Citation: *Clarke* v. *Halotier*, 2011 YKTC 02 | Date: December 17, 2010
Docket: 10-T0056
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

IN THE MATTER OF THE *LANDLORD AND TENANT ACT*
R.S.Y. 2002, c. 131, and amendments thereto

BETWEEN:

HEATHER DOROTHY MARGARET CLARKE

Tenant

AND:

HENRI HALOTIER

Landlord

Appearances:

Heather Clarke — Appearing on her own behalf
Henri Halotier — Appearing on his own behalf

REASONS FOR JUDGMENT

[1] COZENS T.C.J (Oral): This is an application by the tenant, Heather Clarke, for the return of a security deposit being retained by the landlord, Henri Halotier.

[2] Ms. Clarke rented residential premises owned by Mr. Halotier pursuant to the terms of a six-month lease agreement, with the tenancy commencing on October 1, 2009. The rent was $1,250 per month. By written agreement dated January 19, 2010, the lease agreement was extended for a further six months, from April 1 to September

30, 2010, on the same terms as the original lease agreement. A statement as to condition of premises was attached to the lease agreement.

[3] Ms. Clarke provided Mr. Halotier a written notice of termination of tenancy on July 5, 2010, purporting to be effective August 4, 2010. Ms. Clarke subsequently paid rent until August 31, 2010. Mr. Halotier was able to rent the premises to new tenants as of September 17, 2010. The new tenants paid rent for September in the amount of $625. Mr. Halotier seeks to retain the security deposit of $1,250 for non-payment of the rent for September, plus damages he alleges were done to the premises by Ms. Clarke. He acknowledges that he owes Ms. Clarke the amount of $686 for oil left in the tank. Ms. Clarke agrees that this amount is appropriate.

[4] The only witnesses to testify were Ms. Clarke and Mr. Halotier. Affidavits were filed by both. The first area of dispute is whether Ms. Clarke was able to terminate the tenancy as of August 31, 2010. Her position is that she is able to do so on two grounds: Firstly, she and Mr. Halotier reached an oral agreement that she would be able to do so. Secondly, she was only obligated in law to provide one month's notice of termination of tenancy. In support of this, she testified that she was told so by a representative at Consumer Services. As to the first ground, Mr. Halotier denies having made any such agreement. He testified that he contacted Consumer Services and was informed that Ms. Clarke could not terminate the lease before September 30.

[5] On the evidence, I cannot determine whether such an agreement was reached or not. It appears that the parties put much of what they agreed to in writing, however, not with respect to this purported agreement. While I also cannot state with certainty that

such an oral agreement was not made, I find that, in the circumstances, it would be unsafe to make a definitive determination in as such the terms of the lease agreement govern the situation.

[6] Secondly, there is nothing in the *Landlord and Tenant Act*, R.S.Y. 2002, c. 131, which governs the notice requirement for a six-month lease. For a one-year lease, the requirement in s. 91 is that the notice be given at least 90 days before the expiration of the lease agreement, to be effective on the last day of the year of the tenancy. There is no provision that the tenancy can be terminated earlier than the last day of the tenancy simply by the provision of notice in the absence of other grounds, such as substantial breach by the landlord.

[7] When I turn to the lease agreement, there is nothing which speaks to the issue of the notice requirements for a six-month tenancy. The lease agreement appears to be a general agreement which was not specifically drafted to govern the tenancy agreement between Ms. Clarke and Mr. Halotier. For example, where the agreement referred to the tenancy as being monthly, this portion was crossed out and replaced by handwritten words stating that the term was six months. As such, that portion of clause 11 of the lease agreement, which speaks to the notice requirement in the case of a monthly tenancy, does not apply to the six-month tenancy agreed to.

[8] I am not prepared, on the evidence and in the circumstances, to find that there is any basis for an officially induced error to play a part in this decision. Therefore, I find that Ms. Clarke was obligated under the terms of the lease agreement to pay rent for the month of September 2010, in the amount of $1,250. Deducted from this amount,

however, is the amount of $625 paid by the new tenants to Mr. Halotier. Therefore, on this point, Ms. Clarke owes Mr. Halotier $625 rent.

[9] The second area of dispute is the claim by Mr. Halotier to retain the security deposit as compensation for damages to the premises caused by Ms. Clarke. As a statement as to condition of premises was signed by the parties, Mr. Halotier is entitled to make this claim pursuant to s. 63(3) of the *Landlord and Tenant Act*. In reviewing the statement as to conditions of premises, I note that there are no indications as to any damage being present at the time the statement was signed or at the time that Ms. Clarke moved out.

[10] I have reviewed the photographs filed by Mr. Halotier and his evidence as to what he was required to do to clean the premises. I have also considered the evidence of Ms. Clarke as to her efforts to clean the premises. It appears that almost the entirety of what the photographs show and what Mr. Halotier's affidavit states are related to cleaning of the premises, the one exception being the two dents or dings in a door. Ms. Clarke states that these were present when she moved in but were simply not noted on the statement as to condition of premises at the time. She testified that the focus, at that point, was on the cleanliness of the premises.

[11] Mr. Halotier states that the damage to the door was not present when Ms. Clarke moved in, and it was an oversight on his part not to note it on the statement as to conditions of premises when Ms. Clarke moved out. He estimates the cost of repair to the door to be roughly between two to three hundred dollars. Damage as stated in s. 63(3) of the *Landlord and Tenant Act* does not include reasonable wear and tear

associated with living in the premises (see *Qwon* v. *Johnson*, 2007 NSSM 80, at para. 12).

[12] There is also no requirement in the lease agreement that Ms. Clarke return the premises in pristine condition, only that she is responsible for ordinary cleanliness, at clause 3 of the lease agreement. I find that while the premises were not left as clean as they could have been that the condition nonetheless does not constitute damage as contemplated by s. 63(3) of the *Act*. Therefore, I find that Mr. Halotier is not entitled to retain any of the security deposit for alleged damage caused to the premises by Ms. Clarke for which cleaning was done by Mr. Halotier.

[13] I do find, however, that the damage to the door is compensable. The purpose of the statement as to conditions as to premises is to note the state of the premises at the time of moving in so as to be able to clearly determine any responsibility the tenant may have for damage. No damage to the door was noted and Ms. Clarke signed it. The door is easily visible, so could have been seen. I do not have a solid estimate as to cost to repair as repairs have not yet been done and no contractor has provided an estimate. I am going to split some responsibility and award $125 to Mr. Halotier for the door.

[14] In conclusion, I find that Mr. Halotier owes to Ms. Clarke the sum of $686. Ms. Clarke owes Mr. Halotier the sums of $625 for rent and $125 for the door. Offsetting these amounts leaves an amount of $64 owing from Ms. Clarke to Mr. Halotier. Mr. Halotier shall return the security deposit less this amount. Therefore, I order that Mr. Halotier shall return $1,186 of the security deposit to Ms. Clarke.

[15] In the circumstances, including the partial success of each party, I decline to

award any interest on this amount or any costs.

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COZENS T.C.J.