Citation: *King.* v. *Nicloux,* 2005 YKTC 76 Date: 20051104
Docket: T.C. 05-T0056
Registry: Whitehorse

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

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

ROBERT KING

LANDLORD

v.

KAREN NICLOUX

TENANT

Appearances:
Robert King — Appearing on his own behalf
Jamie Van Wart with Karen Nicloux — For Tenant

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): This is a landlord tenant matter in which the landlord, Robert King, seeks an order terminating the tenancy of Karen Nicloux, compensation for use and occupancy from November 1st, payment for damages, reimbursement for repairs, and costs.

[2] Substantial evidence was presented to me in both affidavit and *viva voce* form. It has been a somewhat unusual case in that the landlord and tenant have provided

opposing evidence on virtually every issue, from the nature of the tenancy agreement to the amount of rent agreed upon. Determination of the application turns largely on a determination of whose evidence ought to be preferred in this case.

[3] Mr. King's evidence can be briefly summarized as follows: Ms. Nicloux expressed an interest in renting Mr. King's trailer located at number 30 Takhini Trailer Park. She viewed the premises on June 29, 2005. On June 30, 2005, Mr. King and Ms. Nicloux, along with a friend of Ms. Nicloux's, met in the parking lot at A&W to discuss the possible tenancy. Mr. King advised that he was interested in a one-year tenancy agreement with monthly rental payments of $750. Ms. Nicloux informed him that a one-year term was to her favour. Mr. King provided her with a written tenancy agreement for signature. Ms. Nicloux advised that she wished more time to look over the agreement, but that Mr. King could pick up the completed and signed agreement from her at the trailer at a later date.

[4] Ms. Nicloux returned the document to Mr. King, unsigned sometime in August, indicating a preference to enter an agreement of purchase and sale instead, and therefore a tenancy agreement would not be needed. Mr. King altered the unsigned tenancy agreement to reflect a month to month tenancy, but did not return the document to Ms. Nicloux, nor did he discuss the nature of the tenancy agreement with her further. He, however, considered the tenancy agreement to be a month to month tenancy, as evidenced by his providing Ms. Nicloux with a months notice to vacate the premises on September 28, 2005.

[5] Mr. King received the following payments in relation to the rental of the trailer: $750 from Nicloux on June 30th, and payments from the Department of Indian and Northern Affairs in the following amounts: $1050 on July 7th, $525 on August 1st, $625 on September 6th and $625 on October 1st. By Mr. King's calculations, considering the required security deposit and monthly rent of $750, Ms. Nicloux was in arrears in the amount of $175 as of the filing of the application. Accordingly, Mr. King served Ms. Nicloux with a 14 day notice to vacate, based on a substantial breach of the tenancy agreement, dated October 17, 2005 for failure to pay the rent when due.

[6] By contrast, Ms. Nicloux's evidence alleges the following: at the meeting of June 30th, a one-year lease agreement was entered into and signed by her as witnessed by her friend, Brian Read. She did not take the lease agreement with her and Mr. King never provided her with a copy of it. While the agreed upon rent was $750, Ms. Nicloux later found an ad in the Yukon News seeking rent of$725 per month for the trailer. At a subsequent meeting with Mr. King, she indicates that he agreed to reduce the rent to $725. Ms. Nicloux experienced problems with the washing machine, she indicates that Mr. King provided approval for her to have the machine fixed and to take that amount off of the rent otherwise owing. The cost of fixing the machine was $114.

[7] Ms. Nicloux does not dispute the amounts received by Mr. King but says that by her calculations, considering a security deposit and rental payments of $725, plus the credit of $114 for the washing machine repairs, she is not in arrears but rather has a credit of $64 at the time the application was filed.

[8] In considering the conflicting evidence of the parties, the main issues to be decided by this Court are: whether the tenancy agreement was a month to month or a year to year agreement, as this has implications for the validity of the notice given on September 28, 2005; whether there was an agreement to reduce the rent to $725, as this effects the question of whether Ms. Nicloux was in substantial breach of the tenancy agreement for failure to pay rent when due; and whether there was an agreement to offset the rent with the cost of the washing machine repairs, as well as who is responsible for the repairs to the washing machine.

[9] Dealing with the first of these issues, the nature of the tenancy agreement, I find that I am not persuaded by the evidence of the existence of a written one year lease agreement. While Ms. Nicloux supported her position with a signed statement from her friend, Brian Read, that statement was not made under oath nor was Mr. Read provided for cross-examination. No written one-year agreement was provided to me.

[10] I find it difficult to accept that Mr. King, who clearly stated that his own preference was for a one-year agreement and who has brought his application for termination based on the ground of substantial breach rather than confirming a valid one month notice, would have in his possession two agreements, one signed and one unsigned. However, s. 59(1) of the *Landlord Tenant Act* which defines a tenancy agreement, includes agreements which are written or oral, expressed or implied. And I am satisfied on all of the evidence that there was at least an implied agreement for a year to year tenancy. Mr. King clearly expressed his expectation of a one year agreement and while he later viewed the agreement as a month to month, he conceded that he had no discussions with Ms. Nicloux in this regard. Accordingly, I find the

tenancy agreement to be a year to year agreement. As a result, the one-month notice provided by Mr. King on September 28th does not meet the notice requirements in the *Landlord Tenant Act* and is of no force in effect.

[11] Turning next to the issue of the monthly rent. Both parties agreed that the initial amount agreed upon was $750 per month. Ms. Nicloux, however, alleges a later discussion altering the amount to $725 to reflect the ad in the Yukon News. She initially swore an affidavit that this discussion and agreement occurred on the 1st of July. Mr. King provided clear documentary evidence that he was in Watson Lake on the 1st of July. Ms. Nicloux then testified at the hearing that her affidavit was an error, as she had only given it a cursory review before swearing it and that the discussions and agreement actually took place on the 7th of July. Mr. King testified that he had not returned to Whitehorse by that date. He provided further evidence on this issue in the form of a Whitehorse Star ad indicating that the initial rent requirement was to be $775 per month. The Yukon news ad had misprinted it as $725 but that he agreed to split the difference with Ms. Nicloux and agreed to accept $750 a month.

[12] On this issue I am troubled by the inconsistent statements provided by Ms. Nicloux as to when this so called discussion and agreement took place. I find the alteration in her evidence to be a convenient response to Mr. King's evidence. In addition, I find the explanation provided by Mr. King to be entirely reasonable in the circumstances and to be supported by the two conflicting ads filed in evidence. On a balance of probabilities, I am not satisfied that the parties agreed to a rent reduction to $725. I find the rent to be $750 per month.

[13] Similarly, with respect to the issue of the washing machine repairs, I am not satisfied of the existence of an agreement to offset the rent with the repair costs. Both Mr. King and Ms. Nicloux filed receipts for repair of the washing machine. Mr. King's receipt, issued by Mobile Domestic Appliance Repair indicates the washer was fixed on October 13th. Ms. Nicloux's receipt issued by someone named Darrel Yeo is dated October 14th. It makes no sense for Mr. King to agree to offset the cost of repairs when he was clearly making arrangements to address and pay for the repairs himself.

[14] Furthermore, the issue of the washing machine repairs occurred in mid-October, well after the relationship between the parties had begun to break down, with Ms. Nicloux going so far as to change the locks without the required permission on October 1st. I am hard pressed to believe that the parties would have agreed on anything following that point in time.

[15] Having made these findings, I must also find Ms. Nicloux to be in substantial breach of the tenancy agreement for failing to pay rent when due. While Mr. King did receive partial rent payments, all amounts received with the sole exception of the first payment on June 30th, came from the Department of Indian and Northern Affairs. Ms. Nicloux failed in her obligation to pay the difference. I find her to be in arrears in the amount $175. While this is not an exorbitant amount, it is nonetheless a breach under s.93 of the *Act*.

[16] I would also note that the obviously acrimonious relationship between the parties does not suggest that there is any utility in attempting to look for alternative methods to resolve this dispute, thereby preserving this relationship. I am therefore prepared to

grant the order terminating the tenancy. I am not, however, prepared to summarily evict a single mother with children in the middle of winter. Mr. King has received $625 from the Department of Indian and Northern Affairs for the month of November and is still in possession of the security deposit of $750. Accordingly, there will be no financial prejudice to Mr. King if Ms. Nicloux is given a reasonable notice period in which to vacate.

[17] My order terminating the tenancy will be effective November 30, 2005. Mr. King is entitled to full compensation for use and occupancy for the month of November. I therefore order that Mr. King may deduct the outstanding rent of $175, plus the remaining $125 for November, for a total of $300 from the existing security deposit. The remainder of the security deposit will be returned to Ms. Nicloux. With respect to the washing machine repairs, I am not satisfied by Mr. King's hearsay evidence regarding the white fuzzy material that he has established for me that the damage to the washing machine was caused by the wilful or negligent conduct of Ms. Nicloux as required. Accordingly, I am not prepared to order that Mr. King be reimbursed for the repair costs.

[18] Similarly, I am not persuaded that Mr. King should bear the cost of repairs paid by Ms. Nicloux, having himself paid to have the machine fixed the very day before. If the receipt provided by Ms. Nicloux is a valid receipt, I am not satisfied that there was an agreement between the parties for Ms. Nicloux to attend to the repairs herself and be reimbursed. Mr. King's claim for possible damages to the premises is denied as no evidence of actual damages has been put before me and I am not entitled to make orders for things that have not been proven.

[19] However, as Mr. King has been largely successful in his application, he is entitled to recover his costs for these proceedings in an amount to be fixed by the clerk. I am also going to order that Mr. King may setoff the amount of his costs as against the amount owing to Ms. Nicloux for the remainder of the security deposit. What that essentially means, Mr. King, is you can take the amount of the costs out of the amount left over on the security deposit. That is my order. Thank you.

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RUDDY T.C.J.