

Citation: *Yukon Housing Corp. v. Kirsten Atkins*,
2008 YKTC 54

Date: 20080523
Docket: T.C. 08-T0016
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:

YUKON HOUSING CORPORATION

Applicant

AND:

KIRSTEN ATKINS

Respondent

Appearances:
Stephanie Schorr
Karen Wenckebach

Counsel for the Applicant
Counsel for the Respondent

REASONS FOR JUDGMENT

[1] COZENS T.C.J. (Oral): This is an application by Yukon Housing Corp. (the Landlord) for an order terminating the tenancy of Kirsten Atkins (the Tenant) at 881 Fourth Avenue, Dawson City, Yukon (the Premises). Additional relief is sought by way of an order granting possession of the premises to the landlord for a warrant of entry to

facilitate this possession and for compensation for use and occupation of the premises from May 1, 2008 until the premises are vacated.

[2] The parties have agreed that the evidence to be relied upon is contained in the affidavits of Ron Brown, filed May 14th and May 21, 2008, the affidavits of Shona Mostyn filed May 14th and May 21, 2008, and the affidavit of Kirsten Atkins filed May 20, 2008.

Background

[3] The tenant has occupied the premises since approximately July 14, 2003. A month-to-month tenancy agreement entered into on that date included the following clauses. Clause 3:

INFORMATION TO BE PROVIDED BY TENANT The tenant will provide to the Landlord on or before the first day of each month verification of the gross income received by the persons residing in the Premises during the immediately preceding month. The tenant will provide to the Landlord such evidence and support of the information contained on the Household Income and Asset Review Form as the Landlord may reasonably require.

Clause 6:

The Tenant promises to and agrees with the Landlord as follows:

- a) Information - The information shown on Household Income and Asset Review Forms hereafter will be true, correct and complete in every respect. The Tenant understands that eligibility for housing, accommodation type and calculation throughout the tenancy will be based on information that was supplied by the Tenant on the housing application and updates from time to time. This information consists of the Tenant's gross household income, assets and members, which the Tenant agrees to keep current at all times. Once a year (generally in May), the Tenant will supply the Landlord with the 'Notice of Assessment' (received from Revenue Canada) to verify the income received in the previous calendar year.

- (s) Termination by Landlord - The Landlord may terminate this lease, without cause, by giving 30 days written notice on or before the last day of the month of the tenancy to be effective on the last day of the immediately following month of the tenancy.

Nothing in this section shall be construed as limiting the Landlord's right to apply to the Territorial or Supreme Court of the Yukon Territory pursuant to the Landlord and Tenant Act for an early termination of the lease on the basis of a substantial breach or otherwise.

Clause 7:

NON-WAIVER No condoning, excusing or overlooking by the Landlord of any default or non-observance by the Tenant of his promises or obligations will operate as a waiver of the Landlord's rights in respect of any continuing or subsequent default or non-observance. The Landlord's consent will not be deemed to waive or render unnecessary the Landlord's consent to any subsequent act similar or otherwise, by the Tenant.

[4] The landlord provided the tenant with a written notice of termination dated August 21, 2007, terminating the tenancy effective September 7, 2007. The landlord relied upon s. 93(2) of the *Landlord and Tenant Act* and alleged that the tenant had committed a substantial breach of the tenancy agreement of July 14, 2003. The nature of the breach was alleged to be a failure by the tenant to provide the landlord with financial information set out in clause 3 of the tenancy agreement despite numerous requests by the landlord.

[5] The tenant appealed the eviction notice to the Dawson City Housing Advisory Board (the Board) and an appeal hearing was heard on October 4, 2007. The Board upheld the eviction notice but allowed the tenant until December 31, 2007 to produce the required income information.

[6] On January 3, 2008, the landlord issued a second notice to terminate effective January 21, 2008, based upon an allegation of failure by the tenant to provide the

required income information. The tenant appealed this eviction notice to the Board. The appeal was heard by the Board on January 8, 2008. The Board again upheld the eviction notice.

[7] By letter dated January 13, 2008, sent to the Board by Andrew Limbert on behalf of the tenant, there was a request that the Board extend the time allowed for the tenant to supply the required income information to February 29, 2008, and that the Board accept the letter as "an agreement to comply with the housing demands for business information and lift the eviction in consideration of this agreement."

[8] Subsequent to this letter, the tenant had a telephone conversation with Ron Brown, Director of Housing Operations for Yukon Housing Corporation. The tenant in her affidavit states that Mr. Brown said that he was going to review the proposal contained in the January 13th letter and speak to the Board about the matter. He told her that it would take two to three weeks to review the file and respond to her. In the meantime, the eviction would be put on hold.

[9] In his affidavits, Mr. Brown states that in the telephone conversation of January 18, 2008, he told the tenant that he would allow her until February 29, 2008 to provide the required information and that the notice of termination would not be enforced until that date. He allows that he may have said that the January 13th letter was under review. He also said that he had not told the tenant that he would lift the eviction but that he would ensure that it was postponed or not enforced. He also stated that he assumed, based upon the January 13th letter, that the tenant would be providing the required income information by the February 29th deadline and that this provision of

information was not conditional upon Yukon Housing Corp. providing the tenant with any further response. He said that he did not, in fact, respond any further to the tenant, within two or three weeks or afterwards.

[10] The tenant received a letter from Ken Smith, chairperson of the Dawson City Housing Association, Yukon Housing Corporation, dated January 23, 2008, responding to the tenant's letter of January 13, 2008. In this letter, Mr. Smith states that:

I understand from the Whitehorse office that they are not taking any action on the enforcement of the eviction until they have had time to review and respond to your latest proposal. I understand that they communicated this to you by phone on January 18, 2008.

[11] The tenant did not provide any further income information to the landlord by February 29, 2008, and sent a letter to the landlord on March 26, 2008, asking why there had not been a response for over two months.

[12] On March 28, 2008, a third notice to terminate was prepared with an effective date of April 30, 2008. The tenant continues to reside in the premises as of the date of this hearing.

Analysis

[13] At the commencement of this hearing, counsel advised me that arguments were going to be focused on two aspects of this case only. The first issue to be resolved was whether representations made by Ron Brown to the tenant in a telephone conversation on January 18, 2008 allow the tenant to successfully argue the issue of promissory estoppel. The second issue is whether a termination of the tenant's occupation of the premises should be suspended pending the completion of an investigation by the Human Rights Commission of the tenant's complaint against the landlord.

[14] For the purposes of this application, the reasonableness of the landlord's request for income information and the extent of the tenant's compliance or non-compliance are not, therefore, matters that I need to decide.

Promissory estoppel

[15] As stated in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] S.C.J. No. 43, in paragraph 13:

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promissory assurance which was intended to affect their legal relationship and to be acted upon. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, Ritchie J. stated, at p. 615:

It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

[16] Counsel for the landlord essentially submits that at no time in the telephone conversation of January 18th did Mr. Brown advise the tenant or state anything that would reasonably have caused her to believe that she was relieved of her obligation to provide the required income information, and in particular, to the landlord by February 29, 2008, as per her proposal.

[17] The letter of January 23rd also does not say anything that would release the tenant from her obligation. Thus, the tenant should not succeed on the issue of promissory estoppel. Further, anything said in the January 18th conversation is not of

particular relevance in any event as the landlord is not relying on the second notice to terminate dated January 3, 2008, but on the right of termination on 30 days notice set out in clause 6(s) of the tenancy agreement and the notice to terminate dated March 28, 2008.

[18] Counsel for the tenant submits that the comment by Mr. Brown that he would consider the proposal and respond to her within two or three weeks, followed by the letter of January 23rd, caused the tenant to believe that there was no point in her providing the required information by February 29th until there was further confirmation by Mr. Brown that he was accepting the proposal outlined in the letter of January 13th.

[19] The subsequent notice to terminate of March 28th should not be outside of the scope of the application of promissory estoppel because, albeit purportedly under the without cause rights of the landlord under clause 6(s) of the tenancy agreement, it is still based upon an allegation by the landlord that the tenant has failed to comply with her income disclosure obligations. Some support for counsel's position in this regard is that although the notice to terminate March 28, 2008 makes no reference to a substantial breach, the application of the landlord filed May 14, 2008 states that the landlord is relying on s. 96 of the *Landlord and Tenant Act* and the substantial breach of the tenant by failing to disclose the required income information.

[20] Ms. Wenckebach has said everything that could possibly have been said on behalf of her client's position in answering the questions that were put to her in her submissions. I have some difficulty, however, with the position of the tenant. The evidence of Mr. Brown is that he told the tenant, in the telephone conversation of

January 18th that he would suspend the operation of the notice to terminate of January 3, 2008 until February 29th in order to allow her to provide him the required income information. His evidence does not show that there was any waiver by the landlord of the tenant's obligation to provide income information while the landlord considers the proposal of the tenant. He agrees to hold off the enforcement aspect of the eviction notice.

[21] This evidence is not directly challenged by the evidence of the tenant. Rather she relies on the representations that the eviction was being put on hold pending further review to mean, to her, that the proposal has not been accepted yet and there is no requirement on or benefit to her to make the necessary efforts to provide the income information by February 29, 2008. When she does not hear from Mr. Brown within the two or three week period and the deadline of February 29th gets closer, she takes no steps to contact him in order to find out where the proposal stands or whether she should begin to compile the income information.

[22] The party relying on a waiver of a contractual term must show that the waiver is clear and unequivocal. In my view, there is no such evidence in this case and no waiver of the ongoing obligation of the tenant under the tenancy agreement to provide monthly income information. There is also not, as per the *Maracle* case, sufficient evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations other than a clear intention that the enforcement aspect available would be suspended. So there is a clear intention on his part to delay the landlord's rights of enforcement of the termination of tenancy but there is no clear intention on his part to waive the ongoing requirement to

disclose income information or to waive -- well, frankly, that is simply it. Hence, the tenant cannot succeed on the argument of promissory estoppel.

[23] I also find on these facts that the notice to terminate dated March 28, 2008, in any event, falls outside the scope of a successful argument in promissory estoppel. It is simply not reasonable for the tenant to rely on the January 18th telephone conversation and letter of January 23rd to believe that the landlord had made a representation to her that she was not under the ongoing obligation to provide income information on a monthly basis as per clause 3 of the tenancy agreement. The landlord had a right to terminate without cause and the notice to terminate of March 28th is in compliance with the tenancy agreement. I do not find, based on the whole of the evidence, that the grounds set out in the application that indicated that they were based on a substantial breach will compromise the effectiveness of the notice to terminate of March 28th.

[24] With respect to the human rights complaint: The tenant filed the complaint under the *Human Rights Act*, R.S.Y. 2002, c. 116, against the landlord on May 1, 2008. The basis of the complaint is that the *Act* has been contravened by the landlord in respect of discrimination on the basis of source of income and the protected areas of the offering are providing services, goods or facilities to the public and in connection with any aspect of the occupancy, possession, lease or sale of property offered to the public. The Human Rights Commission has referred the complaint, after preliminary investigation, for settlement and/or further investigation. The tenant has submitted that any actions to terminate her tenancy should be effectively suspended until after the investigation stage of the Human Rights proceedings is completed. There is no time frame provided for

when this investigation is to be completed. I should say that the tenant has also, in her complaint, raised the issue of harassment.

[25] The landlord submits that this is a separate proceeding and should in no way interfere with the ability of the landlord to exercise its right under the tenancy agreement and the *Landlord and Tenant Act* to terminate the tenancy of the tenant. Both counsel agree that the *Act* does not have a remedy that would allow for the tenancy to be reinstated should the tenant be successful in her complaint.

[26] I agree with counsel for the landlord. These are separate proceedings and should follow their own course and time frames, particularly given the limitations of the remedies available in the *Act* regarding ongoing tenancy. Hence, I am not prepared to use the jurisdiction I have to suspend any termination of the tenancy until the Human Rights proceedings, at least the investigation stage, are completed.

[27] As a result, I am prepared to make an order that the tenancy regarding the premises situated at 881 Fourth Avenue, Dawson City, Yukon is terminated as of May 31, 2008, as per the notice to terminate of March 28, 2008. There will be an order that the landlord is entitled to regain possession of the said premises. A warrant in the prescribed form shall issue to the Sheriff of the Yukon Territory or a peace officer for the City of Dawson to enter into the premises and give the possession of the premises to the landlord.

[28] With respect to the relief of compensation for use and occupation of the premises, there is little in the way of evidence to set out, or there was nothing in the way of submissions to set out what this amount would be. All that I see, in the evidence that

I have got, is that Ms. Atkins was basically paying \$32 a month. So I have a question. I was going to invite some submissions on that aspect.

[29] MS. SCHORR: We would be prepared to waive that relief, because really, you're right, it amounts to \$32 a month. Ms. Atkins paid rent for May and we returned that cheque because we didn't want to represent that she was continuing her tenancy, and so we seek no damages on that front.

[30] THE COURT: There will be no order for compensation. Is there anything else required? Thank you, counsel.

COZENS T.C.J.