

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHARLES J. MARKEY IA Part 32  
Justice

RUNNERLESS KNITS, INC.	X Index : Number <u>24139</u> 2008 : : Motion : Date <u>February 26,</u> 2009 : : Motion
-against-	
KNITWORK PRODUCTIONS CORPORATION, et al.	: Cal. Number <u>18</u> : : Motion Seq. No. <u>1</u> X

The following papers numbered 1 to 9 read on this motion by defendants to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7), and for security for costs pursuant to CPLR 8501 (a).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1 - 4
Answering Affidavits .....	5 - 6
Reply Affidavit .....	7 - 9

Upon the foregoing papers it is ordered that the motion is determined as follows:

In order to prevail on that branch of their motion which is brought pursuant to CPLR 3211 (a) (1), defendants are required to demonstrate that "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; see Uzzle v Nuncie Court Homeowners Assoc., 55 AD3d 723, 724 [2008]; 30<sup>th</sup> Place Holdings, LLC v 474431 Assocs., 54 AD3d 753 [2008]; Sullivan v State of New York, 34 AD3d 443, 445 [2006]).

With respect to that branch of defendants' motion which is predicated upon CPLR 3211 (a) (7), the court is not called upon to determine the truth of the allegations (see AG Capital Funding Partners v State St. Bank & Trust Co., 5 NY3d 582, 591 [2005]; 219 Broadway Corp. v Alexanders, Inc., 46 NY2d 506, 509 [1979]).

Rather, the court must assume all allegations to be true, liberally construe the pleadings, and give the plaintiff the benefit of every possible inference (see Cron v Hargro Fabrics, 91 NY2d 362, 366 [1998]; Leon v Martinez, 84 NY2d 83, 87 [1994]; Sanders v Winship, 57 NY2d 391, 394 [1982]), determining only whether the plaintiff has a cause of action cognizable at law (see Leon v Martinez, 84 NY2d at 87-88; Natural Organics v Smith, 38 AD3d 628 [2007]). Affidavits submitted by the plaintiff in opposition to the motion may be considered by the court to rectify any defects in the complaint itself (see Leon v Martinez, supra, at 88; Rovello v Orofino Realty Co., 40 NY2d 633, 636 [1976]; Morad v Morad, 27 AD3d 626 [2006]).

Applying the above principles, the complaint, as supplemented by plaintiff's opposing papers, adequately sets forth valid causes of action against defendants to recover damages for breach of contract (see Uzzle v Nuncie Court Homeowners Assoc., supra; R.I. Is. House, LLC North Town Phase II Houses, 51 AD3d 890, 895 [2008]) and for an account stated (see generally Interman Indus. Prods., Ltd. v R.S.M. Electron Power, 37 NY2d 151, 153-154 [1975]; Arrow Emp. Agency v Rosen Bakery Supplies, 2 AD3d 762 [2003]; Yannelli, Zevin & Civardi v Sakol, 298 AD2d 579 [2002]). Furthermore, defendants' contention that there is no legal basis for the award of attorneys' fees and costs is belied by the terms of the contracts allegedly breached, i.e., the credit agreement and invoices (see TAG 380, LLC v ComMet, 10 NY3d 507, 515-516 [2008]; Hooper Assocs. v AGS Computers, 74 NY2d 487, 491 [1989]; Siamos v 36-02 35<sup>th</sup> Ave. Dev., 54 AD3d 842 [2008]).

Contrary to defendants' contention, the documentary evidence they submitted fails to demonstrate conclusively that plaintiff breached the contracts to such an extent that defendants' own performance thereunder was excused (see Uzzle v Nuncie Court Homeowners Assoc., supra, at 724; R.I. Is. House, LLC v North Town Phase II Houses, supra, at 893; Sta-Brite Servs. v Sutton, 17 AD3d 570 [2005]; Maggio Importato v Cimitron, 189 AD2d 654 [1993]), or that they timely objected to the invoiced sums (see Arrow Empl. Agency v Rosen Bakery Supplies, supra; Yannelli, Zevin & Civardi v Sakol, supra).

With respect to that branch of defendants' motion seeking security for costs, plaintiff admits that it is a foreign corporation not licensed to do business in New York, and that, consequently, defendants are entitled to such security as a matter of right (CPLR 8501[a]). Defendants contend that a bond in the amount of \$15,000 is warranted by "the significant number of depositions that need to be taken in the instant case and the numerous locations at which such depositions need to be taken, and the likely need to employ the services of a translator." They

have, however, failed to support their broad assertions with specifics as to the anticipated number and locations of prospective depositions. Allowable costs and disbursements are statutory (CPLR Articles 82 & 83) and "in New York the courts have been niggardly in construing Article 83" (McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY Book 7B, CPLR C8301:1 at 191; see Allied Excavating Corp. v Graves Equipment Company, 99 AD2d 499 [1984]; Hartmann v Fox, 87 AD2d 885 [1982]). Consequently, the court finds no basis for departing from the statutorily-fixed amount of the undertaking to be given as security for costs (CPLR 8503).

Accordingly, defendants' motion is granted solely to the extent that plaintiff is required to provide security for costs by filing an undertaking in the amount of \$500 and serving a copy thereof. All proceedings herein are stayed until such security is provided (CPLR 8502).

Dated: April 22, 2009

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J.S.C.