court, New York County

Docket Number: Index No. 653529/2022

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

KAPITUS SERVICING, INC.,

Plaintiff,

- v -

RAGTIME GOURMET CORP./JOE-LE HOLDING CORP.,
ANGELO GURINO

Defendant.

-----X

INDEX NO. 653529/2022
MOTION DATE 11/22/2024
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, plaintiff’s motion is denied.

Background

In 2016, Ragtime Gourmet Corp. d/b/a Gourmet of Howard Beach (“Corporate Defendant”) entered into a purchase and sale of future receivables agreement with Core Business Finance. The agreement listed as merchant “Ragtime Gourmet, Inc/Jo-Le Holding Corp.” Angelo Gurino (“Individual Defendant”, collectively with the Corporate Defendant the “Defendants”) also signed a guaranty agreement in connection with the future receivables sale. According to this agreement, Colonial Funding Network, Inc. was an authorized servicing agent for Core, the funder. In 2019, Colonial would later change their name to Kapitus Servicing, Inc. (“Plaintiff”).

Plaintiff alleges that in August of 2016, they paid the Corporate Defendant the agreed upon purchase price for the future receivables. As part of the agreement, the Corporate Defendant was to use a specified credit card processor, enabling Plaintiff to collect a daily percentage of receivables. After \$15,578.25 of the \$132,480.00 total purchased receivables were

remitted, Plaintiff alleges that the Corporate Defendant diverted their receivables to a non-authorized credit card processor. The total amount of outstanding receivables and fees allegedly now owed to Plaintiff is \$124,401.75. In 2022, Plaintiff filed this underlying proceeding against “Ragtime Gourmet Corp./Jo-Le Holding Corp. d/b/a Ragtime Gourmet of Howard Beach.” Defendants, but not Jo-Le Holding Corp., have answered.

Standard of Review

Under CPLR § 3212, a party may move for summary judgment and the motion “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” CPLR § 3212(b). Once the movant makes a showing of a prima facie entitlement to judgment as a matter of law, the burden then shifts to the opponent to “produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 [2016]. The facts must be viewed in the light most favorable to the non-moving party, but conclusory statements are insufficient to defeat summary judgment. *Id.*

Discussion

Plaintiff brings the present motion for summary judgment, which is opposed by Defendants. As a preliminary matter, it is undisputed that Jo-Le Holding Corp. (a separate company from the Corporate Defendant) was never served in this action, and the time to do so has expired. Plaintiff argues that the Corporate Defendant and Jo-Le Holding Corp. have both the same business address, and the same officer designated for service, and therefore when the Corporate Defendant answered that was the functional equivalent of Jo-Le Holding Corp. answering. This argument fails. Plaintiff has only briefly argued and has not in any way

conclusively established an alter ego theory that would make Jo-Le and the Corporate Defendant the same entity. This Court does not have jurisdiction over a party that has not been served and has not waived service, and therefore all claims against Jo-Le Holding Corp. will be dismissed.

Questions of Fact Prevent Summary Judgment in This Matter

Under the standard for summary judgment as set forth above, the presence of a question of material fact precludes the granting of summary judgment. Defendants have raised multiple areas that they believe defeat summary judgment, but because there are material issues of fact going to the enforceability of the agreement itself, the Court need not reach the other arguments. Defendants have argued that the receivables agreement is actually a usurious loan, which is unenforceable under New York law. *See, e.g., Adar Bays, LLC v. GeneSYS ID, Inc.*, 37 N.Y.3d 320, 333 [2021]. The three factors that distinguish a receivables purchase agreement from a usurious loan are “(1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy.” *LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 A.D.3d 664, 666 [2nd Dept. 2020].

It is not disputed that under the agreement here, the merchant declaring bankruptcy constitutes a default and that Plaintiff would have recourse should that occur. Plaintiff argues that the presence of recourse in the face of bankruptcy does not defeat summary judgment, but they cite to no binding authority on that issue. The First Department has in contrast stated that an agreement that provides recourse should the merchant declare bankruptcy “suggests a loan rather than a sale and purchase of receivables.” *Kapitus Servicing, Inc. v. Point Blank Constr., Inc.*, 221 A.D.3d 532, 534 [1st Dept. 2023]. Because there are issues of fact that go to the enforceability of the agreement, summary judgment cannot be granted in this matter. Accordingly, it is hereby

ADJUDGED that plaintiff's motion is denied; and it is further

ORDERED that the matter is dismissed as to defendant Jo-Le Holding Corp. only.

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5/23/2025

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE