Citation: *Westman v. Risby and Risby*, 2009 YKTC 8 Date: 20090130
Docket: 08-T0093
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.T. 2002, CHAPTER 131 AND AMENDMENTS THERETO

BETWEEN:

Ronald Kenneth Westman

LANDLORD

AND:

Wayne Risby and Norma Risby

TENANT

Appearances:
Ronald Westman — Appearing on his own behalf
Wayne Risby and Norma Risby — Appearing on their own behalf

REASONS FOR DECISION

Overview

[1] This is an application by Ronald Westman (the "Landlord"), for an order terminating the residential tenancy of Wayne and Norma Risby (the "Tenants"), an order entitling the Landlord to regain possession of the premises at 16 Vimy Place, Whitehorse, Yukon, (the "Premises"), compensation for arrears of rent for January, February, November and December, 2008, as well as for January 2009 until the date of termination of the tenancy.

[2] The Tenants occupied the Premises from July 1, 2007 to June 30, 2008 under the terms of a written one-year lease agreement that was executed September 7, 2007 (the "Lease Agreement"). The Tenants continue to occupy

the Premises from July 1, 2008 until the present, although no further agreement in writing was made as to the nature of the tenancy after the Lease Agreement expired. The Landlord takes the position that the tenancy was monthly. The Tenants assert that there was oral agreement between the parties for a further one year tenancy.

[3] The Landlord delivered a written Notice to Vacate to the Tenants on December 30, 2008, requiring the Tenants to provide the Landlord with vacant possession of the Premises on 14 days notice.

[4] The Landlord claims that the Tenants have committed a substantial breach of their obligations as tenants for non-payment of rent under s. 76(2)(a) of the *Landlord and Tenant Act*, R.S.Y. 2002, c. 131 (the "*Act*").

[5] Other issues have been raised by the Landlord and the Tenants, including the offsetting of costs and potential damage to the Premises. Some of these issues were agreed upon at trial and the others will be dealt with in these reasons.

[6] There was also an issue of the Lease Agreement being part of a "rent-to-purchase" agreement between the Landlord and the Tenants. There is some support for this found in the Lease Agreement in the clause which stipulates "Any default of payment on the first of the month by either party shall result in repayment if the mortgage falls through". That said, little further evidence was provided on this issue, and as it is of marginal relevance regarding the remainder of the issues, I will not consider it further in these reasons.

[7] Evidence was provided by way of Affidavit and *viva voce*.

Issues

[8] The significant issues involved in this case are as follows:

a) Are the Tenants occupying the Premises pursuant to a monthly tenancy or a further one year lease?

b) What are the arrears of rent owed by the Tenants to the Landlord, and are the Tenants in substantial breach of their obligations as tenants for these arrears of rent such as would entitle the Landlord to give them 14 days notice to vacate the premises?

Continuation of Tenancy

[9] The evidence of the Tenants is that they had a discussion with the Landlord on August 10, 2008. The Tenants state that the Landlord was in a somewhat intoxicated state on that day. In this discussion, the Tenants told the Landlord that a monthly tenancy was not workable as they had children and that they wanted a further one year lease. The Tenants state that the Landlord agreed to a further one year lease. The Tenants state that despite their efforts to have this oral agreement for a further one year lease reduced to writing, including a brief discussion with the Landlord as late as October, 2008, they were unable to do so as the Landlord was difficult to locate or otherwise communicate with.

[10] The Landlord states that he would never have agreed to a further one year lease due to financial difficulties he was having regarding the mortgage. While he did have discussions with the Tenants on or about the times they stated, these discussions did not result in him agreeing to a further one year lease.

[11] I accept that the Landlord may have intended to continue the tenancy on a monthly basis and communicated that intention to the Tenants. That said, I also find that the Tenants did not accept the monthly tenancy and requested a further one year lease. I am not prepared, however, to find that the Landlord expressly agreed to change his position and agree to a further one year lease. Part of my

reason for not making this finding is the Tenants' evidence that the Landlord was somewhat intoxicated on the August 10, 2008 date when this agreement was purported to have been made.

[12] I find however, that the Landlord did not expressly change the tenancy to a monthly tenancy. There was, at a minimum, at least an agreement to consider the nature of the tenancy, including the execution of a further one year lease. There is no evidence as to any further steps by the Landlord to make clear or reduce to writing the terms of the tenancy as he intended them to be. He continued to accept the rent from the Tenants. While the Tenants may not have taken every reasonably possible step to follow up the August 10 discussion to ensure that they had a tenancy agreement in writing, I accept, on the evidence of both parties, that communication with the Landlord was difficult to facilitate.

[13] In conclusion, I find that the parties did not expressly reach any final agreement as to how the tenancy was to continue, whether on a monthly basis or for a further year. The Lease Agreement did not have a term regarding the ongoing status of the tenancy at the conclusion of the lease, nor did it contain a term regarding the notice required to terminate the tenancy. As such, the question to be resolved is what the default position for the tenancy is, in the absence of an express agreement between the parties.

Law

[14] Section 91(1) of the *Act* stipulates that a yearly tenancy requires 90 days notice in order to terminate the tenancy, with the tenancy terminating on the last day of the year of the tenancy.

[15] Section 16(2) of the *Act* reads that "If a tenant, on the determination of their lease, whether created by writing or by parol, remains in possession with the consent, express or implied, of the landlord, they are deemed to be holding subject to the terms of the lease, so far as they are applicable."

[16] The Tenants had the status of overholding tenants as of July 1, 2008. As per s. 16(2), they hold this tenancy subject to the terms of the Lease Agreement, insofar as these terms are applicable. They remained in the premises, at least until December 30, 2008, with the consent of the Landlord, both expressly and through implication. They continued to pay rent, and their rent payments were accepted by the Landlord. While the Lease Agreement is silent on the notice that must be given, the *Act* is not. The Landlord must provide the Tenants with three months notice of his intention to terminate the tenancy.

[17] This issue was considered to some extent in the case of ***Opseth*** v. **Getz**, 2004 SKCA 70, which also considered the decision in ***Heck*** v. ***Vaage***, [1953] 1 D.L.R. 500 (Sask. C.A.). A tenancy from year to year arises either by express agreement, or by presumption of law or by statute (para. 8). A presumption of a tenancy from year to year only arises:

(a) provided that there are no circumstances to rebut the presumption;
(b) in the absence of facts pointing to a contrary conclusion;
(c) unless there be some agreement between the parties to the contrary. (para. 9)

[18] If it is clear that the parties cannot agree on the terms of the lease then the tenancy is continued at will or by sufferance and can be terminated by notice. (para. 11)

[19] I find that the only evidence to rebut the presumption of a tenancy continuing from year to year would be that of the Landlord's discussion with the Tenants about continuing the tenancy on a monthly basis. Given, however, the Tenants' expressed desire to have a further one year lease, their attempts to have this further lease put into writing, the Landlord's acceptance of their continuing tenancy and rent payments, and the lack of any further attempts by the Landlord to clarify the terms of the ongoing tenancy or to make it clear that he was not willing to agree to a further one year lease, I find that the tenancy

continues for the one year period from July 1, 2008 until June 30, 2009. Therefore, the 90 day notice required to terminate the tenancy must be given before April 2, 2009.

[20] This finding is dependent, however, on a determination of whether there has been a substantial breach of the tenancy agreement.

Rental Arrears and Substantial Breach for Non-payment of Rent

[21] Section 93(1) of the *Act* allows for termination of a tenancy if the Tenants have committed a substantial breach of their tenancy agreement. The tenancy can be terminated by either; (a) an application to a judge for an order terminating the tenancy, or (b) 14 days notice in writing.

[22] Section 76(2) of the *Act* sets out the responsibility of a tenant to pay rent when it is due.

[23] Section 93(2)(a) and (b) of the *Act* stipulate that a "substantial breach" includes a breach of a responsibility of the tenant set out in s. 76(2) or a series of breaches of a residential tenancy agreement, the cumulative effect of which is substantial.

[24] While the Lease Agreement does not contain a term that expressly indicates that the $1,200.00 monthly rent be payable on the first of the month, it does so implicitly or indirectly through a term dealing with remedies if there is "Any default of payment on the first of the month…".

[25] The Landlord argues that the Tenants' failure to pay rent as per the terms of the Lease Agreement, and subsequent to the expiration of the Lease Agreement on what he considered to be a monthly tenancy, constitutes a substantial breach by the Tenants of their tenancy agreement.

[26] It is undisputed on the evidence that the manner in which the Tenants paid rent changed partway through the term of the Lease Agreement. While the payments from July, 2007 to April, 2008 were made directly to the Landlord, either personally or through credit transfer into the Landlord's account at Canada Trust, from May 1, 2008 the payments were made directly into Citi Financial, the mortgage holder. The Tenants stated that they altered the manner in which they made the rent payments in order to ensure that the rent monies went towards the Landlord's mortgage payment on the Premises, instead of being used for some other purpose. The Tenants stated that they were aware of some difficulties that the Landlord was having with his mortgage payments, and they wished to do all that they could to avoid the Premises falling into foreclosure, which could potentially impact upon their ability to continue to rent the Premises.

[27] The Tenants paid rent for the period from July to December, 2007. The Landlord claims that no rent was paid for January, 2008. The Tenants produced an unsigned receipt for payment of rent in January in the amount of $383.50. In reaching this figure for rent due and payable, the Tenants had deducted the amount of $700.00 for dog care and $115.50 for furnace repairs. The Landlord and the Tenants agreed at trial that an amount of $350.00 should be deducted for costs attributable to the Tenants' care of the Landlord's dog. The Landlord has also agreed to a further deduction of $115.50 for the Tenants' out of pocket costs associated with furnace repair/cleaning. Therefore, it is clear on the evidence that the Tenants owe the Landlord rent for January, 2008 in the amount of at least $351.00, subject to establishing that they in fact paid the $383.50 noted in the unsigned receipt.

[28] The Landlord further claims that the Tenants failed to pay rent in February, 2008. In support of his claim for January and February, 2008 rent, the Landlord relies on his bank records which do not show a deposit that he considers representing rent paid.

[29] The Tenants have produced the unsigned receipt for January, 2008 showing that they paid $383.50. Their explanation for the receipt being unsigned is that the carbon must not have been placed properly under the original page and therefore the signature did not register on the copy. They also have provided a receipt for $1,200.00 dated February 1, 2008 (corrected from February 1, 2007, a time when the Tenants were in fact not renting the Premises). This receipt has been signed by the Landlord, whose explanation is that he signed this in good faith expecting to receive the $1,200.00, monies which he did not ultimately receive.

[30] I find that the Tenants did in fact make the payment of $383.50 for January, 2007 rent. I make this finding based upon the history of prior payment of rent, the nature of the receipt with its breakdown for set-offs, and the reasonable explanation provided by the Tenants. I do not consider the lack of an entry on the Landlord's bank records to be of any great significance, as there is evidence that he may have received payments directly. What the Landlord may have done with these payments would be outside of the Tenants' control.

[31] Therefore, after recalculating the appropriate costs associated with the Tenants' care of the Landlord as being $350.00 instead of $700.00, I find that the Tenants owe the Landlord $351.00 in rent for January, 2008.

[32] I further find that the Tenants made the $1,200.00 rent payment for February, 2008. The acknowledged proof of payment tendered by the Tenants overrides the explanation offered by the Landlord. Therefore there are no rental arrears for February, 2008.

[33] The Tenants made $1,200.00 payments to Citi Financial from May through October, 2008.

[34] In November, 2008, the Tenants made a rental payment of only $600.00. The reason given by the Tenants for the withholding of the additional $600.00 was that the Tenants were told by City of Whitehorse bylaw officers that they were responsible for moving sod that was piled on City property beside the Premises. The City officials were apparently unable to contact Mr. Westman and thus put the Tenants on notice that they would be responsible. Rather than dispute the issue, and unable to contact the Landlord, the Tenants moved the sod pile themselves. They received estimates over the telephone for short-notice completion of this project, which were well in excess of the $600.00 they set-off from rent due. This figure was based on 10 hours labour expended by the Tenants at a quoted rate of $95.00 per hour, reduced to $600.00.

[35] While the Landlord disputed whether he was in fact responsible in the first place for removing the sod, despite what the City officials told the Tenants, the Landlord agrees that the work to move the sod pile onto his property was work he had always intended to do and that it benefited him. He disputes the costs sought by the Tenants, however, and proposes that a more reasonable amount would be approximately $295.00, calculated on an hourly basis with overtime for the final two hours.

[36] I agree with the amount put forward by the Landlord and allow for a reduction in the $1,200.00 rent of $295.00. Therefore the Tenants owe the Landlord $305.00 for rent for November, 2008.

[37] I do not consider the rental arrears from January and November, 2008 to amount to a substantial breach of the tenancy agreement. There were some legitimate costs, labour and expenses borne by the Tenants that were not resolved until trial. There is also provision in the Lease Agreement for a set off of repair costs from rent due.

[38] The Tenants agree that the rent for December, 2008 and January, 2009 is outstanding in the amount of $2,300.00. They made a $100.00 payment in January to Citi Financial, an amount not disputed by the Landlord. The explanation offered by the Tenants for the non-payment of rent in December and January is somewhat inadequate. That said, in all the circumstances, I do not find that this failure to pay rent when due is a substantial breach of the tenancy agreement. There is no dispute that the Landlord was, at times although not necessarily always, difficult, if not virtually impossible to contact, and was to some extent an absentee landlord. While the Tenants could and likely should have made the $1,200.00 monthly payments directly to Citi Financial as they had been doing, there was some ambiguity created by the involvement of the third party who served the Notice to Vacate on the Tenants. This individual apparently conveyed information to the Tenants which appears to have created some uncertainty on the status of the tenancy.

[39] It is true that the advice by a Citi Financial official to the Tenants to hold onto the rental monies was given well into January, 2009, and after rent was already due. This advice gives some limited support, however, to the increasing uncertainty of events in the December and January time frame. The $100.00 rental payment in January by the Tenants without explanation does not particularly assist.

[40] On the basis of all the evidence therefore, I find that, as of January 19, 2009, the Tenants have not committed a substantial breach of their tenancy agreement.

[41] Therefore I calculate the total rental arrears as being $2,956.00.

Other issues

[42] The Tenants take the position that they should be compensated for the Landlord's occupation of a portion of the Premises in July through September, 2007. I find, however, that any such issue of compensation should have been covered in the Lease Agreement, if such compensation was being sought. As it was not, and the Tenants were aware of the factual underpinnings of their claim for set-off at the time they entered into the Lease Agreement, and chose not to address this issue in the Lease Agreement, I consider that the claim for set-off should be denied.

[43] The Landlord also sought an order that he retain the damage deposit until such time as any suspected damage to the Premises caused by the Tenants had been determined. Firstly, there was no damage deposit given by the Tenants to the Landlord. Secondly, there is no reliable evidence to establish that any damage has been caused to the Premises by the Tenants, despite the fact that the Landlord is entitled under s. 73 of the *Act* to enter the Premises with the provision of 24 hours written notice to the Tenants or otherwise with the written consent of the Tenants. As such I am not prepared to make any order in this regard.

Conclusion

[44] I find that the Tenants have not committed a substantial breach of their tenancy agreement and that they occupy the Premises on a year to year tenancy on the same terms as the Lease Agreement, and that this tenancy will terminate June 30, 2009 upon the Landlord providing written notice to the Tenants of his intention to terminate the tenancy. This written notice must be given prior to April 2, 2009.

[45] The Tenant is indebted to the Landlord in the amount of $2956.00 for arrears of rent. Post-judgment interest will be awarded on this amount pursuant to the *Judicature Act*, R.S.Y. 2002, c. 128.

[46] These arrears of rent are to be paid in full by March 31, 2009. Failure to pay these arrears of rent in full, as well as a failure to pay the regular rent due of $2,400.00 for February and March, 2009, may be considered by a court upon any further application that may be brought by the landlord, to constitute a substantial breach of the tenancy agreement.

[47] No costs are awarded.

Cozens T.C.J.