NO. 09-1014

IN THE SUPREME COURT OF TEXAS

In Re PERVEZ DAREDIA, Relator

Original Proceeding from the 393rd Judicial District Court
Denton County, Texas
Cause No. 2007-60095-393

REPLY TO AMERICAN EXPRESS' RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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ORAL ARGUMENT REQUESTED

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PRELIMINARY STATEMENT

The Response Brief filed by American Express Centurion Bank and American Express Bank, FSB (jointly referred to as "American Express") fails to comply with the Texas Rules of Appellate Procedure in several ways including:

1) The size of the font appears to be smaller than allowed by Rule 9.4(e);

2) The number of pages of the response exceeds the 15 page limitation allowed by Rule 52.6; and

3) The brief does not indicate it was served on the Respondent as required by Rules 9.5 and 52.7(c).

Even though under the Texas Rules of Appellate Procedure and the principal of fundamental fairness, American Express' Response Brief should be struck and ordered to file a response in conformity with the Rules of Appellate Procedure. Daredia files this reply under Texas Rule of Appellate Procedure 52.5 out of an abundance of precaution because the Supreme Court does not require a reply brief be filed prior to a determination being made on the merits of the case.

REPLY ON THE MERITS TO AMERICAN EXPRESS' RESPONSE BRIEF

In reviewing the response filed by American Express there is a very important concession which encapsulates why Daredia is clearly entitled to mandamus relief. That concession is that the judgment, though allegedly erroneously granted, was final and not interlocutory. In attempting to distinguish this case from the holding of *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001), American Express stated:

> The facts of the instant case are distinguishable from those of *Lehmann v. Har Con Corporation* and *Dikeman*[1]. Unlike *Lehmann* and *Dikeman* here the presiding judge did not simply sign an order that was drafted incorrectly by the moving attorney. **Here, American Express presented an erroneous order to the Court because the proposed order mistakenly completely disposed of the case against both defendants on a default motion**.[2]

While American Express has never pointed to a scintilla of evidence that the judgment was erroneously drafted, the concession that the judgment is final because it "completely disposed of the case against both defendants" shows that the wording of the judgment clearly and unequivocally indicated it was a final and not interlocutory as now claimed.

A judgment that clearly and unequivocally disposed of all claims and all parties is still a final judgment even if it was erroneously drafted or granted. *Lehmann* 39 S.W.3d at 200, 202; *Texas Integrated Conveyor System, Inc. v. Innovated Conveyor Concepts, Inc*., No. 05-08-00654-CV, ___ S.W.3d ____, 2009 WL 3177570 (Texas. App. Dallas, October 6, 2009)(pet. denied)(op., not yet reported); *Carmmack the Cook, LLC v. Eastburn*, 296 S.W.3d 884 (Tex. App. – Texarkana 2009, no pet.); *Fallas County Water Cont. and Imp. Dist. No. 1 v. Haak*, 220 S.W.3d 92 (Tex. App. –Waco 2007, no pet.); *Tutson v. Upchurch*, 203 S.W.3d 428 (Tex. App. – Amarillo 2006, no pet).

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[1] *Dikeman v. Snell*, 490, S.W.2d 183 (Tex. 1973).

[2] This is a not an inadvertent concession because American Express made the same concession in other places in its Response Brief. (*See* p. 10, "The proposed judgment inadvertently professed to enter relief against both Daredia and Map Wireless, Inc."; p. 17, "Despite this, however, the action by American Express against Daredia individually was disposed of when the clerk entered the judgment.")

The reason American Express must make this concession is based upon the wording of the judgment itself. The final paragraph of the judgment expressly states:

> That each of said item shall bear interest from the date of this judgment until paid at the rate of 8.25% per annum, for which let execution issue. All writs and process shall issue without further order of the court. All relief not expressly granted herein is denied. This judgment disposes of all parties and all claims in this cause of action and is therefore FINAL.

While American Express has tried to claim that the judgment is ambiguous and Judge Isaacks made a "clerical error" by not correcting all of American Express' drafting errors, Judge Isaacks made no changes to the final paragraph cited above. At most, the interlineations in the judgment confirm that the monetary damages and other relief were rendered solely against Map Wireless, but the dismissal was to all parties and all claims because American Express had been granted all relief it requested. That is completely consistent and there is no ambiguity. American Express was granted the full amount of the damages sought and all relief that was requested in its petition.

Regardless of whether there is an alleged ambiguity, that does not change the rule that an erroneous final judgment is still a final judgment. Otherwise, a party could always argue that a judgment which erroneously grants more relief than was requested is ambiguous on its face. Based upon the progeny of *Lehmann* cited above and in the Petition for Wit of Mandamus, that is clearly not the law under Texas jurisprudence.

If the wording of a judgment clearly and unequivocally disposes of all parties and all claims, it is irrelevant whether the parties intended the judgment to be final or not. *Lehmann*, 39 S.W.3d at 204. Once a judgment and the trial court's plenary power expires, any judge is without any jurisdiction to vacate the judgment. *See Mathes v. Kelton,* 569 S.W.2d 876 (Tex. 1978); *Dikeman v. Snell,* 490 S.W.2d 183, 186 (Tex. 1973); *McHone v. Gibbs,* 469 S.W.2d 789 (Tex. 1971).

Judge Robison was without jurisdiction to vacate a judgment more than sixteen (16) months after it became final. As a result Daredia is clearly entitled to mandamus relief.

CONCLUSION

The law is clear that a final judgment cannot be vacated after the trial court loses plenary jurisdiction. As previously stated in the Petition for Mandamus Relief and as conceded in the response brief, American Express' best argument is that the judgment was erroneously entered. An erroneously entered judgment that disposes of all parties and all claims is still a final enforceable judgment absent an appeal. The trial court was without any jurisdiction to vacate the final judgment in this case regardless of whether it was erroneously entered.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Relator Pervez Daredia prays this Court find that the Judgment signed by Judge Issacks on July 2, 2007 was final and not interlocutory. Daredia, therefore, would request that the Court grant this request for mandamus relief and find that the Respondent was without

jurisdiction to vacate the July 2, 2007 judgment and enter an order requiring Judge Robison to vacate his order granting American Express' motion for judgment nunc pro tunc and related interlocutory default judgment. Daredia further requests that this Court enter a finding that the Judgment signed on July 2, 2007 is a full and final judgment, affirming that American Express may take nothing from Daredia. Daredia further prays for the Court to grant him all other relief in both law and equity to which he may show himself to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the Reply to Response to Petition for Writ of Mandamus has been mailed to all attorneys of record and parties in this cause of action, as listed below, on the _____ day of February 2010.

The Honorable Judge Doug Robison
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