

Court of Common Pleas of Ohio  
Erie County, Civil Division

Andrew A. Oliver

Case No. 2008 CV 762

v.

National Collegiate Athletic Association.

Decided December 24, 2008

Richard G. Johnson, for plaintiff.

Linda J. Salfrank and Kimberly W. Herlihy, for defendant.

TONE, Judge.

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{¶ 1} This matter is before the court on the motion for summary judgment filed by the defendant, the National Collegiate Athletic Association ("NCAA"), on November 3, 2008. On November 4, 2008, the plaintiff filed a motion to strike the defendant's motion for summary judgment with a request for an expedited ruling. After thorough review of the pleadings and the applicable case law, the court determines that the defendant's motion is not well taken and is hereby denied.

FACTS

{¶ 2} The facts of this case are set forth in this court's entry of December 12, 2008, which is reported at \_\_\_ Ohio Misc.2d \_\_\_, 200\_-Ohio-\_\_\_\_.

ARGUMENT

{¶ 3} The NCAA argues that because the plaintiff has no evidence of a contract with it, it is entitled to summary judgment. To bolster this claim, the defendant further contends that it is undisputed that the plaintiff violated the NCAA's amateur athletics rules, that he has committed a prior first breach and has unclean hands, and that he is thus precluded from prevailing on a contract claim. The defendant also contends that the plaintiff has failed to exhaust the administrative remedies set forth by the NCAA.

{¶ 4} Second, the defendant argues that the NCAA is entitled to summary judgment on the plaintiff's breach-of-tortious-interference claim. Here, the defendant maintains that the plaintiff cannot present sufficient evidence based upon the undisputed facts to recover under this theory because, if the plaintiff is claiming that the NCAA somehow interfered with the plaintiff's future expectancy, the argument must fail as a matter of law.

{¶ 5} Third, the defendant avers that the plaintiff's allegations of legal-ethics violations are immaterial and do not give rise to any claim for relief in regard to the NCAA and that the plaintiff cannot state a claim for legal malpractice against the NCAA.

{¶ 6} Last, the NCAA states that it is entitled to partial summary judgment on the plaintiff's request for monetary and punitive damages. The defendant states that the plaintiff can present no evidence that he has suffered compensatory, nonspeculative damages. Furthermore, the plaintiff cannot

request punitive damages without any evidence of malice or wrongful intent, which are not present, according to the defendant.

{¶ 7} The plaintiff responds that he has a contractual relationship with the defendant by his national letter of intent and that he is a third-party beneficiary to the contractual relationship between the defendant and Oklahoma State University ("OSU"). In addition, the plaintiff contends that his 2007 NCAA Student Athletic Statement is an adhesion contract that gives his promotional rights to the defendant in exchange for his athletic eligibility. The plaintiff further answers the defendant's allegation of unclean hands by unequivocally stating that he did not negligently, recklessly, knowingly, or intentionally violate the NCAA's constitution, bylaws, regulations, or rules. The plaintiff also argues that there are no administrative remedies for him to exhaust since the defendant does not allow the plaintiff to participate in its reinstatement procedures.

{¶ 8} Next, the plaintiff reiterated that the defendant tortiously interfered with his contract in numerous ways, and he submitted expert-witness reports to show this interference and the damages that flow from it.

{¶ 9} Last, the plaintiff asserts that the defendant only alludes to declaratory and injunctive relief and makes no consistent argument to either claim and that the defendant ignores the fact that this court has already granted a temporary restraining order on counts three and four.

#### LAW AND ANALYSIS

{¶ 10} “[A summary judgment] motion is made on the grounds that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law as shown by the pleadings \* \* \* served and filed herewith.” 1 Ohio Civil Practice (2008), Section 3.65. “The principal function of Civ.R. 56(E) is to enable movement beyond allegations in the pleadings and to analyze the evidence so as to ascertain whether an actual need for a trial exists.” *Smith v. Mayfield* (Oct. 30, 1989), Mahoning App. No. 89 CA 19, \*2. When a motion for summary judgment is made and supported as provided in the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings: his response must set forth specific facts showing that there is a genuine issue for trial. *Id.*

{¶ 11} The test for rendering summary judgment is determined by a tripartite demonstration: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.* (1978), 54 Ohio St.2d 64, 66.

{¶ 12} “The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment.” *Id.* at 66. It is the duty of a party on whom the burden of proof rests to produce evidence that furnishes a reasonable basis for sustaining his claim. If the

evidence so produced furnishes only a basis for a choice among different possibilities as to any issue in the case, he fails to sustain such burden. *Stevens v. Indus. Comm.* (1945), 145 Ohio St. 198, 203.

{¶ 13} In response to the motion for summary judgment, the nonmoving party may not rely on his pleadings if he bears the burden of truth at trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317. Instead he must produce evidence, in some form permitted by Civ.R. 56(C), sufficient to justify the court's conclusion that a reasonable jury could properly render a verdict in his favor. *Id.* at 325. He need not try his case at this level but must produce more than a mere scintilla of evidence to support his claims. *Id.* The nonmoving party must come forward with specific facts showing a genuine issue of material fact in order to escape summary judgment. *Wing v. Anchor Media, Ltd., of Texas* (1991), 59 Ohio St.3d 108, 111. If he fails to prove the existence of an element essential to that party's case, there can be no genuine issue as to any material fact and all other facts are rendered immaterial. *Celotex*, 477 U.S. at 322-323. Where the nonmoving party cannot produce evidence on the issue, there is no genuine issue of material fact and summary judgment is therein mandated. See *Wing*, 59 Ohio St.3d 108.

{¶ 14} Assuredly, the parties in this matter realize that this court can now consider evidence outside of the pleadings (i.e., affidavits), unlike before the previous judgment entry filed on December 12, 2008, which addressed the motion to dismiss. The arguments have primarily remained the same as

expressed in the motion to dismiss, but the court has greater latitude to examine the moving party's evidence, which should furnish a reasonable basis for sustaining its claim, and the adverse party's response setting forth specific facts, before determining whether there are or are not genuine issues for trial.

{¶ 15} The defendant first argues that the plaintiff's claim for breach of contract is without merit because the plaintiff, having failed to attach to the complaint any document purporting to be a contract, cannot present any evidence of an agreement or contract between the plaintiff and the NCAA. The plaintiff has stated that he does indeed have a contract with the NCAA because of his national letter of intent and that he is furthermore a third-party beneficiary to the contractual relationship between the NCAA and OSU. The court has previously ruled in its decision on the motion to dismiss that there is a contractual relationship between the two parties shown by the fact that the administrative remedies had to be exhausted before this matter could go forth.

{¶ 16} Even though the defendant declares that there is no contract between the parties, the plaintiff has responded that the national letter of intent is the contract that binds the two parties' relationship. Whether the basic rudiments of a contractual relationship were formed from that letter is questionable, but the court finds that a contractual relationship does exist. How? A contractual relationship was formed by the plaintiff's status as an intended third-party beneficiary between the NCAA and OSU. The plaintiff, who is not a party to the contract between NCAA and OSU, stands to benefit from the

contract's performance, and thus he acquires rights under the contract as well as the ability to enforce the contract once those rights have vested. See *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 161; Black's Law Dictionary (7th Ed.1999) 149. NCAA members, and OSU in this particular case, pursuant to the NCAA's constitution, bylaws, and regulations, agree that students will not be allowed to play intercollegiate sports unless they meet NCAA requirements. Furthermore, the member institutions agree to let the NCAA set the criteria and to abide by the NCAA's final eligibility decision. See *Hall v. NCAA* (N.D.Ill.1997), 985 F.Supp. 782, 795.

{¶ 17} In order to prove a breach of contract, it is elementary that the plaintiff must show that the defendant failed to perform a material obligation under the contract. The plaintiff has argued, in essence, that the NCAA has failed to meet its duties of good faith and fair dealing by failing to provide fair procedures in its consideration of the plaintiff's athletic eligibility. These arguments are incorporated within Count One of the plaintiff's complaint and, without question, furnish a reasonable basis for not granting summary judgment. There are genuine issues of material fact, which may include but may not be limited to whether the plaintiff was given procedural due process, whether the procedure was arbitrary and capricious, and whether the plaintiff has been punished unreasonably. Reasonable minds could come to more than one conclusion and a reasonable jury could render a verdict in plaintiff's favor. Thus,

summary judgment is denied as to the defendant's argument that there is no contractual relationship between the NCAA and the plaintiff.

{¶ 18} In response to the defendant's argument that the plaintiff should be barred from a breach-of-contract claim because of the doctrines of waiver, estoppel, and unclean hands, the court determines that there remain genuine issues as to material facts, and thus the summary judgment in this regard is also denied. A brief summary of each doctrine is explained below.

#### *Doctrine of Waiver*

{¶ 19} "The most frequently employed definition of waiver is that it is the voluntary relinquishment of a known right. As a general rule, the doctrine of waiver is applicable to all personal rights and privileges, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided that the waiver does not violate public policy." *State, ex rel. Hess v. Akron* (1937), 132 Ohio St.305, 307. In order to establish a waiver it must be shown that the person against whom the waiver is asserted had, at the time, actual or constructive knowledge of the existence of his rights or of the facts upon which he or she depended. 42 Ohio Jurisprudence 3d (2003) 142, Estoppel and Waiver, Section 95.

#### *Doctrine of Estoppel*

{¶ 20} "In essence, the expression of estoppel in the form of a rule is that one party will not be permitted to deny that which, by his words, his acts, or his

silence (when there is an obligation to speak), he has induced a second party reasonably and in good faith to assume and rely upon to that party's prejudice or pecuniary disadvantage." *First Fed. S. & L. Assn. of Toledo v. Perry's Landing, Inc.*, 11 Ohio App.3d 135, 145, 463 N.E.2d 636.

### *Doctrine of Clean Hands*

{¶ 21} "The 'clean hands doctrine' of equity requires that whenever a party takes the initiative to set in motion the judicial machinery to obtain some remedy but has violated good faith by his prior-related conduct, the court will deny the remedy." *Marinero v. Major Indoor Soccer League* (1991), 81 Ohio App.3d 42, 45. The maxim that he who comes into equity must come with clean hands requires only that the plaintiff must not be guilty of reprehensible conduct with respect to the subject matter of his suit. *Id.* " 'If the alleged wrongful conduct of the complainant appears not to have injured, damaged, or prejudiced the defendant, the maxim may not be successfully invoked.' " *McClanahan v. McClanahan* (1946), 79 Ohio App.231, 235, quoting 19 American Jurisprudence, Equity, Section 473. Moreover, the Ohio Supreme Court has held that where a plaintiff's guilt is subordinate to that of the defendant, the doctrine of unclean hands will not be available to that defendant. *Pride v. Andrew* (1894), 51 Ohio St.405, 414-415.

{¶ 22} Since each doctrine is somewhat intertwined, the court will address the doctrine focusing on the "unclean hands doctrine" since it is the theory that

is meticulously discussed by the defendant. This case encompasses the following pertinent issues: whether, as a matter of law, the plaintiff violated NCAA Rule 12.3.2.1; whether, as a matter of law, the NCAA failed to afford the plaintiff due process rights granted by OSU's Student Code of Conduct; whether both the NCAA and OSU breached various Rules of Professional Conduct governing the practice of law in Ohio as they relate to this plaintiff; and whether the rule is unfair as it relates to student athletes in general and to the plaintiff in particular. Whose hands are dirtiest? Is the plaintiff responsible for reprehensible conduct? If so, did the plaintiff's reprehensible conduct injure, damage, or prejudice the defendant? Is the plaintiff's conduct subordinate to that of the allegations averred toward the defendant? What is evident is there are genuine issues as to material facts and reasonable minds could come to more than one conclusion. Therefore, summary judgment is denied concerning the doctrines of waiver, estoppels, and unclean hands.

{¶ 23} On the topic of the exhaustion of administrative remedies, the court has previously ruled that the issue is moot as determined in the December 12, 2008 opinion and judgment entry.

{¶ 24} The court now addresses the plaintiff's request for monetary and punitive damages. It should be noted that in the December 12, 2008 opinion and judgment entry, the court determined, based solely on Civ.R. 12 (B)(6), that the plaintiff stated claims for breach of contract that *if* successful would permit relief to be granted and that the plaintiff sufficiently pleaded the elements of

tortious interference, which *if* proven the plaintiff's relief would be granted. The court now observes these claims under a different set of lenses—that of the tripartite conditions for summary judgment. The plaintiff need not try his case at this level but must come forward with specific facts showing a genuine issue of material fact in order to escape summary judgment.

{¶ 25} Concerning Counts One and Two, the plaintiff has admitted that there remains a material question of fact as to what the contractual relationship is between the plaintiff and the defendant. Even in that respect, if the plaintiff proves that as an intended beneficiary of the contract between the NCAA and its member school, OSU, the parties violated his due process rights, he may be compensated for his damages. Are the damages speculative? Plaintiff is suing for compensatory damages in excess of \$25,000. Surely a jury could determine whether there was a breach, whether there was tortious interference, and whether the plaintiff should be granted compensatory damages for the alleged breach. Such damages are not speculative regarding these issues.

{¶ 26} However, the plaintiff has also set forth evidence that the defendant's alleged actions were the result of malice, defined as either (1) that state of mind under which a person's conduct is characterized by hatred, ill will, or a spirit of revenge or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Preston v. Murty* (1987), 32 Ohio St.3d 334. The defendant's motion for summary judgment as to the plaintiff's claim for punitive damages is denied. However, the

court will determine at trial if sufficient evidence has been presented from which the essential element of actual malice may be inferred. Thus, the defendant's motion for summary judgment concerning punitive damages is hereby denied; but the court will withhold ruling on whether punitive damages may be argued to the jury until the court hears the evidence presented during the trial of this matter.

{¶ 27} Finally, injunctive relief should only be exercised by this court to prevent irreparable harm to the plaintiff. This court should only exercise equitable jurisdiction to prevent imminent harm, not to redress past harm. In order for this court to grant the plaintiff's motion for injunctive relief, the plaintiff "must show that the relief is necessary to protect a clear right from immediate and irreparable harm when any other remedy at law is inadequate." *AgriGen. Co. v. Lightner* (1998), 127 Ohio App.3d 109, 115. Further, irreparable harm consists of the substantial threat of material injury that cannot be compensated with monetary damages. *Id.* Injunctive relief is a drastic remedy and decisions related thereto are addressed to the discretion of this court. See *Consun Food Industries, Inc. v. Fowkes* (1991), 81 Ohio App.3d 63, 69. Therefore, the court will hear the evidence at trial and the arguments of counsel prior to ruling on this issue of equitable relief.

So ordered.