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07-2-08247-6

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2007-07-12374/01 1118 \$FFR
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

J. E. EDMONSON and NAOMI I. EDMONSON,
husband and wife,

Plaintiffs,

v.

IVAN G. POPCHOI and VARVARA M.
POPCHOI, husband and wife; NATIONAL
CITY MORTGAGE, INC., d/b/a NATIONAL
CITY BANK, an Ohio corporation; AND
FIDELITY NATIONAL TITLE COMPANY OF
WASHINGTON, INC., a Washington
corporation,

Defendants,

v.

CSABA KISS, a single person,
Third Party Defendant.

No. 07-2-08247-6 SEA

**DEFENDANTS POPCHOI'S
ANSWER, AFFIRMATIVE
DEFENSES, COUNTERCLAIMS
AND THIRD PARTY CLAIMS**

A. ANSWER

Defendants Ivan and Varvara Popchoi hereby Answer the Plaintiffs' First Amended
Complaint as follows:

1. PARTIES, JURISDICTION AND VENUE.

1.1 Admitted.

1.2 Admitted.

ORIGINAL

JOHN W. HATHAWAY, PLLC
ATTORNEYS AT LAW
701 FIFTH AVENUE, SUITE 3401
SEATTLE, WA 98104
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1 1.3 Admitted.

2 1.4 Defendants lack the information to know the truth or falsity of the allegations
3 stated in this paragraph and therefore deny them.

4 1.5 Defendants lack the information to know the truth or falsity of the allegations
5 stated in this paragraph and therefore deny them.

6 1.6 Admitted.

7 1.7 This paragraph does not contain any factual allegation for defendants to
8 answer. The legal conclusion stated in this paragraph concerning jurisdiction and venue
9 does not require a response.

10 **2. MATERIAL FACTS AND CAUSES OF ACTION.**

11 2.1 Admitted.

12 2.2 Defendants lack the information to know the truth or falsity of the allegations
13 stated in this paragraph and therefore deny them.

14 2.3 Defendants deny that the legal description contained in this paragraph
15 correctly describes the real property in dispute. Defendants lack the information to know
16 the truth or falsity of the remaining allegations stated in this paragraph and therefore deny
17 them.

18 2.4 Defendants lack the information to know the truth or falsity of the factual
19 allegations stated in this paragraph and therefore deny them. Plaintiffs' assertion of legal
20 title is a legal claim, not a factual allegation, and therefore requires no answer.

21 2.5 The statement in this paragraph is an assertion of a legal claim, not a factual
22 allegation, and therefore requires no answer.

23 2.6 The statement in this paragraph is an assertion of a legal claim, not a factual
24 allegation, and therefore requires no answer.

25 2.7 Defendants deny that the legal description contained in ¶ 2.3 of the First
26 Amended Complaint legally describes "the Property." Defendants deny that Plaintiffs are

1 in possession of the property in dispute or all of the property in dispute.

2 2.8 Defendants admit that they are owners of record of the real property legally
3 described in the Statutory Warranty Deed referenced in the allegation stated in this
4 paragraph. Defendants deny the remaining factual allegations stated in this paragraph.

5 2.9 Defendants admit that they granted a security interest in the real property
6 legally described in the Statutory Warranty Deed referenced in ¶ 2.8, above, to National
7 City Mortgage, Inc., by the deed of trust referenced in this paragraph. Defendants deny the
8 remaining factual allegations stated in this paragraph.

9 2.10 Defendants admit that they granted a security interest in the real property
10 legally described in the Statutory Warranty Deed referenced in ¶ 2.8, above, to National
11 City Bank, by the deed of trust referenced in this paragraph. Defendants deny the
12 remaining factual allegations stated in this paragraph.

13 3. RESPONSE TO PLAINTIFFS' REQUESTS FOR RELIEF

14 3.1 The court should deny Plaintiffs' request for judgment quieting title in them
15 to any property to which Defendants hold record title.

16 3.2 The court should deny Plaintiffs' request for judgment establishing a
17 prescriptive easement for Plaintiffs' benefit on any property to which Defendants hold
18 record title.

19 3.3 The court should deny Plaintiffs' request for Defendants be barred from any
20 right, title and interest in or to any property to which Defendants hold record title.

21 3.4 The court should deny the Plaintiffs' claim for attorneys fees and costs.

22 3.5 This paragraph does not require a response.

23 B. AFFIRMATIVE DEFENSES

24 Having answered Plaintiffs' First Amended Complaint, Defendants Ivan and Varvara
25 Popchoi now assert the following affirmative defenses:

26 1. Plaintiffs have failed to state a claim upon which relief can be granted as to the

1 property legally described in the First Amended Complaint and factual allegations stating
2 a claim for quieting title by adverse possession.

3 2. Plaintiffs' possession of any real property of which defendants are the owners of
4 record has at all relevant times been permissive.

5 **C. COUNTERCLAIM - WRONGFUL LIS PENDENS**

6 Having stated their Answers to the Plaintiffs' First Amended Complaint and their
7 Affirmative Defenses, Defendants Ivan and Varvara Popchoi now assert the following
8 Counterclaim.

9 **1. COUNTERCLAIM FACTS.**

10 1.1 On or about March 7, 2007, Plaintiffs Edmonson commenced this lawsuit,
11 demanding that the court quiet title in them to a 1.5 foot strip of Defendants' real property
12 adjacent to and the length of the property's southern boundary line. The Plaintiffs filed a
13 First Amended Complaint on April 20, 2007.

14 1.2 Plaintiffs do not allege any facts in their Complaint or First Amended
15 Complaint establishing the necessary elements of Adverse Possession.

16 1.3 Plaintiffs also caused a Lis Pendens, instrument number 20070308000785,
17 to be recorded against the Defendants' property on March 8, 2007, thereby clouding
18 defendants' title.

19 1.4 As a direct consequence of Plaintiffs' lawsuit and wrongful Lis Pendens,
20 Defendants' construction lender, National City Mortgage, Inc., ceased funding construction
21 draws necessary to complete construction on the single family residence that Defendants
22 are building on their property. National City Mortgage, Inc. continued refusing to allow
23 construction draws to pay for completed work on the home until May 17, 2007. Defendants'
24 inability to pay workmen and subcontractors between March 8, 2007 and May 17, 2007
25 materially delayed construction of the residence and increased the costs of construction.

26 1.5 After purchasing their property in May 2006, Defendants caused the residence

1 on the property to be demolished and, in September 2006, commenced building their new
2 residence. Construction of Defendants' residence was in progress on March 7, 2007, when
3 Plaintiffs commenced this lawsuit. Plaintiff's lawsuit and wrongful Lis Pendens caused
4 Defendants' construction lender to refuse Defendants' draw requests for over 2 months,
5 delaying completion of construction and increasing the cost to build the residence. After
6 commencing this lawsuit, Plaintiffs began interfering with the work of Defendants'
7 subcontractors, harassing the workmen at the site and attempting to direct Defendants'
8 subcontractors in their work. Plaintiffs' harassment has interfered with the work to
9 complete Defendants' residence.

10 **2. FIRST COUNTERCLAIM: WRONGFUL LIS PENDENS**

11 2.1 Defendants/Counterclaim Plaintiffs reallege the allegations stated in ¶ 1.1
12 through ¶ 1.5 of the Counterclaim Facts as though set forth in this paragraph.

13 2.2 Plaintiffs have failed to allege facts establishing a substantial justification for
14 recording a Lis Pendens against the Defendants' property, which Lis Pendens creates an
15 unjustified cloud on Defendants' title.

16 2.3 Pursuant to RCW 4.28.328(3), Plaintiffs are liable to Defendants for their
17 actual damages caused by Plaintiffs' unjustified recording of the Lis Pendens, including the
18 Defendants' losses and damages from delays in disbursement of Defendants' construction
19 loan proceeds, in amounts to be proven at trial.

20 2.4 Pursuant to RCW 4.28.328, Plaintiffs are liable for Defendants' attorneys fees
21 and costs required to clear the cloud on title caused by Plaintiffs' wrongful Lis Pendens.

22 **3. SECOND COUNTERCLAIM: INTENTIONAL INTERFERENCE WITH CONTRACT**

23 3.1 Defendants/Counterclaim Plaintiffs reallege the allegations stated in ¶ 1.1
24 through ¶ 1.5 of the Counterclaim Facts as though set forth in this paragraph.

25 3.2 Plaintiffs' conduct constitutes intentional unprivileged interference with
26 Defendants' contracts with its lender and with its subcontractors, for the purpose of

1 impeding and delaying the construction of Defendants' residence. Plaintiffs' interference
2 has delayed the completion of construction of Defendants' residence and increased the cost
3 to build the residence, in amounts to be proven at trial.

4 3.3 In addition to their damages, Defendants are entitled to injunctive relief to
5 prevent Plaintiffs from continuing to interfere in the construction of Defendants' residence.

6 **D. THIRD PARTY CLAIM**

7 **1. THIRD PARTY PLAINTIFF.** Ivan G. Popchoi and Varvara M. Popchoi, husband and
8 wife, purchased the real property legally described in Exhibit A to this Third Party
9 Complaint from Csaba Kiss, pursuant to a Statutory Warranty Deed.

10 **2. THIRD PARTY DEFENDANT.** Third Party Defendant Csaba Kiss is a single person
11 who sold the real property to the Popchois legally described in the Exhibit A to this Third
12 Party Complaint, by Statutory Warranty Deed, dated May 4, 2006. At all times relevant
13 to this lawsuit, Csaba Kiss has been a sophisticated, professional real estate sales person.

14 **3. FACTS RELEVANT TO THIRD PARTY CLAIM.**

15 3.1 On May 4, 2006, Csaba Kiss conveyed the real property legally described in
16 Exhibit A to this Third Party Complaint to Ivan and Varvara Popchoi by Statutory
17 Warranty Deed, which stated, in part, that Csaba Kiss "conveys and warrants" the legally
18 described property to Ivan G. and Varvara M. Popchoi. At the time that he signed the
19 Statutory Warranty Deed, Csaba Kiss knew from the sale negotiations that the Popchois
20 purchased the property to build a new home on it, then to sell the property after a year.

21 3.2 The real property that Csaba Kiss warranted and conveyed to Ivan and
22 Varvara Popchoi includes the real property to which Plaintiffs Edmonson claim ownership
23 by adverse possession.

24 3.3 To satisfy City of Bellevue requirements for developing the real property, the
25 Popchois had their property surveyed and had the surveyor stake the boundaries at the
26 corners. On August 18, 2006, shortly after the surveyor had completed staking the corner

1 boundaries of the lot, the Edmonsons' attorney, Joshua Sundt, notified the Popchois by
2 letter that the Edmonsons' claimed ownership by adverse possession of a portion of the
3 property that Csaba Kiss had conveyed to the Popchois' by Statutory Warranty Deed.

4 3.4 The Popchois retained attorney David Paul Williams to advise them
5 concerning the Edmonsons' adverse possession claim and to assert their rights under the
6 Statutory Warranty Deed. Mr. Williams promptly notified Csaba Kiss of the Edmonsons'
7 adverse possession claim by letter, dated August 31, 2006, a true and correct copy of which
8 is attached to this Third Party Complaint as Exhibit B. The letter was sent to Mr. Kiss by
9 first class mail and also by certified mail, return receipt requested.

10 3.5 Mr. Williams' August 31, 2006 letter to Csaba Kiss advised Mr. Kiss that time
11 was of the essence in eliminating the Edmonsons' claim because the foundation of the
12 Popchois' new residence was scheduled to be poured the following week. Mr. Williams'
13 letter urged Mr. Kiss to retain an attorney to contact the Edmonsons and negotiate the
14 purchase of a quit claim deed conveying any adversely possessed property to the Popchois.
15 Mr. Williams letter also advised Mr. Kiss that, under the warranty, Mr. Kiss would be liable
16 for the Popchois' attorneys fees in responding to the adverse possession claim and
17 requested that Mr. Kiss keep attorney Williams apprised of Mr. Kiss's efforts to resolve the
18 Edmonsons' claims so that the Popchois' attorneys fees may be kept to a minimum.

19 3.6 By letter dated September 6, 2006, Mr. Williams notified Csaba Kiss that the
20 Popchois had delayed pouring the foundation for the residence to September 11, 2006 to
21 allow Mr. Kiss additional time to resolve the Edmonsons' adverse possession claim. Mr.
22 Williams further stated that "no further delays can be expected as every day of delay costs
23 my clients money. All consequences of any failure to act on your part rest solely with you."

24 3.7 Csaba Kiss failed to respond to David Williams' letters, so Mr. Williams
25 personally undertook negotiations with Joshua Sundt, the Edmonsons' attorney, to reach
26 a negotiated resolution of the Edmonsons' adverse possession claim. By letter to Csaba

1 Kiss dated October 6, 2006, Mr. Williams notified Mr. Kiss that the Edmonsons had been
2 unwilling to accept any of Mr. Williams' offers to resolve their adverse possession claim by
3 agreement and that the Popchois were asserting claims against Mr. Kiss for "breach of one
4 or more warranties given when you conveyed the property to my clients." Mr. Williams'
5 letter urged Mr. Kiss once again to retain an attorney to take steps to cure his breaches of
6 warranty and title by purchasing whatever property rights the Edmonsons claim. Mr.
7 Williams reminded Mr. Kiss that the Popchois "intend to complete construction of their
8 new home and sell it within a year at which time they must be able to convey clear title to
9 their purchaser." Mr. Williams requested a response to his letter by October 16, 2007.

10 3.8 On October 17, 2006, Melanie A. Leary, an attorney with the Demco Law
11 Firm, P. S., sent Mr. Williams a written response to his October 6, 2006 letter. Ms. Leary
12 advised Mr. Williams that she represented Mr. Kiss and relayed Mr. Kiss's position that the
13 Popchois were not entitled to the protection of the warranties provided by the Statutory
14 Warranty Deed executed by Mr. Kiss. Ms. Leary's letter notified Mr. Williams that Mr. Kiss
15 was "far more inclined to let a court decide" the Popchoi's warranty rights "than to spend
16 money to settle" the Popchois warranty claim.

17 3.9 Mr. Williams sent Melanie Leary a letter, dated March 20, 2007, notifying
18 her that the Edmonsons had filed an adverse possession lawsuit against the Popchois, and
19 enclosing copies of the Edmonsons' Summons, the Complaint to Quiet Title and the Case
20 Scheduling Order. Mr. Williams' March 20, 2007 letter notified Ms. Leary that these
21 pleadings were being delivered to her as legal counsel for Csaba Kiss. Mr. Williams once
22 again demanded that Mr. Kiss indemnify and hold the Popchois' harmless from the
23 Edmonsons' adverse possession claims. Mr. Williams' March 20, 2007 letter formally
24 tendered defense of the Edmonsons' lawsuit to Mr. Kiss:

25 This is a tender of defense and demand to hold my clients harmless and indemnify
26 them form any loss or damages, including attorneys fees, expenses and all other
costs, arising out of this lawsuit.

1 Williams' March 20, 2006 letter to Leary, a copy of which is attached to this Third Party
2 Complaint as Exhibit C. Mr. Williams closed his March 20, 2007 letter by demanding that
3 Ms. Leary notify Mr. Williams of Mr. Kiss's acceptance of the tender by March 30, 2007,
4 after which the Popchois would take appropriate legal action against Mr. Kiss.

5 3.10 By letter dated April 27, 2007, Matthew Davis, another attorney with the
6 Demco Law Firm, P. S., notified David Williams that Mr. Kiss would agree to accept tender
7 of the defense of the Edmonsons' adverse possession lawsuit, conditioned on the Popchois'
8 relinquishing any right to approve a settlement of the Edmonsons' claims and the Popchois'
9 agreement that the Popchois' claims against Mr. Kiss were limited to the diminution in
10 value of their lot caused by losing the adversely possessed property, which Mr. Davis stated
11 would be *de minimis*. Mr. Davis conditioned acceptance of the tender upon the Popchois'
12 agreement that the grantor, Mr. Kiss, would have unilateral control of the defense and
13 settlement of the Edmonsons' claim.

14 3.11 Attorney John Hathaway substituted for David Williams as the Popchois'
15 counsel of record. Mr. Hathaway responded in writing to Mr. Mathews' April 27, 2007
16 letter on May 2, 2007. Mr. Hathaway confirmed to Mr. Matthews that the Popchois do not
17 intend to retain any rights regarding defense of the Edmonsons' claims that RCW 64.04.030
18 confers only on the grantor or rights that RCW 64.04.030 states that the Grantees are not
19 entitled to possess. Mr. Hathaway requested that Mr. Matthews provide Mr. Hathaway
20 with any legal authority supporting Mr. Kiss's position that the grantor must have the
21 right unilaterally to control the defense and settlement of the Edmonsons' claim, without
22 any input from the grantee, and without regard to any harm to the grantee that may be
23 caused by the settlement. Mr. Hathaway's letters advised Mr. Matthews that, in addition
24 to diminution of value caused by losing the disputed property, the Popchois' damages
25 included any impairment of marketability of their new home caused by loss of the disputed
26 land, and consequential damages from construction delays proximately caused by the

1 lawsuit. Mr. Hathaway advised Mr. Matthews that the Popchois' damages may also
2 include the adverse consequences caused by reducing the square footage of their lot to a size
3 below the minimum square footage required by Bellevue's Land Use Code and the
4 reduction in the south setback of the Popchois' residence to below the five feet minimum
5 required by Code.

6 3.12 Mr. Hathaway's May 2, 2007 letter also asked Mr. Davis to clarify the
7 scope of Mr. Kiss's defense of the grantees' title and whether it included assertion of the
8 Popchois' statutory counterclaim against the Edmonsons for recording a wrongful lis
9 pendens on the property.

10 3.13 Mr. Davis emailed Mr. Hathaway on May 2, 2007, acknowledging receipt
11 of Mr. Hathaway's letter and advising Mr. Hathaway that he intended to settle the lawsuit
12 with the Edmonsons and paying Mr. Popchoi "the \$200 difference in his land." Mr.
13 Matthews advised Mr. Hathaway that he would have to research the Popchois' right to
14 consequential damages. Mr. Davis did not contact Mr. Hathaway after May 2, 2007 and
15 before the filing of this Third Party Complaint or respond to any of the requests contained
16 in Mr. Hathaway's May 2, 2007 letter.

17 **4. FIRST THIRD PARTY CAUSE OF ACTION: BREACH OF WARRANTY OF SEISIN**

18 4.1 The Popchois reallege the allegations stated in ¶ 3.1 through ¶ 3.13 of this
19 Third Party Complaint as though set forth in this paragraph.

20 4.2 By executing a Statutory Warranty Deed to convey the subject real property
21 to the Popchois, Third Party Defendant Csaba Kiss (1) warranted that he was lawfully
22 seized of an indefeasible fee simple estate in the property, (2) warranted that the property
23 being conveyed was free of all encumbrances, and (3) warranted to the grantee the quiet
24 and peaceable enjoyment of such premises, assuming the grantor's duty to defend the
25 grantee's title to the property against all persons who may lawfully claim the an interest
26 in the property. Whether lawful or unlawful, the possession of part of the conveyed land

1 by another not the grantee works a disseisin that breaches the grantor's warranties.

2 4.3 The Popchois have been damaged by the grantor's breaches of warranties in
3 an amount to be proven at trial. The Popchois' damages include the diminution in fair
4 market value of the property caused by loss of any of the allegedly adversely possessed
5 property, including diminution in value resulting from the lot having less than the
6 minimum square footage required by Code and resulting from reducing the south setback
7 of the Popchois' new residence to below the minimum feet required by law. The Popchois'
8 consequential damages include losses from the delays in completion of construction caused
9 by the Edmonsons' adverse possession claim.

10 **5. SECOND THIRD PARTY CAUSE OF ACTION: BREACH OF DUTY TO INDEMNIFY**
11 **AND DEFEND.**

12 5.1 The Popchois reallege the allegations stated in ¶ 3.1 through ¶ 3.13 of this
13 Third Party Complaint as though set forth in this paragraph.

14 5.2 Third Party Defendant Csaba Kiss also breached his warranties to the
15 Popchois by failing and refusing to defend and hold the Popchois harmless from the adverse
16 possession claims asserted by the Edmonsons, from and after August 31, 2006, when Mr.
17 Kiss first received notice of the Edmonsons' adverse possession claim. The Popchois are
18 entitled to recover judgment against Csaba Kiss for the attorneys fees and legal expenses
19 that they have incurred because of the Edmonsons' adverse possession claim.

20 **E. REQUEST FOR RELIEF**

21 Having Answered the Complaint, and asserted their Affirmative Defenses,
22 Counterclaims, and Third Party Claims, the Popchois hereby request that this Court grant
23 them the following relief:

24 1. Enter and order dismissing the Edmonsons' claims with prejudice and granting the
25 Popchois the relief requested in ¶ ¶ 3.1 through 3.5 of the Popchois' above-stated Answer
26 to Plaintiffs' Complaint; and

1 2. Enter judgment against the Edmonsons and in favor of the Popchois for the
2 Popchois' damage under RCW 4.28.328(3) for Plaintiffs' wrongful recording of a Lis
3 Pendens against the Popchois' property; and

4 3. Enter judgment against the Edmonsons and in favor of the Popchois for the
5 Popchois' reasonable attorneys fees and costs of suit, as allowed by RCW 4.28.328; and

6 4. Enter an order enjoining the Edmonsons from further interference with the
7 Popchois' lender, and subcontractors engaged in building the Popchois' house; and

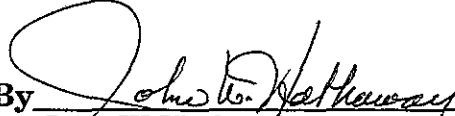
8 5. Enter judgment against the Edmonsons and in favor of the Popchois for the
9 Popchois' damages caused by the Edmonsons' intentional interference with the Popchois'
10 lender, subcontractors and workmen engaged in building the Popchois' house; and

11 6. Enter judgment against Csaba Kiss in favor of the Popchois for the Popchois'
12 damages caused by Third Party Defendant Kiss's breaches of his warranty of seisin and
13 breach of his duty to defend and hold the Popchois harmless from the Edmonsons' adverse
14 possession claim, including judgment for the Popchois' reasonable attorneys fees and costs
15 incurred in defending the Edmonsons' claims and in mitigating the damages from those
16 claims; and

17 7. Enter such further orders and judgments in the Popchois' favor as the Court finds
18 fair and equitable.

19 **DATED** this 23rd day of May, 2007

20 **JOHN W. HATHAWAY, PLLC**

21
22 By 
23 John W. Hathaway, WSNB 8443
24 Attorney for Ivan and Varvara Popchoi
25
26

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