

No. 2013-69238

Rogelio Morales, Jr.
aka Roy Morales

In the District Court of

v.

Harris County, Texas

Felix Michael Kubosh, *et al.*

157th Judicial District

**DEFENDANT FELIX MICHAEL KUBOSH'S ORIGINAL ANSWER AND
RESPONSE IN OPPOSITION TO PLAINTIFF'S ORIGINAL PETITION, AND
APPLICATION FOR T.R.O. AND TEMPORARY/PERMANENT INJUNCTION,
AND DEFENDANT'S REQUEST FOR DISCLOSURES**

To the Honorable Harris County District Court Judge handling this T.R.O. proceeding:

Comes now Defendant Felix Michael Kubosh ("Mike Kubosh") and responds to the Original Petition and Application for Temporary Restraining Order and Permanent Injunction, etc. filed by Plaintiff Rogelio Morales, Jr. ("Plaintiff Morales") complaining of Felix Michael Kubosh, Annise Parker in her capacity as Mayor of Houston and the members of the Houston City Council in their official capacity and shows the following:

GENERAL DENIAL

1. Under Rule 92, TEX. R. CIV. P., Defendant Mike Kubosh denies that Plaintiff Morales is entitled to any relief whatsoever.

2. Before proceeding with this suit, this Court should ask the preliminary question of whether George M. Bishop of Chappell Hill, Texas, the attorney who drafted these papers and filed suit through his friend Frank Svetlik, is the same George Bishop disbarred from practicing law through State Bar and criminal enforcement proceedings.

See, e.g., *Bishop v. State Bar of Tex.*, 791 F.2d 435 (5th Cir. 1986), a true copy of which is attached as **Defendant's Exhibit 1**.

SPECIFIC DENIALS AND AFFIRMATIVE DEFENSES

3. Defendant Mike Kubosh denies that he is currently a resident of Cypress, Harris County, Texas and avers, instead, that he is and has been a resident of the City of Houston at all times relevant to this lawsuit.

4. Plaintiff Morales is not entitled to a Temporary Restraining Order ("T.R.O.") or other injunctive relief because he waived the right to challenge Defendant Mike Kubosh's residency before City Council (Mayor Annise Parker and Council Members Helena Brown, Jerry Davis, Ellen Cohen, Wanda Adams, Dave Martin, Al Hoang, Oliver Pennington, Ed Gonzalez, James G. Rodriguez, Mike Laster, Larry Green, Stephen C. Costello, Andrew C. Burks, Jr., Melissa Noriaga, C.O. Bradford and Jack Christie) during the year prior to the November 5, 2013 election.

5. Alternatively, laches bars the relief Plaintiff Morales seeks because of Morales' inexcusable failure to raise in a timely manner the issue of Defendant Kubosh's residency under the City's Charter and Code of Ordinances. The City Charter provision that specifically governs City Council runoff elections appears below:

CITY OF HOUSTON CHARTER: ARTICLE V

Section 8. Run-off election, ticket declaration.

- (a) The successful candidate for any office must receive a majority of the votes cast in the election for his office and if no candidate for a particular office receives a majority, a run-off election must be held as provided by the Texas Election Code, Acts 1951, 52nd Legislature, page 1097, Chapter 492, Article 81.

- (b) A group of candidates for Mayor and Council Members who have duly filed for office as provided in Section 6 hereof, comprising not more than one candidate for each of the offices, may file a declaration in writing with the City Secretary stating that they have associated themselves as a ticket for the purpose of presenting to the electors their qualifications for office and their political aims, which declaration may be filed at any time after all have filed for office but not later than five o'clock P.M. (local time) of the second day next following the last day for filing for office. They shall state in the said declaration the name of their ticket which shall not exceed four words in length and which ticket name shall not use all or any part of the name of any political party which nominated candidates for State office in the State General Election last preceding, or any part of the name of any ticket previously declared by another group of candidates. **No candidate shall join in the ticket declaration of more than one ticket, and after a ticket declaration is filed, no candidate's name may be withdrawn from the ticket unless the candidate withdraws his application to be candidate at the election.** The City Secretary shall cause the official ballot to be printed with the names of all candidates associated in a ticket declaration shown under a column headed by the ticket name.

By unreasonably waiting until post-election to challenge Defendant Mike Kubosh's residency on the basis of public records available to him since November of 2012, Plaintiff Morales intentionally waived any right he had to contest Defendant Mike Kubosh's right to appear in this runoff election, or, alternatively, Morales' unreasonable delay and Defendant Mike Kubosh's expenditures of time, money and energy in the interim bar Plaintiff Morales from obtaining the injunctive relief he seeks. *See Landry's Seafood Inn & Oyster Bar-Kemah, Inc. v. Wiggins*, 919 S.W.2d 924, 927 (Tex. App.—Houston [14th Dist.] 1996, no writ) (laches bars T.R.O. relief).

6. Assuming, *arguendo*, that Plaintiff Morales is correct in his analysis of the law or the facts (he is not), then he has an adequate remedy at law because he can seek to contest the election under the Texas Election Code.

7. Plaintiff Morales is not entitled to T.R.O. or other equitable relief because denial of a T.R.O. will not preclude him from obtaining the declaratory relief he sought by filing this declaratory judgment suit, nor will rejection of his T.R.O. application preclude him obtaining a permanent injunction in a case on the merits.

COUNTERCLAIMS

8. Plaintiff Morales seeks a Temporary Restraining Order (“T.R.O.”) that confronts Defendant Mike Kubosh with irreparable injury, that is, the unreasonable denial of the voter-conferred right to defeat Plaintiff Morales in the City Council runoff election scheduled to occur in December 2013, the deprivation of the right to appear on the ballot at the beginning of the runoff campaign, and the loss of all of the time, money, and energy Defendant Kubosh has already devoted to this case.

9. This Court should deny the request for a T.R.O. because a T.R.O. would destroy, rather than preserve, the status quo. *See Ballenger v. Ballenger*, 668 S.W.2d 467, 469-70 (Tex. App.—Corpus Christi 1984, writ dismissed) (a T.R.O. that destroys the status quo should not be granted).

10. In a mandamus case, *In re Barnett*, 207 S.W.3d 306 (Tex. 2006) (orig. proc.), for example, the Texas Supreme Court granted mandamus relief when the Dallas Independent School District and its Board of Trustees refused to place Reverend Marion Barnett’s name on the ballot for DISD Trustee Position #6 after his application revealed sufficient information to show his residency within the district. *See also In re Carlisle*, 209 S.W.3d 93 (Tex. 2006) (orig. proc.) (granting mandamus to place Carlisle’s name on the Republican ballot after it was erroneously removed).

11. Defendant Kubosh's candidacy fully complies with Article 5, section 4 of the municipal code of the City of Houston, which requires that a candidate for City Council of the City of Houston must have resided in the City of Houston for at least twelve (12) months immediately preceding the Election Day, *i.e.*, November 5, 2012.

12. Plaintiff Morales' decision to file suit under the Texas Declaratory Judgment Act confers jurisdiction on this Court to award Defendant Kubosh his reasonable, necessary, just and equitable attorneys' fees for defending this suit and vindicating his voter-conferred right to participate in the runoff election. Defendant Kubosh therefore counterclaims to recover his attorneys' fees, court costs, and litigation expenses from Plaintiff Morales, individually.

**BRIEFING REGARDING PLAINTIFF MORALES' LACK OF ENTITLEMENT
TO T.R.O. OR OTHER INJUNCTIVE RELIEF**

13. There is no dispute that Defendant Mike Kubosh is the candidate for PLACE 3 AT LARGE of the Houston City Council. Election Day was November 5, 2013. He won the most votes in the first round of the election. Plaintiff Morales placed a distant second.

14. By bringing this lawsuit, Plaintiff Morales seeks to thwart the will of the voters and eke out a victory in a Council race election Morales otherwise could not win.

15. The definition of residence for the purpose of voter registration is well settled in Texas. As stated in the seminal case of *Mills v. Bartlett*, 377 S.W.2d 636, 637 (Tex.1964), "[n]either bodily presence alone nor intention alone will suffice to create the residence, but when

the two coincide at that moment the residence is fixed and determined. There is no specific length of time for the bodily presence to continue.”

16. A majority of Texas courts have consistently ruled that residency is a combination of intention and fact, and that the voter’s intention must be reviewed to make a final determination of residence. *McBeth v. Streib*, 96 S.W.2d 992 (Tex. Civ. App.–San Antonio 1936, no writ). For example, the El Paso Court of Appeals held that “the voter’s intention was material to a proper determination of the voter’s residence requirement.” *Simmons v. Jones*, 838 S.W.2d 298, 301 (Tex. App.–El Paso 1992, no writ).

17. Coupled with the voter’s intention, there must also exist a physical connection to the place in which such voter is claiming residence. *Commercial Standard Ins. Co. v. Nunn*, 464 S.W.2d 415 (Tex. Civ. App.–Texarkana 1971, writ disp’d).

18. The homestead exemption for 15303 Greenwood Manor Drive in Cypress that Plaintiff Morales attached as Exhibit A to his Original Exhibit proves nothing. Since the 1840s, Texas courts have protected homesteads in order to avoid putting families out of a house in which to reside. Plaintiff’s Exhibit A bears the date **June 6, 2007**, more than five years before Defendant Mike Kubosh moved into the City of Houston, which occurred during October 2012, and refers expressly to **Tax Year 2008**.

19. The Department of Public Safety (“DPS”) public registration of a Chrysler convertible at 13503 Greenwood Manor Drive in Cypress Plaintiff attached as Exhibits B and C support Defendant Mike Kubosh’s claim of a City of Houston residency at his *current address* of “**2424 Sawyer Heights Street, Apartment 161,**

Houston, Tx 77007,” as reflected in the “Renewal Notice Street” portion of those records on page 1 of Plaintiff’s Exhibits B and C.

20. Defendant Mike Kubosh’s registration of a Kia on **April 5, 2011** preceded his October 2012 move to Houston by one and one half years, as Plaintiff Morales knows. Exhibit D supports Defendant Mike Kubosh’s claim of a City of Houston residency at his *current address* of “**2424 Sawyer Heights Street, Apartment 161, Houston, Tx 77007**” in the “Renewal Notice Street” portion of that record on page 1 of Plaintiff’s Exhibits B and C.

21. Defendant Mike Kubosh proffers the following exhibits to demonstrate that he is a resident of the City of Houston and has been at all times relevant to this suit:

- a. a true copy of Defendant Michael Kubosh’s **October 11, 2012 lease application** for his 909 Texas Avenue, City of Houston apartment residence, where Mike moved in and began living on October 25, 2012, **Defendant’s Exhibit 2;**
- b. a true copy of Defendant Michael Kubosh’s **April 26, 2013 Statement of Deposit** for his subsequent City of Houston lease at 2424 Sawyer Heights, Loft #161, Houston, Texas 77002, where Mike moved in and began living on April 30, 2013, **Defendant’s Exhibit 3;**
- c. a true copy of Defendant **Mike Kubosh’s Form 8822 U.S. Post Office Change of Address Form dated October 24, 2012**, changing his address from 13503 Greenwood Manor Dr., Cypress to **909 Texas Avenue, Houston, Texas 77002, Defendant’s Exhibit 4;**
- d. a true copy of Defendant **Mike Kubosh’s Voter Registration Card reflecting his residential address at 2424 Sawyer, Houston, Texas, his Texas Driver’s License identifying his address as 2424 Sawyer, Houston, Texas, and his Houston Public Library Card, Defendant’s Exhibit 5;**

- e. a true copy of Defendant Mike Kubosh's **October 24, 2012 Form 1040 IRS** notifying the Internal Revenue Service of his move from Cypress into Houston, attached as **Defendant's Exhibit 6**;
- f. a true copy of Defendant Mike Kubosh's **October 24, 2012 Notice of Change of Residential Address**, notifying Robin K. Myers of mpmHouston Real Estate Services of his move from 13503 Greenwood Manor to his new residential address at 909 Texas Ave. in the City of Houston address, attached as **Defendant's Exhibit 7**;
- g. a true copy of Defendant Mike Kubosh's **October 24, 2012 Notice of Change of Residential Address**, notifying Comcast Cable of his move from 13503 Greenwood Manor to his new residential address at 909 Texas Ave. in the City of Houston address, attached as **Defendant's Exhibit 8**; and
- h. a true copy of Defendant Michael Kubosh's overdue library book notices directed to his residential address at 909 Texas Avenue Apartment 917 after his move into the City of Houston on October 24, 2012, **Defendant's Exhibit 9**.

WHEREFORE, PREMISES CONSIDERED, Defendant Mike Kubosh respectfully requests this Court to deny Plaintiff's application for T.R.O. or other injunctive relief.

Respectfully submitted,

LAW OFFICE OF DAVID A. FURLOW, P.C.

By: /s/ *David A. Furlow*

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COUNSEL FOR DEFENDANT FELIX
MICHAEL KUBOSH

CERTIFICATE OF SERVICE

I hereby certify that I served this Answer and Response on this the 19th day of November, 2013, on Plaintiff's counsel Frank Svetlik by hand delivery, and on Plaintiff's co-counsel George Bishop by U.S. mail, postage prepaid, at the addresses below:

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I am also serving Defendants Mayor Parker and the City Council through City Attorney David Feldman in person at the courthouse when he appears at the T.R.O. hearing.

/s/ David A. Furlow