Citation: *McBee* v. *Hammond and Rakowski*, 2007 YKTC 44

Date: 20070601
Docket: T.C. 07-T0025
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Faulkner

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

BETWEEN:

DONNA MCBEE

Landlord

AND:

CHELSEA HAMMOND and
MICHAEL RAKOWSKI

Tenants

Appearances:
Lois Anderson — Appearing for Donna McBee
Chelsea Hammond and Michael Rakowski — Appearing on their own behalf

REASONS FOR JUDGMENT

[1] FAULKNER C.J.T.C. (Oral): In this case the landlord, Donna McBee, has made application to terminate the tenancy of two tenants, Michael Rakowski and Chelsea Stanton. For some reason she has the name Stanton as the respondent and her name is Hammond. In any event, nothing particularly turns on the mistaken style of cause. All the parties are here and prepared to proceed.

[2] As I said, the landlord wants to terminate the tenancy and, as well, she wants compensation for what she alleges was in effect a theft or misappropriation of some of her property by these two tenants.

[3] It also appears, although it is not specifically stated, that she is in effect applying to the Court to use the security deposit to pay for these alleged damages.

[4] There are a couple of issues here. The first is that, according to the *Landlord and Tenant Act,* R.S.Y. 2002, c. 131, a security deposit may only be applied to damages when there has been a signed condition agreement following an inspection of the premises by the landlord and the tenants at the outset of the tenancy. The onus would be on the landlord to prove that such a thing existed. There is, in fact, no evidence before me that there ever was any condition agreement. There is some mention of copying machines that would not work and so on, and I am not sure that that suffices for proof of what the agreement was.

[5] In any event, the allegation really is not that there was damage to the property. The allegation is that the tenant wrongfully converted to their use or disposed of several hundred dollars worth of food that was in the freezer in the premises.

[6] Now, with respect to that, the landlord's affidavit suggests that the food was hers and that she gave no permission for it to be deposed of.

[7] The problem here is that the premises was fully rented out. So the landlord herself was not living in the premises, and absent some mention or agreement that the freezer was off limits, the tenants could reasonably conclude that they were entitled to

make use of the freezer. That being so, I think they were also entitled to presume that any contents in the freezer had effectively been abandoned by their owners, whether it was the landlord or some previous tenant or some combination thereof.

[8] So, while it is certainly the case that a theft or conversion of the landlord's property by a tenant could constitute a fundamental breach of the tenancy agreement, in my view it has not been proved on balance that that is what occurred here. In my view, the tenants acted in good faith, and the evidence is, interestingly enough, that all of the tenants concurred in this decision, which is interesting, because the application is only brought against two tenants, the present respondents, and that suggests to me that what is really going on here is that the landlord wants to evict these people, but wants to charge up the whole of the loss to them, when they were not, on the clear evidence, the persons solely responsible for what happened.

[9] The result of that is that the landlord's application to terminate the tenancy must be dismissed. It follows from that that the tenants are entitled to stay in possession until the end of June, as their rental payments and agreement would have allowed them so to do.

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FAULKNER C.J.T.C.