STATE OF MICHIGAN

COURT OF APPEALS

EDWARD POWELL, JR. and JARED POWELL,

Plaintiffs-Appellants,

v

MENOMINEE COUNTY, MENOMINEE REGIONAL AIRPORT COMMITTEE, and MENOMINEE COUNTY BOARD OF COMMISSIONERS,

Defendants-Appellees.

UNPUBLISHED
October 21, 2021

No. 355565
Menominee Circuit Court
LC No. 19-016302-CZ

Before: REDFORD, P.J., and K. F. Kelly and LETICA, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order denying plaintiffs' motion for summary disposition and granting defendants' motion for summary disposition and dismissal of plaintiffs' complaint. We affirm.

I. FACTUAL BACKGROUND

Plaintiffs sued defendants Menominee County, Menominee County Board of Commissioners, and Menominee Regional Airport for declaratory relief on the ground that defendants improperly denied PHDS, Inc. (PHDS) registration as a flying club with privileges at the Menominee Regional Airport. Plaintiffs alleged that PHDS, an entity to which they were members, constituted a "flying club" under provisions of the Michigan Aeronautics Code, MCL 259.1 *et seq*., specifically MCL 259.4(c) and MCL 259.91. Plaintiffs and defendants filed competing motions for summary disposition under MCR 2.116(C)(10). Plaintiffs argued that PHDS qualified as a flying club under federal and state laws and regulations and defendants improperly denied PHDS registration as a flying club with privileges at the airport. Defendants provided a detailed factual background with supporting documentation and argued that PHDS failed to meet federal and state requirements to be registered and have privileges at the airport as a flying club. The trial court denied plaintiffs' motion, granted defendants' motion, and entered an order dismissing plaintiffs' complaint. This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10). *Heaton v Benton Constr Co*, 286 Mich App 528, 531; 780 NW2d 618 (2009). "We also review de novo questions of statutory interpretation." *TCF National Bank v Dept of Treasury*, 330 Mich App 596, 605; 950 NW2d 469 (2019) (citation omitted).

> A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013) (quotations marks and citations omitted).]

The moving party bears the initial burden of production, which may be satisfied "in one of two ways." *Quinto v Cross & Peters Co*, 451 Mich 358, 361; 547 NW2d 314 (1996). "First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Id.* at 362 (quotation marks and citation omitted). Once the moving party satisfies its burden in one of those two ways, "[t]he burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id.*

III. ANALYSIS

Plaintiffs argue that PHDS constituted a "flying club" as defined under federal and state laws and regulations. We disagree.

A. WHAT IS A FEDERALLY OBLIGATED AIRPORT

The parties do not dispute that the Menominee Regional Airport is a federally obligated, public-use airport. A federally obligated airport is an airport that has participated in federal grant programs, received federal development assistance or aid, or received other federal support for improvement or maintenance of a public-use airport.[1] An airport sponsor is the entity that carries out the obligations associated with operating a federally obligated airport.[2] In this case, Menominee County, through the Menominee County Board of Commissioners, with the aid of the

[1] See generally Appendix 1 of the FAA Advisory Circular 150/5190-6 § 1.1g.

[2] See generally Appendix 1 of the FAA Advisory Circular 150/5190-6 § 1.1d.

Menominee Regional Airport Committee, controls and operates that Menominee Regional Airport. Menominee County, therefore, is the airport sponsor.

B. WHAT IS A FLYING CLUB UNDER FEDERAL LAW

Until March 9, 2016, FAA Order 5190.6B, Chapter 10 of the FAA Airport Compliance Manual, § 10.6, defined and set forth the federal standards for flying clubs at federally obligated airports as follows:

> a. Definition. FAA defines a flying club as a nonprofit or not-for-profit entity (e.g., corporation, association, or partnership) organized for the express purpose of providing its members with aircraft for their personal use and enjoyment only.
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> b. General. The ownership of the club aircraft must be vested in the name of the flying club or owned by all its members. The property rights of the members of the club shall be equal; no part of the net earnings of the club will inure to the benefit of any individual in any form, including salaries, bonuses, etc. The flying club may not derive greater revenue from the use of its aircraft than the amount needed for the operation, maintenance and replacement of its aircraft. For a sample of flying club rules and regulations, see the Sample Flying Club Rules and Regulations at the end of this chapter.
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> c. Policies. A flying club qualifies as an individual under the grant assurances and, as such, has the right to fuel and maintain the aircraft with its members. The airport owner has the right to require the flying club to furnish documents, such as insurance policies and a current list of members, as may be reasonably necessary to assure that the flying club is a nonprofit organization rather than an FBO[3] or other commercial entity.
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> The FAA suggests several definitions and items as guidance for inclusion by airports in their minimum standards and airport rules and regulations. (See Appendix O of this Order, Sample Minimum Standards for Commercial Aeronautical Activities, and Appendix P, Sample Airport Rules and Regulations.) These items include:
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> (1). All flying clubs desiring to base their aircraft and operate at an airport must comply with the applicable provisions of airport specific standards or requirements. However, flying clubs will not be subject to commercial FBO

[3] Appendix 1 of the FAA Advisory Circular 150/5190-6 § 1.1i defines "Fixed Base Operator (FBO)" as a "business granted the right by the airport sponsor to operate on an airport and provide aeronautical services such as fueling, hangaring, tie-down and parking, aircraft rental, aircraft maintenance, and flight instruction."

requirements provided the flying club fulfills the conditions contained in the stated airport standards or requirements satisfactorily.

(2). Flying clubs may not offer or conduct charter, air taxi, or aircraft rental operations. They may conduct aircraft flight instruction for regular members only, and only members of the flying club may operate the aircraft.

(3). No flying club shall permit its aircraft to be used for flight instruction for any person, including members of the club owning the aircraft, when such person pays or becomes obligated to pay for such instruction. An exception applies when the instruction is given by a lessee based on the airport who provides flight training and the person receiving the training is a member of the flying club. Flight instructors who are also club members may not receive payment for instruction except that they may be compensated by credit against payment of dues or flight time.

(4). Any qualified mechanic who is a registered member and part owner of the aircraft owned and operated by a flying club may perform maintenance work on aircraft owned by the club. The flying club may not become obligated to pay for such maintenance work except that such mechanics may be compensated by credit against payment of dues or flight time.

(5). All flying clubs and their members are prohibited from leasing or selling any goods or services whatsoever to any person or firm other than a member of such club at the airport, except that said flying club may sell or exchange its capital equipment.

(6). A flying club at any airport shall comply with all federal, state, and local laws, ordinances, regulations and the rules and regulations of the airport.

(7). The flying club should file periodic documents as required by the sponsor, including tax returns, insurance policies, membership lists, and other documents that the sponsor reasonably requires.

d. Violations. A flying club that violates the requirements for a flying club – or that permits one or more members to do so – may be required to terminate all operations as a flying club at all airports controlled by the airport sponsor.

On March 9, 2016, the FAA issued a policy statement that amended FAA Order 5190.6B § 10.6. The FAA clarified that flying clubs at federally obligated airports must conform to the FAA definition of a flying club found in § 10.6 which requires that the flying club be "a nonprofit or not-for-profit entity . . . organized for the express purpose of providing its members with aircraft for their personal use and enjoyment only" and "ownership of the club aircraft must be vested in the name of the flying club or owned by all its members. The property rights of the members of the club shall be equal; no part of the net earnings of the club will inure to the benefit of any

individual in any form . . . ."[4] The FAA explained that commercial service providers that call themselves flying clubs to avoid having to comply with an airport's minimum standards for commercial service providers, hold themselves out as alternatives to traditional flight schools and aircraft rental providers, and charge only nominal annual club fees, do not conform to the FAA definition of a flying club.[5] The FAA in relevant part stated that its policy emphasized that flying clubs "should at no time hold themselves out as fixed based operators, flight schools, or as businesses offering services to the general public" and "must not indicate, in any form of marketing and/or communications, that they are a flight school and flying clubs must not indicate in any form of marketing and/or communications that they are a business where people can learn to fly."[6]

The FAA also directed sponsors of federally obligated airports to "take appropriate action to ensure that commercial operators and flying clubs are properly classified . . . ."[7] The FAA, therefore, revised § 10.6(c)(3) and (4), and added (c)(8) and (9), which state as follows:

> (c)(3). A flying club may permit its aircraft to be used for flight instruction in a club-owned aircraft as long as both the instructor providing instruction and person receiving instruction are members of the club owning the aircraft, or when the instruction is given by a lessee based on the airport who provides flight training and the person receiving the training is a member of the flying club. In either circumstance, a flight instructor may receive monetary compensation for instruction or may be compensated by credit against payment of dues or flight time; however that individual may not receive both compensation and waived or discounted dues or flight time concurrently. The airport sponsor may set limits on the amount of instruction that may be performed for compensation.
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> (c)(4). A qualified mechanic who is a registered member and part owner of the aircraft owned and operated by a flying club may perform maintenance work on aircraft owned by the club. The mechanic may receive monetary compensation for such maintenance work or may be compensated by credit against payment of dues or flight time; however that individual may not receive both compensation and waived or discounted dues or flight time concurrently. The airport sponsor may set limits on the amount of maintenance that may be performed for compensation.
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> (c)(8). Flying Clubs may not hold themselves out to the public as fixed based operators, a specialized aviation service operation, maintenance facility or a flight school and are prohibited from advertisements as such or be required to comply with the appropriate airport minimum standards.

[4] See Fed Reg Vol 81, No 50, 13720-13721.

[5] *Id*. at 13721.

[6] *Id*.

[7] *Id*.

(c)(9). Flying Clubs may not indicate in any form of marketing and/or communications that they are a flight school, and Flying Clubs must not indicate in any form of marketing and/ or communications that they are a business where people can learn to fly.[8]

C. PHDS IS NOT A FLYING CLUB AS DEFINED BY LAW

There is nothing ambiguous in the language set forth in FAA Order 5190.6B § 10.6 and the amendments and clarification by the FAA in its policy statement at Fed Reg Vol 81, No 50, 13720-13721. The plain language of the FAA Order requires that flying clubs at federally obligated airports must comply with the FAA Order, and sponsors of federally obligated airports must enforce such compliance. Menominee County, therefore, as the airport sponsor of a federally obligated airport, had the obligation to ensure that the airport complied with federal and state laws and regulations.

To have flying club status under FAA Order 5190.6B § 10.6, an entity must demonstrate that it is a nonprofit or not-for-profit entity whose aircraft's ownership is vested in the name of the flying club or owned by all its members equally. An entity seeking flying club status is prohibited from holding itself out as a fixed based operator, flight school, or as a business that offers services to the general public. An entity seeking flying club status is expressly prohibited from marketing or communicating in any manner that it is a business where people can learn to fly. See FAA Order 5190.6B § 10.6(a), (b), (c)(8) and (9).

In this case, the record reflects that Joseph Ciochetto, the president, treasurer, and a director of PHDS, owned and held title to the aircraft that PHDS members used, a 1968 Cessna 172K bearing FAA registration number N78729. Ciochetto registered that aircraft with the FAA and identified himself as the owner.[9] The FAA Registry for the aircraft indicates that Ciochetto specified that there were no other owners.

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[8] *Id.*

[9] 14 CFR 47.5 provides:

(a) A person who wishes to register an aircraft in the United States must submit an Aircraft Registration Application, AC Form 8050-1 under this part.

(b) An aircraft may be registered only by and in the legal name of its owner.

(c) 49 U.S.C. 44103(c), provides that registration is not evidence of ownership of aircraft in any proceeding in which ownership by a particular person is in issue. The FAA does not issue any certificate of ownership or endorse any information with respect to ownership on a Certificate of Aircraft Registration, AC Form 8050-3. The FAA issues a Certificate of Aircraft Registration, AC Form 8050-3 to the person who appears to be the owner on the basis of the evidence of ownership submitted pursuant to § 47.11 with the Aircraft Registration Application, or recorded at the Registry.

The "Aircraft Operating Lease Agreement" between Ciochetto and PHDS indicates that the aircraft is held in a trust of Joseph and Lou Ann Ciochetto, of which Ciochetto identified himself as a trustee acting on behalf of the trust when signing the lease. Ciochetto also identified himself in the lease as the owner of the aircraft.[10] The lease provided in relevant part as follows:

> 8. Legal Title to the Aircraft. Legal title to the Aircraft shall remain in the Owner at all times. All attachments, accessories, repairs, remodeling and renewals shall become a part thereof and be the property of Owner. Lessee agrees to place on the exterior or interior of the Aircraft such labels, tags or other notifications of

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> (d) In this part, "owner" includes a buyer in possession, a bailee, or a lessee of an aircraft under a contract of conditional sale, and the assignee of that person.

Plaintiffs argue that Subpart (d) of this regulation signifies that a lessee like PHDS is an "owner" and as such PHDS meets the FAA Order's ownership requirement. Plaintiffs, however, fail to read and understand Subpart (d) which specifies that "a lessee of an aircraft under a contract of condition sale" is deemed an owner. In *Young v Phillips*, 203 Mich 566, 568; 169 NW 822 (1918) (quotation marks and citations omitted), our Supreme Court long ago explained:

> A conditional sale, as that term is used and understood in the affairs of business, is an agreement for the sale of an article of merchandise or other chattel in which the vendee undertakes to pay the price, and possession of the article or chattel is immediately given to the vendee; but the property in—that is, the title to—the same is not to pass to the vendee until the purchase price is fully paid.
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> If, under such a pure conditional sale contract, the vendee fails to make the payments in accordance therewith, the vendor can immediately exercise his right to take the property, or he may sue upon the contract and recover judgment for the unpaid purchase money; but by taking the latter position he makes such sale absolute . . . . We may assume, then, that if the contract simply attempts to do what is set forth in this definition, there can be no question that the instrument is a conditional sale, and, under our recording laws, would not have to be recorded. But when it becomes evident from the instrument itself that it was the intention of the parties not to create a pure conditional sale contract, but, . . . that the title to the property was retained in the vendor simply for security, thereupon the instrument loses its characteristics as a pure conditional sale, and in reality becomes a conveyance intended to operate as a mortgage of goods and chattels, and must be recorded according to the terms, of the recording statute.

The plain language of the aircraft lease between Ciochetto and PHDS makes clear that it is not a lease of an aircraft under a conditional contract of sale, but merely a lease. Under the terms of the lease, there is no specified purchase price or installment payment obligation and at no time would the title to the aircraft transfer to PHDS or its members. Therefore, PHDS, as lessee under the lease cannot be deemed an "owner" under Subpart (d), and its argument in this regard fails as a matter of law.

[10] The trust agreement referenced in the lease is not part of the lower court record.

> Owner's ownership thereof as may be required by applicable law and other governmental rules and regulations.

From this unrebutted evidence, the trial court correctly found that Ciochetto and Lou Ann Ciochetto owned and held title to the subject aircraft and neither PHDS nor its members held ownership interests in the aircraft as required under FAA Order 5190.6B § 10.6 as amended and clarified by the FAA in its policy statement at Fed Reg Vol 81, No 50, 13720-13721. The trial court did not err in this regard, there being no evidence to the contrary. Further, FAA Order 5190.6B § 10.6 provides no lease exception to the ownership requirement, nor does it specify that any form of substantial compliance suffices to meet the ownership requirement. De novo review of the record evidence establishes that plaintiffs failed and could not demonstrate PHDS's compliance with the FAA Order's ownership requirement. Defendants, therefore, appropriately denied PHDS's registration as a flying club at the Menominee Regional Airport, a federally obligated airport, because PHDS failed to comply with the FAA Order's ownership requirement. The trial court did not err in granting defendants summary disposition because plaintiffs failed and could not establish PHDS's flying club status or entitlement to register as a flying club.

D. PHDS IMPROPERLY MARKETED ITSELF

Evidence in this case also established that PHDS violated the FAA Order's prohibition against holding itself out as a place where people could learn to fly by advertising in a flyer posted at the airport terminal that it welcomed student pilots and had a flight instructor on staff. Plaintiffs' assertion that the advertising flyer merely solicited new PHDS members lacks merit. The flyer plainly sought student pilots who could receive flight instruction from a flight instructor on PHDS's staff. As such, PHDS invited people to learn to fly through PHDS and thereby violated the FAA Order and failed and could not qualify as a flying club. The trial court correctly ruled that PHDS could not establish entitlement to registration as a flying club under the FAA Order and, therefore, properly granted defendants summary disposition of plaintiffs' complaint.

Plaintiffs assert that flying clubs may provide flying instruction to club members and that Ciochetto only gave flying lessons to members. Although flying clubs may provide flying instruction to members, evidence in the record indicates that Patrick Schmidt paid Ciochetto 22 payments for flight instruction during 2016 and 2017, and flew from the Menominee Regional Airport approximately 15 times. The record indicated Schmidt was never a member of PHDS and paid Ciochetto for flight instruction. The record reflects that the trial court recalled that Schmidt had been a defendant in a lawsuit brought by Ciochetto against various defendants and evidence in that case revealed that Schmidt took flying lessons from Ciochetto and paid him for the lessons but never joined PHDS.

Plaintiffs submitted a list of PHDS members to the trial court in this case that identified Schmidt as a retired member, but plaintiffs produced no other documentation to support their claim that Schmidt had been a member when he paid for and received flight lessons from Ciochetto. No other evidence rebutted the evidence that indicated that Schmidt had never joined PHDS. On appeal, plaintiffs concede that they do not know if Schmidt was a member of PHDS when he took flight lessons from Ciochetto. The record evidence in this case does not establish conclusively whether Schmidt received flight instruction while a member of PHDS or that PHDS functioned as a flight school. Nevertheless, the evidence regarding Schmidt does not negate the fact that neither

PHDS nor its members owned the aircraft or negate that PHDS advertised to the general public that it constituted an entity that provided services to persons so that they could learn to fly. Both of these facts support the trial court's conclusion that PHDS violated the FAA Order and justified defendants not registering PHDS as a flying club.

Plaintiffs also argue that PHDS complied with the FAA Order because it merely offered an alternative to flight school and allowed student pilot PHDS members to get flying time. That argument, however, lacks merit because the FAA specifically identified entities that called themselves "flying clubs" but charged nominal membership fees and provided flying instruction as an alternative to flight school training, are entities that do not comply with the FAA Order's flying club requirements. PHDS appears to fall squarely within the type of noncompliant entity described by the FAA in its policy statement. PHDS charged members a nominal $1.00 annual fee and held itself out as a business where people could learn to fly. Plaintiffs' description of PHDS as merely an alternative to flight school cannot satisfy the FAA's Order requirements and indicates that PHDS violated not only the letter of the FAA's Order but also its spirit. The trial court did not err in finding that PHDS did not comply with the FAA Order in this regard. Defendants, therefore, also appropriately denied PHDS's registration as a flying club at the Menominee Regional Airport on this ground. The trial court did not err by granting defendants summary disposition of plaintiffs' complaint because they were not entitled to declaratory relief.

IV. CONCLUSION

Because the Menominee Regional Airport constituted a federally obligated airport, federal law and regulations as well as state law governed and controlled the determination whether PHDS satisfied the requirements to be registered and operate as a flying club. PHDS failed to meet the necessary requirements and defendants did not err in their decision to deny registration of PHDS as a flying club. The trial court correctly determined that defendants decided the issue properly and plaintiffs were not entitled to declaratory relief.

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ James Robert Redford
/s/ Kirsten Frank Kelly
/s/ Anica Letica