NOT DESIGNATED FOR PUBLICATION

PETER TUNG NGUYEN	*	**NO. 2005-CA-0007**
VERSUS	*	**COURT OF APPEAL**
CLINICAL HEALTHCARE LABORATORY, INC. AND JONATHAN DUONG NGUYEN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2004-12672, DIVISION "J"
Honorable Nadine M. Ramsey, Judge

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Judge Roland L. Belsome

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(Court composed of Judge Charles R. Jones, Judge David S. Gorbaty, Judge Roland L. Belsome)

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August 10, 2005

AFFIRMED

Peter Tung Nguyen ("the appellee") filed a Petition for Writ of Mandamus against Clinical Healthcare Laboratory, Inc. ("Clinical") and its president, Jonathan Duong Nguyen ("Jonathan") (collectively, "the appellants"), seeking inspection of Clinical's corporate records and attorney's fees for failure of the corporation to comply with the request for inspection. Judgment was rendered in favor of the appellee. For the reasons set forth below, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY:

The appellee's Petition for Writ of Mandamus sought inspection of Clinical's corporate books pursuant to La. R.S. 12:103. The statute provides, in pertinent part:

> D. (1)(a) Upon at least five days' written notice any shareholder, except a business competitor, who is and has been the holder of record of *at least five percent of the outstanding shares* of any class of a corporation for at least six months shall have the right to examine, in person or by agent or attorney, at any reasonable time, for any proper and reasonable purpose, any and all of the records and accounts of the corporation and to make extracts therefrom. Emphasis added.

The appellee alleged in the petition that he was a shareholder of more than the requisite 5% of the outstanding shares in Clinical and that he was denied a request to inspect the corporate records. The appellants' opposition to the inspection was based on the assertion that the appellee owned only 2% of the stock in the corporation.

The matter was tried on September 29, 2004. Judgment was rendered on October 12, 2004, ordering the inspection of the corporate records and ordering the appellants to pay attorney's fees in the amount of $1,000.00. This appeal followed.

ARGUMENT:

The appellants assert the following three assignments of error: 1) the trial court erred in issuing a writ of mandamus ordering production of corporate records to a 2% shareholder; 2) the trial court erred in awarding attorney's fees; and 3) the trial court erred in disregarding the books and records of the corporation when determining corporate ownership.

The thrust of the appellants' argument is that a 2% shareholder cannot lawfully compel the examination of the corporate books under La. R. S. 12:103. Jonathan testified at trial that the appellee and his wife, Kinh owned

two shares (2%) of stock in Clinical. A copy of the stock certificate evidencing these two shares was introduced into the record. Jonathan further testified that the shareholders, all family members, were as follows:

79% Jonathan Duong Nguyen (the appellant)
10% Huyuh Peter Nguyen and his wife, Yeu Thi Nguyen
4% Thang Van Nguyen
2% Annie Nguyen
2% Chau Van Hoang and his wife, Katrina Hoang
2% Peter Tung Nguyen (the appellee) and Kinh Thi Nguyen
1% Men Thi Nguyen

The appellee, on the other hand, maintains that he does own more than 5% of the outstanding shares based on certain loan documents. More specifically, in connection with a loan made to Clinical from the Regional Loan Corporation, the appellee signed a continuing guaranty wherein it was represented that the appellee and his wife, Kinh, together owned 30% of the stock in Clinical. The continuing guaranty, signed by Jonathan and the appellee, lists the stock ownership as follows:

Peter Tung Nguyen (the appellee) and his wife, Kinh-30%
Jonathan Duong Nguyen (the appellant)-10%
Huynh Peter Nguyen and his wife, Yeu Thi Nguyen-60%

In response to this document, Jonathan testified at trial that the Regional Loan Corporation required a continuing guaranty because he did not have adequate credit. Jonathan further testified that the only reason he listed the appellee and his wife as 30% shareholders on the continuing

guaranty was because the Regional Loan Corporation required the guarantors to have at lease 20% ownership in the corporation in order to approve the loan. Jonathan also stated that neither the appellee nor the other guarantors were issued additional shares of stock in return for signing the guaranty. In spite of the representations made in the continuing guaranty, Jonathan submits that the appellee has never owned more than 2% of Clinical's stock.

Jonathan further argues that the trial court was incorrect in its granting attorney's fees because Clinical was in good faith when it refused to release the records. Additionally, he argues that the trial court was in error when it "disregarded the books and records of the corporation in determining ownership." Appellee argues on appeal that the appellants have failed to identify which records were disregarded because the appellants refused to produce any evidence that appellee was not a shareholder of less than the requisite 5%.

STANDARD OF REVIEW:

It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong", and where there is a conflict in the testimony, reasonable evaluations of

credibility and reasonable inferences of fact should not be disturbed on review,

even though the appellate court may feel that its own evaluations and inferences are as reasonable. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be manifestly erroneous or clearly wrong. When findings are based on determinations regarding the credibility of witnesses, the manifest error-- clearly wrong standard demands great deference to the trier of fact's findings. Where a fact-finder's finding is based on its decision to credit the testimony of one or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. *Rosell v. ESCO*, 549 So.2d 840, 844-845 (La. 1989).

LAW AND ANALYSIS:

The Louisiana Business Corporation Law evidences intent on the part of the legislature to limit a shareholder's access to the records of a corporation. *Palowsky v. Premier Bancorp, Inc.*, 595 So. 2d 670, 671 (La. App. 1 Cir. 1991). La. R.S. 12:103(D)(1)(a) grants to a shareholder, who is not a business competitor and who has been the holder of record of at least five percent of the outstanding shares of a corporation for at least six months, the right to examine "any and all of the records and accounts of the corporation and to make extracts therefrom" at any reasonable time and for

any reasonable purpose.

A claimant’s right to be allowed to inspect corporate records, and to penalties for failure of the corporation or its officers to comply, depends initially on whether the claimant is a "shareholder" or "shareholder of record", the terms being synonymous under the statute. *Redemer v. Hollis*, 347 So. 2d 48 (La. App. 2 Cir. 1977). La. R.S. 12:1 defines "shareholder" as "the holder of record of one or more shares." "Shares" means "the units into which the shareholders' rights to

participate in the control of the corporation, in its profits or in the distribution of

corporate assets, are divided." The question of whether appellee is a shareholder is no longer disputed. The issue is, of what percentage is he a shareholder.

The appellants have argued that a corporation is allowed to rely entirely on its records in determining entitlement to access to financial information. La. R.S. 12:79 provides:

> Except as otherwise provided in the articles or by-laws, a corporation, and its directors, officers, and agents, may recognize and treat a person registered on its records as the owner of shares, as the owner in fact thereof for all purposes, and as the person exclusively entitled to have and to exercise all

> rights and privileges incident to the ownership of such shares; and rights under this section shall not be affected by any actual or constructive notice which the corporation, or any of its directors, officers or agents, may have to the contrary.

However, the appellants have produced no corporate records but only continue to maintain that appellee was not a shareholder of more than 2% of the stock. No response to the bank loan document has been made by the appellee. Jonathan in his testimony before the trial court indicated that the factual representations made on this document were false and essentially designed to defraud Regional Loan Corporation. Jonathan further explains that this misrepresentation was to secure a loan for which he did not have the necessary credit. The appellee argues that he was issued additional shares of stock in return for his signing the continuing guaranty. Furthermore, with regards to the standard of review, the trial court Judge made a factual determination both of the credibility of the witnesses and of the sufficiency of the evidence presented. Deference should be given to both of these findings by the reviewing court absent some manifestly erroneous judgment. S*ee Rosell,* 549 So. 2d 840 (La. 1989).

Considering the record, we conclude that the appellee did satisfy the requirement of La. R.S. 12:103(D)(1)(a), i.e., that he was a holder of record

of at

least 5% of the stock in the corporation. Consequently, the appellee did meet his burden of proof in this matter and should be afforded the right to inspect the corporation's records. It follows that the appellants were required to allow inspection and thus can be cast for penalties for refusing to do so. Accordingly, we find that the trial court was neither clearly wrong nor manifestly erroneous in ruling in favor of the appellee.

CONCLUSION:

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED