Citation: *Woloshyn v. Miller,* 2014 YKTC 13

Date: 20140417
Docket: 13-T0106
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Chief Judge Ruddy

IN THE MATTER OF THE *LANDLORD AND TENANT ACT*
R.S.Y. 2002, c. 131 AND AMENDMENTS THERETO

BETWEEN:

EDWIN WOLOSHYN

LANDLORD

AND:

SHELDON MILLER and WENDY ELIAS

TENANTS

Appearances:
Edwin Woloshyn — Appearing on his own behalf
Sheldon Miller and Wendy Elias — Appearing on their own behalf

REASONS FOR JUDGMENT

[1] The matter before me is an application pursuant to the provisions of the *Landlord and Tenant Act,* R.S.Y. 2002 c. 131. At all relevant times, Edwin Woloshyn was the landlord of the premises situated at 105 Northstar Drive in Whitehorse. Sheldon Miller and Wendy Elias are named as the tenants in Mr. Woloshyn's application seeking an order terminating the tenancy, a warrant in the prescribed form and compensation for the use and occupation of the premises. At the first appearance

before me on March 27th, 2014, the first two of these three issues were addressed by way of an order terminating the tenancy and issuing the warrant in the prescribed form. The matter was adjourned to April 14, 2014 to address the outstanding issue of compensation for use and occupancy.

[2] With respect to compensation, Mr. Woloshyn has provided an accounting filed March 31, 2014, and now marked as exhibit 1, indicating that the amount of $23,046.86 for unpaid rent and utilities is outstanding in relation to the tenancy agreement which dates back to September of 2010. At the hearing, Mr. Woloshyn advised that he had noted an error in the accounting and was, in fact, seeking compensation in the amount of $23,246.86. He provided an amended first page marked as exhibit 2 with handwritten corrections included on it.

[3] Mr. Miller and Ms. Elias disagree with the accounting and raise the following three issues for consideration:

1. Whether Ms. Elias was, in fact, a tenant. They maintain that the tenancy agreement in question was between Mr. Woloshyn and Mr. Miller only. Ms. Elias was not a party to the agreement.

2. Whether Mr. Woloshyn could legally require the tenant or tenants to pay city utilities for water and sewer in addition to rent.

3. Whether Mr. Woloshyn's accounting is calculated correctly and properly reflects all monies owing from and paid by the tenant or tenants.

[4] An examination of each of these issues is hampered by the fact that the parties never reduced their agreement to writing. Discrepancies in the evidence as it relates to the agreement must be resolved on a balance of probabilities standard.

[5] Dealing with the first question, Mr. Miller and Ms. Elias were adamant that Mr. Miller alone was the tenant, and that Mr. Miller alone was responsible for the payment of rent. Ms. Elias further asserts that for significant periods of the tenancy she was not even resident in the premises as a result of no contact orders or employment. Mr. Woloshyn asserts that the tenancy agreement was with Mr. Miller and Ms. Elias and that he dealt with both of them with equal frequency over the course of the tenancy.

[6] I am satisfied, on a balance of probabilities, that Ms. Elias was indeed a party to the tenancy agreement and is properly named as a tenant for the purposes of this application. I reach this conclusion having regard to the following:

- Over the course of the tenancy, Mr. Miller and Ms. Elias were involved in a longstanding relationship. They share several children.
- At the beginning of the tenancy, the family resided together in the premises.
- Ms. Elias continued to reside in the premises when not on conditions precluding her from doing so or while away in camp for employment.
- Ms. Elias admitted to having discussions with Mr. Woloshyn regarding her plans to assist with back rent when she gained employment at the Minto Mine.
- Ms. Elias, in her evidence, made references to her and Mr. Miller jointly paying rent. For example, in relation to an NSF cheque noted in the accounting, she indicated "we went back and paid in cash".

[7] Considering each of these factors, I am satisfied that it is more likely true than not that Ms. Elias was a party to the tenancy agreement. The fact that she may not have resided continuously in the premises, for whatever reason, does not change her status as a tenant, absent a clear agreement between the parties to remove her from the tenancy. Accordingly, she is jointly liable for payment of any outstanding rent.

[8] Turning to the second issue relating to the required payment for city utilities, there is no dispute that Mr. Woloshyn required the tenants to reimburse him for payments made to the City of Whitehorse for utilities, nor that the tenants made this payment over the three and a half years of the tenancy. This was done on a quarterly basis until the reimbursement was incorporated into the monthly rent payment in June of 2013.

[9] Mr. Miller asserts that he never agreed to reimburse Mr. Woloshyn for city utilities, and only made the payment over the several years of the tenancy under threat of eviction. He further asserts that he has been advised by someone at a local agency that it is illegal for Mr. Woloshyn to require the tenants to make this payment. However, he indicated that he was further advised by the local agency that they could not provide him with anything in writing to confirm this until the new Landlord and Tenant Act comes into force.

[10] I find it difficult to accept Mr. Miller's evidence that the tenancy agreement did not include a requirement that the tenants cover the cost of the city utilities. The payment was in fact made by the tenants over an extended period of time. I accept that payment for the city utilities was indeed part of the tenancy agreement. This leaves the question of the legality of the requirement. Whatever Mr. Miller might have been told, this question must be resolved by reference to the *Act* in force at the time of the tenancy. While an unusual arrangement, I could find nothing in the current *Act* which would preclude the parties from entering into such an agreement.

[11] This leaves the final issue, a consideration of the accounting provided by Mr. Woloshyn in terms of both accuracy and completeness. At the hearing, Mr. Miller referenced several receipts in his possession, which he says were not properly accounted for in exhibit 1. Each of these was reviewed at the hearing, and did appear to have been properly accounted for by Mr. Woloshyn in his accounting.

[12] With respect to accuracy, I have reviewed the accounting and located a mathematical error in the entry dated February 6, 2012. By my calculations, the balance owing on that date should read $2,855.79 rather than $2,971.27, a difference of $115.48. I did not note any other mathematical errors in the accounting.

[13] However, there are two other issues which arise from my review of exhibits 1 and 2. Firstly, Mr. Woloshyn has included fees paid to the Sheriff of $126.00 in his accounting. While he is entitled to recover these costs as costs of this application, they ought not to be included in the calculation for compensation. Secondly, I have concerns with respect to two entries on October 14, 2011. These reference an NSF cheque in the amount of $4,700 and a service charge of $45.00. There is, however, no corresponding entry indicating a payment of $4,700. When asked, Mr. Woloshyn indicated that $1,200 of the $4,700 had been applied on another outstanding account in relation to a truck. He conceded that inclusion of the additional $1,200 as outstanding on the rental accounting was an error, and the amount owing should be reduced by that amount. However, I would note that entries on September 23 and 28, 2011 both refer to payments regarding the NSF cheque, but which total $4,000 not the $3,500 Mr. Woloshyn indicated was properly owing in relation to the rental accounting. While the evidence of all parties satisfies me there was, at one time, a cheque provided by the

tenants to the landlord which was returned NSF, these discrepancies in the evidence nonetheless raise concerns for me in relation to the charged entries on October 14, 2011, leaving me with questions about the amount which is properly chargeable against the tenants and whether it is properly chargeable against the tenants in the rental accounting. In the result, I am not satisfied, on a balance of probabilities that these entries are properly charged against the tenants.

[14] I calculate the amount owing by the tenants to Mr. Woloshyn as compensation for use and occupancy of the premises as follows:

• Amount sought by Mr. Woloshyn:	$23,246.86
• Less mathematical error	115.48
• Less fees for Sheriff	126.00
• Less NSF entry	4,700.00
• Less NSF service charge	45.00
• Total	$18,260.38

[15] Accordingly, the tenants are hereby ordered to pay compensation to the landlord in the amount of $18,260.38 for use and occupancy of the premises. Mr. Woloshyn has sought interest on the outstanding amount. I would decline to make such order in the circumstances of this case and in the absence of a clear agreement between the parties requiring the tenants to pay interest on any late or outstanding rental payments. Mr. Woloshyn is, however, entitled to recover his costs of this application from the tenants, and I order that the tenants pay to the landlord costs in an amount to be determined by the Clerk of the court.

_____

RUDDY C.J.T.C.