COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE No. 07-CI-1765

ENTERED JUN 19 2008 FRANKLIN CIRCUIT COURT SALLY JUMP, CLERK

UNIVERSITY OF LOUISVILLE **PLAINTIFF**

v. **OPINION AND ORDER**

DUKE UNIVERSITY **DEFENDANT**

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This matter is before the Court on Duke University's motion for judgment on the pleadings under CR 12.03. In this case, the University of Louisville has sued Duke University for breach of contract as a result of Duke's cancellation of football games scheduled for 2007, 2008 and 2009 under an Athletic Competition Agreement entered into by the parties in 1999. For the reasons stated below, Duke's motion is GRANTED as to the claims arising out of the 2007 and 2008 football seasons. The Court further holds that the claim arising out of the 2009 season is not ripe for adjudication, and must be DISMISSED without prejudice.

A motion for judgment on the pleadings is appropriate when a decision can be rendered in favor of the moving party as a matter of law, even though the Court must draw all factual inferences in favor of the party opposing the motion. City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court, 104 S.W.3d 757 (Ky. 2003). Here, the Court finds that none of the material facts are in dispute, and Duke is entitled to judgment as a matter of law regarding the claims arising out of the 2007 and 2008 football seasons.

The parties entered into an agreement on June 23, 1999, by which they agreed to play four games in 2002, 2007, 2008, and 2009. Following the 2002 game, Duke

canceled the remaining games in the contract with Louisville. The contract signed by the parties contained a penalty of $150,000 per game for cancellation if the non-breaching party is unable to schedule a replacement game with a "team of similar stature."[1]

The case at bar presents a question of contract interpretation. Absent an ambiguity, Kentucky courts are instructed to interpret contract terms according to their plain and ordinary meaning. Frear v. PTA Industries, Inc., 103 S.W.3d 99, 106 (Ky. 2003).[2] Paragraph 13 of the contract between the parties states that the team which breaches the agreement is required to pay $150,000 per game to the non-breaching party. The breaching party is relieved of the obligation to pay liquidated damages, however, if the non-breaching team is able to schedule a replacement game "with a team of similar stature."[3] The Court finds no ambiguity in this language, and thus this provision must be interpreted according to its plain and ordinary meaning.

To say that one thing is "of a similar stature" to another is to say that the two are on the same level.[4] Nothing in the language of the agreement suggests that it is necessary or appropriate to conduct an in-depth analysis of the relative strengths and weaknesses of the breaching team and its potential replacements. Nor does the agreement specify that replacement teams must be from a particular major athletic conference or even a particular division of the National Collegiate Athletic Association (NCAA). The term "team of similar stature" simply means any team

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[1] Defendant's Memorandum, pp. 1-3; Plaintiff's Response, pp. 3-5

[2] *See* f.n. 15, citing O'Bryan v. Massey-Ferguson, Inc., 413 S.W.2d 891, 893 (Ky. 1966.

[3] Defendant's Memorandum, Exhibit 1, paragraph 13

[4] "Stature" is defined as "quality or status gained by growth, development or achievement". *Webster's Seventh New Collegiate Dictionary* (G. & C. Merriam, 1967). The Court finds that this term, as used in the Athletic Competition Agreement, means the quality or status of development or achievement of Duke's football team.

that competes at the same level of athletic performance as the Duke football team. At oral argument, Duke (with a candor perhaps more attributable to good legal strategy than to institutional modesty) persuasively asserted that this is a threshold that could not be any lower. Duke's argument on this point cannot be reasonably disputed by Louisville.[5] Duke won only one football game, and lost eleven, during the 2007 football season.[6]

Louisville concedes that it has filled its schedules for the 2007 and 2008 football seasons.[7] Louisville does not even attempt to argue that any of the teams scheduled for 2007 or 2008 are inferior to Duke from the standpoint of athletic ability or success on the football field. Rather, Louisville argues that the term team "of a similar stature" is inherently ambiguous and the Court needs to allow further discovery and litigation over the meaning of that term, notwithstanding the enormous costs and lengthy delay to both parties that would result from such a ruling.

As explained above, the Court rejects this argument and finds that this term is unambiguous. Accordingly, it must be applied according to its plain meaning and common use. Louisville's alleged inability to schedule replacement games with teams from major athletic conferences or members of the Football Bowl Subdivision

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[5] Duke, in its Answers to Interrogatories, asserted that "any and all college varsity football teams in the Football Championship Subdivision (formerly Division I-AA) that would be considered as good or better than Duke in football, including but not limited to, any Football Championship Subdivisions teams the Plaintiff played, or ahs agreed to play, in the ten years prior to signing the Agreement and the ten years after signing the Agreement are teams of a 'similar stature' to Duke, as that term is used in the Agreement and as that term is understood in the context of college football programs." Answer to Interrogatory No. 1, attached as Exhibit C to Louisville's Response to Duke's motion for judgment on the pleadings. Louisville offers no counter-definition of the term, but rather argues that the meaning of the term "cannot be determined from the pleadings." (Louisville Response, p. 6)

[6] Duke Motion for Judgment on the Pleadings, Exhibit 4, filed 2/14/08.

[7] Louisville's 2007 schedule is set forth in paragraph 14 of the Complaint; Its 2008 schedule is attached as Exhibit B to its Response to Duke's motion. All teams on these schedules for both years are schools listed by the NCAA as Division 1 institutions.

is irrelevant. Louisville does not, and cannot reasonably, contest the proposition that all of the teams it has scheduled for 2007 and 2008 are "of a similar stature" in terms of the one relevant criterion: the quality of those football teams compared to Duke's football team.

Duke is an NCAA Division I school that regularly competes with football teams in both the Football Bowl Subdivision and the Football Championship Subdivision, as does Louisville.[8] The Court therefore finds that it is reasonable as a matter of law to interpret the plain language of the contract in accordance with the established practice of both parties to this agreement, in which football games are regularly scheduled with Division I schools from both Subdivisions.

Accordingly, the Court finds there is a rebuttable presumption that any team designated by the NCAA as a Division I school, whether in the Football Bowl Subdivision or the Football Championship Subdivision, is a team of "similar stature" to Duke within the ordinary meaning of the language used in this Athletic Competition Agreement. While that presumption is not conclusive, Louisville should be required to produce at least some relevant, material and factual evidence that any of the teams on its schedule for 2007 or 2008 could be considered to be inferior to Duke's football team. Louisville has made no attempt to do this.

A breach qualifies as anticipatory when one repudiates an agreement using unequivocal words or conduct, and said repudiation substantially impairs the value of the contract. Upton v. Ginn, 231 SW3d 788 (Ky.App. 2007). On March 24, 2003,

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[8] Duke's football schedule for 2007 is attached as Exhibit 4 to Duke's Motion for Judgment on the Pleadings. For Louisville's 2007 and 2008 schedules, see paragraph 14 of the Complaint, and Exhibit B to Louisville's Response to Duke's Motion, filed 4/8/08.

Duke sent a letter to the University of Louisville stating that its team would not play the games scheduled for 2007, 2008, and 2009 under the Athletic Competition Agreement at issue in this case.[9] This letter provides evidence of an unequivocal repudiation of the agreement, and refusing to play these games substantially impairs the value of the agreement. An anticipatory breach of a contract can, under some circumstances, give rise to an immediate action for damages. However, one may not collect on damages under the agreement until such damages become due. Jordon v. Nickell, 253 SW2d 237 (Ky. 1952). Damages under this contract for cancellation of the 2009 football game cannot be due until it is determined whether Louisville schedules a replacement game with a "team of similar stature" for the 2009 football season.

The Athletic Competition Agreement provides that the $150,000 penalty is waived when the non-breaching party schedules a contest with a "team of similar stature".[10] Thus, under the terms of this contract, waiver of the penalty cannot be determined until the non-breaching team's schedule is final. If all the teams on this schedule are "teams of a similar stature", then the breaching party cannot be liable.

The 2007 season has been completed,[11] and it appears from the record that Louisville, on the weekend it had contracted to play Duke, instead played the University of Utah, an NCAA Division I Football Bowl Subdivision school. Louisville suggests, without offering any evidence, that Utah may not have been the replacement game for the canceled Duke game. Nevertheless, Louisville has submitted no evidence of record that *any* of its 2007 games were with teams that were

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[9] Defendant's Memorandum, p. 2
[10] Ibid, Exhibit 1, paragraph 13
[11] Plaintiff's Response to Request for Production of Documents #10, Exhibit A2

not designated as Division I schools by the NCAA.[12] Nor has Louisville offered any evidence that any of the Division I teams scheduled are not on a par with the Duke football team in terms of their "development or achievement."

Likewise, the 2008 schedule is now final.[13] Louisville has failed to proffer any evidence that any of its scheduled opponents could be considered inferior to the Duke football team. Louisville has a full schedule of Division I opponents for 2008. Accordingly, Duke cannot be held liable for liquidated damages under the contract. Summary judgment must be granted in favor of Duke and against Louisville for all claims arising out of the 2008 season on the same grounds as for the 2007 season.14

The issue of Duke's potential liability for the $150,000 penalty for the 2009 game cannot be determined until Louisville's schedule for 2009 becomes final.[15] Duke argues that this claim is not ripe for adjudication. Although Louisville's 2009 schedule is not yet final, the Court notes that Louisville has gone on record as stating that "Louisville was able to fill the games in 2008 and 2009 with a home and home contract. It is 2007 that is the problem."[16]

Nevertheless, such a claim based on Louisville's 2009 schedule is certainly premature. While an anticipatory breach may have occurred, the contract itself

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12 Indeed, Louisville's 2007 schedule is set forth in paragraph 14 of the Complaint, and the Court takes judicial notice that all teams on the schedule are NCAA Division 1 schools.

13 48-1-08-VCR-27 A/B , 9:40

14 At the time the motion was filed, Duke maintained that the claim for the 2008 season was not ripe because the season had not been completed. However, at oral argument, Louisville represented to the Court that the 2008 schedule had since been made final.

15 Louisville argues that the language of the liquidated damages clause was supplied by Duke, and thus must be construed against Duke if it is ambiguous. (Louisville Response, p. 10). The Court, however, finds no ambiguity in the contract. Where there is no ambiguity, the rule of *contra proferentem* does not apply. Kentucky Association of Counties All Lines Fund v. McClendon, 157 S.W.3d 626 (Ky. 2005). Moreover, the due date of this penalty is fixed by contract and cannot be accelerated by the Court under Jordan v. Nickell, *supra* at 239.

16 Email from Mark Ament, counsel to Louisville, to Kate Hendricks, general counsel of Duke, September 26, 2006. Exhibit 2, Duke Reply, 4/10/08.

provides that no damages are due if a "contest with a team of similar stature is scheduled." (Contract, Item 13). The Complaint contains no request for injunctive relief, and counsel advised the Court at oral argument that Louisville does not seek injunctive relief. Damages are a necessary element of any claim for breach of contract. Barnett v. Mercy Health Partners-Lourdes, Inc., 233 S.W.3d 723, 727-28 (Ky. App. 2007). Fannin v. Commercial Credit Corp., 249 S.W.2d 826 (Ky. 1952). Under this contract, no damages can be assessed if Louisville schedules a replacement game with a "team of similar stature" to Duke for 2009. Accordingly, Louisville's claim for the 2009 season is not ripe. As the Court of Appeals has held, "[a]n unripe claim is not justiciable." Doe v. Golden & Walters, 173 S.W.3d 260 (Ky. App. 2005).

Louisville argues that summary judgment is premature, and that it is entitled to take additional discovery. In light of the Court's ruling that the contract is not ambiguous and must be applied according to its plain meaning, the Court is at a loss to see how additional discovery could be warranted. Extensive written discovery has been completed. There are no additional disputed issues of material fact on which discovery could reasonably continue. Kentucky courts have long held that parties are only entitled to an adequate, not an unlimited, opportunity to complete discovery. Rich v. Kentucky Country Day, Inc. 793 S.W.2d 832, 838 (Ky. App. 1990). Here, as in Rogers v. Professional Golfers Association, 28 S.W.3d 869, 874 (Ky. App. 2000), the Court has found that the plaintiff's claims must fail as a matter of law and thus, "further discovery is unnecessary."

As the Court of Appeals has noted, in considering a motion for summary judgment "[t]he movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment." Hallahan v. The Courier-Journal, 138 S.W.3d 699, 705 (Ky. App. 2004). When a summary judgment has been made and properly supported, the party opposing the motion must produce "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 482 (Ky. 1991). As the Supreme Court has explained, "[t]he party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent summary judgment.." Wymer v. JH Properties, Inc., 50 S.W.3d 195, 199 (Ky. 2001). Here, Duke has carried its burden to demonstrate that there are no material issues of disputed fact, and that it is entitled to judgment as a matter of law. Louisville has not produced any "significant evidence" that would support its claims or its argument that there are disputed material facts at issue. Accordingly, this Court must grant summary judgment on all claims arising out of the 2007 and 2008 football seasons. The claim arising out of the 2009 football season is not ripe, and must be dismissed without prejudice.

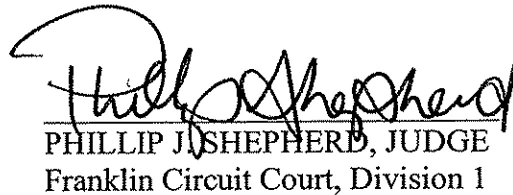
CONCLUSION

For the reasons stated above, the motion of defendant Duke University for judgment on the pleadings will be considered as a motion for summary judgment under CR 56. Hoke v. Cullinan, 914 S.W.2d 3335 (Ky. 1995). Duke's motion is GRANTED as to all claims arising out of the 2007 and 2008 football seasons, and

those claims are DISMISSED with prejudice. Duke's motion to dismiss Louisville's claim regarding the 2009 season for lack of ripeness is GRANTED, and Louisville's claim arising out of the cancellation of the 2009 football game is DISMISSED without prejudice.

This is a final and appealable order and there is no just reason for delay.

So **ORDERED** this the 19th day of June, 2008.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division 1

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07-CI-1765/