

FILED
2011 MAY 10 PM 4:05
CLERK OF DISTRICT COURT
DALLAS COUNTY TEXAS

JUDGE CARLOS CORTEZ,

PLAINTIFF

V.

COYT RANDAL (RANDY) JOHNSTON,

DEFENDANT.

§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

298TH JUDICIAL DISTRICT

JUDGE MARTY LOWRY'S RULE 76a PETITION IN INTERVENTION

The Hon. Marty Lowy ("Judge Lowy") files this Rule 76a Petition in Intervention, as follows:

**I.
JURISDICTION**

To the extent the Court has subject matter jurisdiction, which Judge Lowy does not concede by this filing, Judge Lowy hereby intervenes as follows. Judge Lowy reserves the right to further brief the jurisdiction issue. Judge Lowy intervenes subject to and without waiver of any assertion that the court lacks jurisdiction to act on Plaintiff's motion for protective order.

**II.
INTERVENOR**

Judge Lowy is the sitting judge for the 101st District Court in Dallas County. Judge Cortez has recently non-suited his defamation lawsuit, however, prior to that non-suit, Judge Cortez publicly commented on alleged actions by Judge Lowy, at one point asserting that the conduct which would be brought to light by that defamation suit would end the career of Judge Lowy. Judge Lowy is entitled to intervene in this action as a matter of right pursuant to Rule 76a. Tex. R. Civ. P. 76a(7). Accordingly, Judge Lowy hereby intervenes in this action to assert

his right of access to court records, including unfiled discovery, and to contest any attempts at sealing the same.

III.

PLAINTIFF HAS NOT COMPLIED WITH RULE 76a TO SEAL COURT RECORDS

A. The Documents at Issue are “Court Records” as Defined by Rule 76a

Judge Lowy hereby affirmatively alleges that the documents that are the subject of Plaintiff’s motion for protective order are “court records” within the meaning of Rule 76a because, as discussed below, they have been filed with the court or they are unfiled discovery concerning the administration of public office or the operation of government.

B. Rule 76a Definition of Court Records

1. Filed Records

Rule 76a defines "court records" to include "all documents of any nature filed in connection with any matter before any civil court" (with exceptions not applicable here). Tex. R. Civ. P. 76a(2)(a). A document is "filed" when it is delivered or tendered to, or otherwise put under the custody or control of, the court's clerk. *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993); *Biffle v. Morton Rubber Indus., Inc.*, 785 S.W.2d 143, 144 (Tex. 1990). Thus, once documents are filed with the court they are indisputably "court records" within the meaning of Rule 76a(2) and cannot be sealed unless the moving party makes a specific showing meeting the requirements of Rule 76a overcoming the presumption that the documents are open to the public. *Compaq Computer Corp. v. Lapray*, 75 S.W.3d 669 (Tex. App.-Beaumont 2002) (holding that discovery documents became "court records" when they were filed with the court); Tex. R. Civ. P. 76a(1).

Here, Plaintiff seeks to protect documents that were filed with the Court on February 14, 2011. When those documents were filed with the Court, they became court records under the

unambiguous terms of Rule 76a and are therefore presumed to be public. *See Nguyen v. The Dallas Morning News, L.P.*, No. 2-060298-CV, 2008 WL 251183, *3-4 (Tex. App.-Fort Worth 2008) (finding that documents subject to a protective order submitted to the trial court were considered to be "filed" and were therefore court records under Rule 76a) (unpublished opinion). The Court therefore cannot effectively seal these records through a protective order unless Rule 76a (with exceptions not applicable here) is followed—which it most certainly has not been to date.

2. Unfiled Discovery

Rule 76a extends the definition of "court records" to also include "discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government" (with exceptions not applicable here). Tex. R. Civ. P. 76a(2)(c). Based on the parties involved and the allegations at issue, the unfiled discovery at issue is a court record under Rule 76a because this case concerns the administration of public office or operation of government. *Id.*

Plaintiff captions himself as "Judge Carlos Cortez" and repeats his judicial title throughout his petition. *See, e.g.*, Pl.'s Orig. P. at ¶¶ 4.01, 4.02. Indeed, Plaintiff references "judge" or "judicial" at least 59 times in his seven-page petition. (*Id.* at 1-6.) Further, Plaintiff's alleges unethical conduct by other judges, Judge Lowy included, as part of his petition. According to the Petition, Defendant Johnston's alleged defamation of Plaintiff was part of a scheme entered into with Judge Lowy to attract a political candidate that would "help defeat Judge Carlos Cortez in his re-election to the 44th State Civil District Court" and involved filing of a complaint with the Texas Commission on Judicial Conduct. *Id.* at ¶ 4.03. Defendant Johnston allegedly defamed Plaintiff "in the furtherance of the interest of [Judge Lowy and two

other sitting judges] who were close personal friends of his and who also had personal grudges against Judge Carlos Cortez, as a tactic and a plan to recruit a political opponent." *Id.* at ¶ 4.05. A case alleging unethical or tortious conduct by a member of the Bar, acting in concert with two other elected judges in order to defeat a fourth elected judge, is one that concerns "the administration of public office, or the operation of government." Thus, the unfiled discovery in this case falls within the definition of a "court record" under Rule 76a and carries with it a presumption of openness that Plaintiff has not overcome—indeed, has not even attempted.

C. No Compliance with Rule 76a

Rule 76a contains stringent substantive standards for the sealing of court records and procedural safeguards of the public's right to access open court records. Rule 76a(1) establishes that "court records, as defined in this rule, are presumed to be open to the general public." Tex. R. Civ. Pro. 76(a)(1). Court records may be sealed only upon a showing of all of the following:

- (a) a specific, serious and substantial interest which clearly outweighs:
 - (1) this presumption of openness;
 - (2) any probable adverse effect that sealing will have upon the general public health or safety;
- (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

Id.

Furthermore, a motion for protective order that seeks to seal the results of discovery must comply with Rule 76a. Tex. R. Civ. Pro. 192.6(b)(5). Thus, Plaintiff is not entitled to seal, or to a protective order that constructively seals, court records because he has not complied with procedural and substantive requirements of Rule 76a.

V.
Conclusion

WHEREFOR, PREMISES CONSIDERED, Judge Lowy respectfully requests this Court to deny Plaintiff Judge Carlos Cortez's Motion for Protective Order and to grant all further relief to which he is entitled.

Respectfully submitted,



IKE VANDEN EYKEL

State Bar No. 20485500

KoonsFuller, P. C.

1717 McKinney, Suite 1500

Dallas, Texas 75202

(214) 871-2727

(214) 871-0196 - Fax

ATTORNEY FOR PETITIONER

Certificate of Service

I hereby certify that a true and correct copy of the foregoing document has been served upon counsel of record accordance with the Texas Rules of Civil Procedure on May 10, 2011.

Broadus A. Spivey
Law Offices of Broadus A. Spivey
48 East Avenue
Austin, TX 78701

Via facsimile at 214-234-7370

Andrew R. Korn
John W. Bowdich
Korn, Bowdich & Diaz, L.L.P.
4221 Avondale Avenue
Dallas, TX 75219

Via facsimile at 972-424-5619

Greg Gray
The Gray Law Firm, P.L.L.c.
1012 Ridge Road
Rockwall, TX 75087

Via facsimile at 817-599-6557

Attorneys for Plaintiff Judge Carlos Cortez

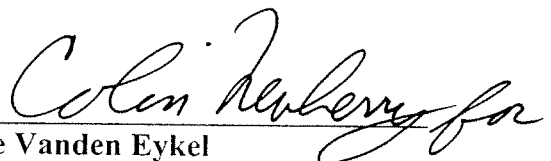
Randy A. Nelson
Thompson, Coe, Cousins & Irons, L.L.P.
700 N. Pearl, 25th Floor
Dallas, TX 75201

Via facsimile at 214-871-8209

Thomas M. Melsheimer
Martha D. Jones
1717 Main Street. Suite 5000
Dallas. TX 75201

Via facsimile at 214-747-2091

Attorneys for Defendant Coyt Randall (Randy) Johnston


Ike Vanden Eykel