Citation: *McRobb.* v. *Saccary*, 2006 YKTC 48 Date: 20060427
Docket: T.C. 06-T0008
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Barnett

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

GARY MCROBB

LANDLORD

v.

LINDA SACCARY

TENANT

Appearances:
Gary McRobb Appearing on his own behalf
Linda Saccary Appearing on her own behalf

REASONS FOR JUDGMENT

[1] BARNETT T.C.J. (Oral): Mr. McRobb, when you were here this morning, you said something to the effect that the *Landlord and Tenant Act* is outdated legislation. I did a little bit of historical research and I can, perhaps, be of some small assistance in telling people what I found.

[2] I went back to 1971 and looked at the revised ordinances for that year. The Landlord and Tenant Ordinance, which was chapter L-2, I found did not contain any special provisions then for residential tenancies, but in 1972, the Landlord and Tenant

Ordinance was amended to deal with residential tenancies. The 1972 amendments did provide for security deposits, but the provisions in 1972, which allowed landlords to retain security deposits in certain circumstances, were different than the present provisions.

[3] The present provisions essentially go back to 1981, when there was an ordinance to amend the Landlord and Tenant Ordinance, in 1981, Second Session, chapter 10. Section 63 of that amended ordinance substantially provided for security deposits to be dealt with as they still are.

[4] When the Yukon Statutes were republished in 1986, and became effective in that republished format on the 12th of October 1987, the legislation then became the *Landlord and Tenant Act*, 1986 Statutes, chapter 98.

[5] That is essentially what we are dealing with still. I have looked both in the Yukon Law Reports and on-line to see if there have been any previous reported, or unreported but transcribed, court decisions dealing with the relevant sections of the *Landlord and Tenants Act*, and I found none. When I say the relevant sections, in my view, the most relevant sections today are s. 59(2) of the *Landlord and Tenant Act* and the sections dealing with security deposits beginning with s. 63 and going right through the provisions of s. 64. As I say, I found no reference to any previous court case considering those sections.

[6] So what brings this matter to court today? I am just going to be very brief.

[7] In September of 2005, Ms. Saccary and Mr. McRobb signed, "a residential rental agreement, " which provided that she, Ms. Saccary, would rent the premises in Whitehorse from Mr. McRobb for an indefinite period and a monthly rent of $850. The agreement also provided that she would put up a security deposit of $850 to be held by Mr. McRobb. Included in the rental agreement was a document titled " Condition of Premises Checklist. " That is important when one looks at s. 63(3) of the *Act*.

[8] In March of 2006, Ms. Saccary gave notice to Mr. McRobb, that she would vacate the premises on the 30th of April 2006. Then, when Mr. McRobb sought to collect rent for the month of April, Ms. Saccary declined to pay that rent. She took the position that the security deposit, which had been given to Mr. McRobb by her at the outset, should be applied to the April rent, as is provided in s. 63(2) of the *Landlord and Tenant Act*.

[9] Mr. McRobb, however, insisted on being paid the April rent. He asserted that s. 63(2) does not apply in this instance, because the rental agreement specifically or expressly provides that, and I am just going to read condition 5, which says this:

> Deposit : Normally, prior to occupancy, the tenant shall provide a security deposit of $850.00 to the Landlord to secure the Tenant's faithful performance of the terms of this agreement. This deposit is refundable subject to inspection and the condition of the premises.
>
> Tenant shall Not have the right to apply the security deposit for payment of the last month's rent. At the time of final inspection at the termination of this agreement, and after all tenants have vacated, the Landlord shall either return the refundable deposit or provide a written notice explaining why the deposit is being retained pursuant to the *Yukon Landlord Tenant Act*. The Landlord may use the deposit for repairing any damages or replacing items, cleaning for any unusual wear and tear to the premises or common areas, and for outstanding rent or other sums owed. The tenant shall be liable for the time required to do repairs or replacements and the

> Landlord shall bill the Tenant for any additional rent days necessary at the previous rate or at the new rate charged if the repair time falls within a new month following the termination of this agreement. Repair work will be done by a professional of the Landlord's choosing or to reduce expense, by the Landlord at a rate of $20 per hour. An itemized bill showing both the time worked and all costs of repairs will be provided upon request. The Tenant shall not perform any repairs without the written permission of the Landlord.

[10] On April 14, Mr. McRobb delivered an eviction notice to Ms. Saccary. The notice, which is Exhibit A to Mr. McRobb's present application, is worded in a manner that is offensive and it should never be used again. But my decision on the present application is not based upon that premise. I just want to be very clear. The eviction notice was not acceptably worded, but that fact does not have anything to do with today's decision.

[11] When Ms. Saccary did not vacate the premises by April 19, as Mr. McRobb had demanded that she do, Mr. McRobb brought the present application purportedly pursuant to s. 57 of the *Act*; however, I believe that the application is really to be made under s. 96 of the *Act*, and I treat it as such. In other words, while I do not think s. 57 has anything to do with today's application, I am prepared to deal with the matter, on the merit, as if it had been made pursuant to the relevant, proper section of the legislation.

[12] The real issue to be decided today concerns the meaning of s. 63(3) and the validity of Mr. McRobb's attempts to terminate Ms. Saccary's tenancy. Section 59(2) is, as I said previously, important, and it says, and I quote:

> This Part applies to tenancies of residential premises and tenancy agreements despite any other Part of this *Act*, and despite any agreement or waiver to the contrary, except as specifically provided in this Part.

[13] The other section that I think is important to the extent that it should be quoted here today is s. 63(3) which says that:

> Despite subsection (2) but subject to subsection (4), if a landlord and tenant have signed a statement as to the condition of residential premises, a security deposit may be applied towards the rectification of damage done to the premises during the term of the tenancy after the signing of the statement.

[14] So Mr. McRobb's submission is that the tenancy agreement, which includes the Condition of Premises Checklist, basically overrides s. 63(2) of the *Act* and allows him to use the security deposit as his discretion to cover the cost of any repairs he may think needs to be done. Mr. McRobb made it clear to me this morning that, in his opinion, other landlords in the Yukon have tenancy agreements essentially similar to the present tenancy agreement. If Mr. McRobb had not said that this morning, my decision would have been considerably briefer than it is.

[15] I simply do not agree, Mr. McRobb, that things can be done this way. Mr. McRobb, it seems to me that your tenancy agreement or rental agreement pays little or no attention to the clear meaning of s. 59(2) of the Act and that the agreement, which you prepared for your tenants to sign, purports to make s. 63(2) of the *Act* inapplicable for the residence that you rent to persons. Well, in my view and in my considered opinion, s. 63(3) is not a specific exception from the provisions of section 63, although it does provide an avenue which can allow a landlord to look to the tenant's security deposit to cover the cost of repairing damages done during the tenancy. But this requires the landlord to pay attention to s. 64(4) and (5) and (6) of the *Act*. Without the tenant's consent, given pursuant to s. 64(4), or without a court order made under ss. 64(5) and (6), a landlord simply cannot lawfully retain the tenant's security deposit.

[16] If I want to put that in somewhat plainer terms, it seems to me that a proper tenancy agreement could say something to the effect that you, the tenant, have given an $850 security deposit. You will be required to pay me the last month's rent, and then the security deposit will be dealt with as permitted by s. 63(3) of the *Landlord and Tenant Act*. That section, as I understand it, says that at the end of the tenancy, when there is a checklist, when there is a security deposit, the landlord and the tenant can sit down together, or at least get together in some fashion, and if they both agree that some damages were done and the tenant is responsible and they sign, then the landlord can use part, or even all, perhaps, of the security deposit, the tenant having agreed, for damages. That is one way.

[17] Absent an agreement, the landlord can make a court application, but not the court application that we are dealing with today. But that, Mr. McRobb, is not what your tenancy agreement says in any way, shape or form. Please keep in mind that I said I was not giving anybody legal advice or not telling people how to write up a tenancy agreement, but I am saying that that is what the legislation means.

[18] The purported conditions in s. 55 of your agreement, Mr. McRobb, are simply not in accord with the relevant sections and the requirements of the *Act*. The notice that was given by you, Mr. McRobb, to Ms. Saccary, was simply, in my opinion, invalid and of no force or effect at all, period.

[19] Now, I do not believe that anything that I have said is inconsistent with anything in the booklet which I received just a short time ago, produced by Yukon Community Services and then titled, "The Landlord and Tenant Act Handbook." In other words, I

am not saying that I think that that handbook makes any statements that I would question.

[20] I think, Mr. McRobb, that your form of agreement is simply, totally unauthorized, period. Nothing in that handbook, as I read it, suggests that the form of agreement that you chose to use is acceptable, and it is not. I am very clear on that.

[21] I do want to note that in court this morning, Ms. Saccary undertook to vacate the premises no later than 5:00 p.m. on the 29th of April 2006. You said, Mr. McRobb, that you were not confident that she would do that, but she committed herself to that course of action very clearly this morning, and I have no doubt that she will do that. She went on to say that there had been no damages to the premises during her tenancy, and that she will leave the premises in a reasonably clean condition, as the legislation requires.

[22] So I think, in a practical sense, this matter is, hopefully, at an end, but Mr. McRobb, you may wish to reconsider. I think you must reconsider the wording of your tenancy agreement. If there are, in fact, other landlords who have agreements which are substantially similar to yours, perhaps what I have said will be of some interest to them also, and to government persons who deal with landlord and tenant issues in the Yukon, although, once again, I am not saying that I think they got it wrong.

[23] I do not believe that there is anything more that I need to say. I think we are adjourned, but, Mr. McRobb, Ms. Saccary, is there anything further?

[24] I think, Mr. McRobb, among other things you wanted to know that Ms. Saccary would be out, and I think that she committed herself to that. You also wanted to have

resolved, to the extent possible, at least here today, the issue that you perceived to arise from the wording of the legislation. To the extent that I can do that, I think I have let you know what I believe.

[25] Are we adjourned? Thank you.

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BARNETT T.C.J.