

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1710

AVIS BOURG, JR.

VERSUS

OFFSHORE MARINE CONTRACTORS, INC., OFFSHORE  
MARINE, INC., TRAM SHIPYARD, INC., AND  
TRAM AVIATION, L.L.C.

Judgment Rendered: May 3, 2012.

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On Appeal from the  
17th Judicial District Court,  
In and for the Parish of Lafourche,  
State of Louisiana  
Trial Court No. 116416

The Honorable Jerome J. Barbera, III, Judge Presiding

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BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

**CARTER, C.J.**

Defendant Offshore Marine Contractors, Inc. appeals the district court judgment granting plaintiff, Avis Bourg, Jr.'s, petition for writ of mandamus. Bourg answers the appeal requesting damages for frivolous appeal. For the reasons that follow, we affirm the judgment of the district court and deny the answer to the appeal.

**FACTS AND PROCEDURAL HISTORY**

Offshore Marine Contractors, Inc. ("OMC") was incorporated by Michael Eymard and his two sons, Louis and Raimy, in 1998. Upon incorporation, one thousand shares of stock were issued to each of the Eymards. In 2003, Avis Bourg, Jr. was hired as a salesman for OMC. Bourg was promoted to vice president of sales and given a seat on the company's board of directors in 2005. According to the minutes of a board of directors meeting and a stock certificate, one thousand shares of stock, representing a twenty-five percent ownership interest in OMC, were issued to Bourg on May 27, 2005.

Bourg was removed as a director and officer in September 2010. Upon removal, Bourg's attorney sent a letter dated September 10, 2010, to OMC requesting the opportunity to inspect its records pursuant to his rights as a shareholder.<sup>1</sup> When Bourg sent representatives to inspect the records, the representatives were asked to leave. Thereafter, in November 2010, Bourg filed a petition seeking issuance of a writ of mandamus to compel access to OMC's corporate records and accounts, alleging that he is a shareholder owning twenty-

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<sup>1</sup> Pursuant to Louisiana Revised Statutes section 12:103D(1)(a), a shareholder who is and has been the holder of at least five percent of the outstanding shares of a corporation for at least six months has the right to examine all of the records and accounts of the corporation.

five percent of its stock.<sup>2</sup> In response, OMC filed various exceptions and a reconventional demand for declaratory judgment claiming Bourg was not the owner of the shares because the shares were not fully paid stock pursuant to Louisiana Revised Statutes section 12:52C.

After a bench trial, the district court ruled in favor of Bourg, granting his request for a writ of mandamus and finding he is a shareholder of OMC, owning one thousand fully paid shares. The judgment also dismissed OMC's reconventional demand.

On appeal, OMC argues that the district court erred in finding Bourg was a shareholder in OMC because Bourg never paid for the shares issued by OMC.

### DISCUSSION

According to Louisiana Revised Statutes section 12:52C, consideration for shares issued "shall be paid in cash or in corporeal or incorporeal property, or services actually rendered to the corporation, the fair value of which is not less than the dollar amount of the consideration fixed for the shares, before the shares are issued." The shares are considered fully paid upon payment of the consideration fixed. La. Rev. Stat. Ann. § 12:52C. A certificate of stock serves as *prima facie* evidence of corporate ownership, but it is to be distinguished from actual ownership which may be determined from all the facts and circumstances of a case. *In re Interdiction of Vicknair*, 01-0902 (La. App. 1 Cir. 6/21/02), 822 So. 2d 46, 50. The party attacking the validity of ownership of the shares has the burden to prove that no consideration was paid. *See Permafill Corporation of*

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<sup>2</sup> Bourg also named Offshore Marine, Inc., Tram Shipyards, Inc., and Tram Aviation, L.L.C. as defendants. The writ of mandamus was granted as to those three defendants pursuant to a consent judgment signed January 19, 2011.

*Louisiana v. Atiyeh*, 97-0099 (La. App. 1 Cir. 2/20/98), 710 So. 2d 1098, 1104; *Thornton v. Thornton Farms, Inc.*, 526 So. 2d 315, 319 (La. App. 3 Cir. 1988).

In deciding whether Bourg paid for the shares issued by OMC, it was necessary for the district court to make factual determinations. It is well-settled that a reviewing court may not disturb the factual findings of the trier of fact in the absence of manifest error. *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989); *Arceneaux v. Domingue*, 365 So. 2d 1330, 1333 (La. 1978). In *Arceneaux*, the Louisiana Supreme Court set forth a two-part test for the appellate review of facts: (1) the appellate court must find from the record that there is a reasonable basis for the finding of the district court, and (2) the appellate court must further determine that the record establishes the finding is not clearly wrong or manifestly erroneous. *Arceneaux*, 356 So. 2d at 1333. Under the manifest error-clearly wrong standard, the reviewing court does not decide whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. *Stobart v. State through Dept. of Transp. and Development*, 617 So. 2d 880, 882 (La. 1993). If the factfinder's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Rosell*, 549 So. 2d at 844.

In oral reasons for judgment, the district court judge stated that "what Mr. Bourg says is more probably than not what happened." He pointed out that at the time of the May 2005 shareholder's meeting, Bourg had been working at OMC for a substantial period of time, the company had obviously "done what Mike Eymard wanted it to do," and it was unlikely that Michael Eymard would have "waited five years for his money." He also stated that, "Mr. Bourg performed the services that

were requested of him[,] and the issuance of the stock was the consummation of the promise made by Mike Eymard, confirmed at the meeting by the board of directors. So, I think Mr. Bourg is the owner of a thousand shares of [OMC].”

It is undisputed that shares of stock in OMC were issued to Bourg. The evidence submitted at trial includes a copy of a stock certificate dated May 27, 2005, certifying that Bourg is the registered holder of one thousand shares of stock in OMC. The evidence also includes a copy of the minutes from a special meeting of OMC’s board of directors held on May 27, 2005. According to the minutes, Bourg was elected to serve as a director and issued one thousand shares. The initial incorporators, Louis, Raimy, and Michael Eymard, were all present at the meeting and signed the minutes.

It is also undisputed that Bourg was treated as a shareholder of OMC from the time the shares were issued in 2005 until his removal in 2010. In September 2006, he was present at a special meeting of the shareholders and reelected to serve as a director of OMC. In March 2007, he was listed as a person owning five percent or more of OMC on a “Disclosure of Ownership” form filed with the Louisiana Secretary of State. In August 2010, he was given official notice of a special meeting of the shareholders with an attached proxy stating he was the “holder of one thousand and no/100 (1,000) shares of common stock of [OMC], entitled to vote at the special meeting of shareholders[.]”

Although shares were issued to Bourg and he was treated as a shareholder for nearly five years thereafter, OMC contends ownership in OMC never transferred to Bourg because he did not pay for the shares. Bourg argues that he paid for the shares through “services actually rendered” to OMC, but OMC argues that those services were for the benefit of another company, Offshore Marine, Inc.

("Offshore Marine").<sup>3</sup> According to Bourg, no value or price for the OMC stock was discussed. He stated that cash payment for the shares was never demanded, and it was never mentioned that he would have to make further payment, beyond his services, for the shares. He also stated that until the day of trial, Michael never mentioned he would have to pay. The services Bourg claims entitle him to shares in OMC include, among other things, his involvement in a deal to purchase vessels. Bourg testified that Michael told him if he wanted to be a partner in OMC, he would have to sign personally and pledge his personal property for the loan to purchase the vessels. Bourg testified that it was 2004 when Michael told him he was going to give him stock in OMC, and at that time, OMC was the only company in existence (i.e., Offshore Marine did not exist).

Michael Eymard, OMC's president and chairman of the board, testified that he told Bourg if he could get the deal to purchase the vessels, Bourg would have ownership interest in a company that would own the vessels (Offshore Marine), not in OMC. OMC claims that Bourg's involvement in the purchase of the vessels was for the benefit of this newly created company. In regard to ownership interest in OMC, Michael testified that some time after the purchase of the vessels, he told Bourg he would be in agreement with Bourg owning part of OMC if he paid for twenty-five percent of the company's worth. According to Michael's testimony, Bourg was to pay twenty-five percent of the company's net value at the time, which he calculated to be \$1.45 million. Michael testified that there was no timeline set up for payment, but that Bourg was going to pay for the OMC shares with the distributions he received from Offshore Marine. According to Michael, every time Offshore Marine made a distribution to Bourg, he and Bourg discussed

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<sup>3</sup> Offshore Marine, Inc. was formed and owned in equal shares by Bourg and Raimy, Louis, and Michael Eymard.

using those distributions to make payments on the OMC stock, but Bourg “always had other uses for his money.” However, because all of the communications between Bourg and Michael regarding stock in OMC were verbal, there is no documentation of any demands for payment or of the amount Michael alleges he told Bourg he would have to pay for the shares.

The district court clearly made credibility determinations in evaluating the testimonies of Bourg and Michael. When there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. *Touchard v. Slemco Electric Foundation*, 99-3577 (La. 10/17/00), 769 So. 2d 1200, 1204. When a factfinder’s determination is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. *Touchard*, 769 So. 2d at 1204.

Moreover, the evidence includes a letter Michael wrote to Bourg offering to purchase his ownership interest in four entities, including OMC. The letter did not indicate Bourg owed any money to OMC for the one thousand shares. The evidence also includes OMC’s letter to Bourg written in response to his September 2010 letter requesting examination of corporate records. The letter sets a date and time for inspection and does not dispute Bourg’s ownership interest in OMC.

In reviewing this matter, we find the district court very closely and carefully considered all of the evidence presented. Likewise, we have thoroughly reviewed the record before us and cannot say the judgment of the district court is clearly wrong. We conclude that the evidence in the record reasonably supports a finding

that Bourg was a shareholder in OMC. Therefore, the district court judgment granting Bourg's writ of mandamus is affirmed.

### **OUTSTANDING MATTERS**

Bourg filed a "Conditional Peremptory Exception of Acquisitive Prescription" with this court. Because we affirm the district court's judgment finding Bourg is a shareholder in OMC, we deny Bourg's exception as moot.

OMC filed a "Motion to Strike Post-Hearing Brief Filed by Appellee" that alleges Bourg's post-hearing brief is not in compliance with this court's order. We deny OMC's motion, finding the scope of Bourg's brief is not outside that permitted by this court as expressed at oral argument.

### **ANSWER TO APPEAL**

Bourg filed an answer to OMC's appeal requesting damages for frivolous appeal. Damages for frivolous appeal are allowed only when it is obvious that the appeal was taken solely for delay or that counsel does not sincerely advocate the view advanced to the court. *In re Succession of Badeaux*, 08-1085 (La. App. 1 Cir. 3/27/09), 12 So. 3d 348, 353, *writ denied*, 09-0822 (La. 5/29/09), 9 So. 3d 166. Because we do not find that OMC's appeal unquestionably falls within either category of frivolous appeals, the answer to the appeal is denied.

### **CONCLUSION**

For the above stated reasons, the judgment of the district court granting Bourg's writ of mandamus is affirmed. Bourg's conditional exception and answer to the appeal are denied. OMC's motion to strike is denied. All costs of this appeal are assessed against Defendant/Appellant, Offshore Marine Contractors, Inc.

**AFFIRMED; EXCEPTION DENIED; MOTION DENIED; ANSWER TO APPEAL DENIED.**