

Citation: *Schmok v. Penney*, 2016 YKTC 29

Date: 20160616
Docket: 15-T0084
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before His Honour Judge Luther

IN THE MATTER OF THE *LANDLORD AND TENANT ACT*
RSY 2002, c. 131 AND AMENDEMENTS THERETO

GORDON SCHMOK

LANDLORD

v.

THOMAS PENNEY and
GABRIELLE BULLINGER

TENANTS

Appearances:

Gordon Schmok

Appearing on his own behalf

Thomas Penney and

Gabrielle Bullinger

Appearing on their own behalf

REASONS FOR JUDGMENT

[1] The parties entered into a one-year residential tenancy lease on 1 September 2015. On 14 December 2015, I granted the landlord's application to terminate the tenancy and that he regain possession on the first day of 2016. The tenants had decided to move out by 1 December 2015 largely because they had broken up. The landlord sought to legally regain possession.

[2] Other issues were set over until April 2016.

[3] In the agreement the tenant promised to reimburse the landlord for the electrical bills. The landlord satisfied me on the overall amount of \$197.41, but for reasons set out below this amount will be reduced by the bills for February and March, this bringing about a total of \$127.34.

[4] As to the cable bill, it only pertained to the month of December 2015 and that amount will be fixed at \$45.00.

[5] The big issue is that of unpaid rent for the months of January to March 2016.

[6] The general public understanding and practice is that there be three months clear notice on a yearly tenancy although that is certainly not set out that way in the *Landlord and Tenant Act*, RSY 2002 c. 131 s. 91 (the "Act"). The provision has since been repealed with the enactment of the *Residential Landlord and Tenant Act*, S.Y. 2012, c. 20. In fact this is likely to be the last case decided under the old *Act*.

[7] The landlord seeks the three months' payment, totalling \$3,450.00. The rent of \$1,150.00 unpaid for December is offset by the security deposit, despite clause 23 of the agreement.

[8] In terms of the one-year lease, clause three sets out a different approach to early termination.

If the tenant terminates the lease early for any reason there will be a charge of \$500.00 for the first month that is left on the lease and \$2,150.00 for each month thereafter.

[9] Nonetheless, the landlord is seeking \$3,450.00, ie. three months at \$1,150.00 as opposed to the formula set out in clause three, ie. \$4,800.00

[10] The tenants gave a text message notice on 1 December 2015 that they “would be vacating the premises at the end of December 2015”. This message was received by the landlord.

[11] The parties made no reference to clause three and I am satisfied that the tenants had completely forgotten about it. It also appears that the tenants were unaware of the three months’ notice that otherwise would have been required. They hoped that the December 1st notice would have been sufficient.

[12] The tenants seek relief from \$3,450.00 claimed on three bases.

[13] Firstly, they claim that there were problems with moisture, mould and bugs in the bathroom. Mr. Penney maintains that they complained to the landlord about 10 times on this particular subject. The landlord claimed that the tenants were not properly cleaning the bathroom, but admitted that the caulking needed to be redone and the moulding replaced. Regrettably, there was nothing in writing on this issue. There should have been at least an email trail for the tenants to persuade me that there was a material breach by the landlord of s. 76(1) (a) (b) of the *Act*. On that basis, the state of repair of the bathroom, the tenants did not have the right to vacate the premises.

[14] Secondly, the tenants maintain that the landlord improperly entered the premises on 8 December 2015, the day after he saw Mr. Penney removing articles from the unit. In fact, Mr. Penney and his cousin were seen taking away some valuable belongings, including tools, as he had broken up with Gabrielle Bullinger and was phasing in the moving out.

[15] Having received the text message notice of termination on 1 December 2015, served both of them with documents on 7 December 2015 and observed items being removed that same day, the landlord assumed on 8 December 2015 that they had vacated the premises. He rang the doorbell, knocked on the door and called out “Anybody here?”. Ms. Bullinger was “spooked out” as she was alone in the apartment on that day which she had off. She was clad only in a t-shirt when she was awakened by the landlord who by this time was in the kitchen. He left when he realized she was there.

[16] There was no evidence of any other occasion that the landlord caused her to fear for her safety or that he had unlawfully invaded her space. The landlord should have taken different, more cautious steps that day.

[17] Ms. Bullinger felt unsafe staying there after that by herself, but that was not the reason the tenants were leaving because this incident took place after various notices were given on December 1 and 7. That Mr. Schmok was rude in serving documents has no bearing on the outcome of this case.

[18] Thirdly, the tenants claim that the landlord did not mitigate his damages which he was required to do under s. 72 of the *Act*.

[19] The tenants maintain that the landlord should have reduced the rent sought for the upcoming rental. Mr. Penney searched online and found that there were 10 apartments coming in at less than \$1,150.00 including one in a new house in Copper Ridge going for \$950.00.

[20] The landlord's ad on Kijiji received 1600 views. He had a number of emails and calls and set up several showings, 50 percent for which the prospective tenants did not bother to show up. The landlord was even willing to change the rules to allow for a small dog, but was still unable to rent the unit within the three months. He has been a landlord for about 10 years and was aware that it is always difficult renting a place in the winter and that this particular winter was especially challenging as there were more and more apartments on the market.

[21] His obligation to mitigate included a realistic assessment of the market as he knew it to be and further reduce the rent sought. It is not enough to say that he had already reduced the rent from \$1,200.00 to \$1,150.00 for these tenants back on 1 September 2015. His unwillingness to go below that figure was not satisfactory in terms of the obligation to mitigate. If for example, he had to settle for \$950.00 per month, he could have sought legal redress from the tenants for the shortfall, because it was they who put him in the position of having to rent it out in January. Nonetheless, it is quite conceivable that with a lower rent, ie. \$950.00, he may well have been able to rent out the unit perhaps as early as February 1.

[22] Based on this scenario, his damages would be \$1,150.00 for January and \$200.00 for February to August inclusive, \$1,400.00, for a total of \$2,550.00.

[23] Judgment is entered for the landlord, Gordon Schmok for:

Loss of rent	\$2,550.00
Electricity	\$ 127.34
Cable	\$ 45.00
The total amount is	\$2, 722.34

[24] There will be no order as to costs.

LUTHER T.C.J.