

Decision: Leave for Review Denied
Original Decision and Order dated March 11, 2011 confirmed

REVIEW CONSIDERATION DECISION

Dispute codes: MNSD O

This is an application filed by the landlord on April 1, 2011 for review of a decision and order, dated March 11, 2011. Section 79(2) of the Act provides that a party to a dispute may apply for a review of the director's decision or order on one or more of the following three grounds:

- a) a party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control;
- b) a party has new and relevant evidence that was not available at the time of the original hearing;
- c) a party has evidence that the director's decision or order was obtained by fraud.

In this application the landlord relies on section 79(2) (a) of the Act.

Unable to attend

In order to meet this test, the applicant must establish that the circumstances which led to the inability to attend the hearing were both:

- beyond the control of the applicant, and
- could not be anticipated.

In this application the landlord sets out the reasons for being unable to attend, in part:

I was not aware of the Tenants actions as I was not in town to pick up the mail.

As for the circumstances that could not be anticipated, in his application the landlord submits:

None provided.

Finally, in regard to what evidence the landlord would have presented in the event of his attendance to the hearing, in the application he states:

Email records of communications between Emma and Marie, photography of damage, bill from painter and description of work completed to be covered by tenant, bill for garbage from ACRD to be paid by tenant and bill for carpet cleaning paid by landlord.

In this application the landlord relies on section 79(2) (b) of the Act.

New and relevant evidence

Leave may be granted on this basis if the applicant can prove that:

- he or she has evidence that was not available at the time of the original hearing;
- the evidence is new;
- the evidence is relevant to the matter which is before the dispute resolution officer;
- the evidence is credible, and

- the evidence would have had a material effect on the decision of the dispute resolution officer.

Only when the applicant has evidence which meets all five criteria will a review be granted on this ground.

The Landlord states that the new and relevant evidence is an invoice from the painter, a garbage/recycle bill from ACRD, a carpet cleaning bill and a summary of emails.

In this application the landlord relies on section 79(2) (c) of the Act.

Decision or orders were obtained by fraud

Residential Tenancy Policy Guideline #24 speaks to these grounds, in part, as follows:

Fraud must be intended. A negligent act or omission is not fraudulent.

A party who is applying for review on the basis that the dispute resolution officer's decision was obtained by fraud must provide sufficient evidence to show that false evidence on a material matter was provided to the dispute resolution officer, and that the evidence was a significant factor in the making of the decision. The party alleging fraud must allege and prove new and material facts, or newly discovered and material facts, which were not known to the applicant at the time of the hearing, and which were not before the dispute resolution officer, and from which the dispute resolution officer conducting the review can reasonably conclude that the new evidence, standing alone and unexplained, would support the allegation that the decision or order was obtained by fraud.

The burden of proving this issue is on the person applying for the review. If the

dispute resolution officer finds that the applicant has met this burden, then the review will be granted.

In his application, the landlord describes the evidence he considers to be fraudulent:

The Tenant advised that the Landlords did not participate in an inspection however, prior to the tenants moving into the house, we viewed and inspected the house together.

Further, in his application the landlord describes the nature of the fraud:

The Landlord states that the Tenants misrepresented facts around the inspections. The Landlord states that inspections were done by the both parties.

On the Landlord's grounds of being unable to attend, I find that not picking up your mail is not something that is beyond the control of the Landlord or something that could not be anticipated.

On the Landlord's ground of new and relevant evidence, I find that the Landlord has failed to provide sufficient evidence that the evidence presented was new subsequent to the hearing.

On the Landlord's ground for a decision obtained by fraud, I found that the original dispute resolution officer referred to condition inspection reports for the move-in and the move-out. The Landlord states that inspections were done ("we did inspect the premises and advised the tenants of our concerns - collectively we agreed on the issues, however there remained a difference of opinion around resolution"), but has not provided any proof of a completed condition inspection report.

Finally, section 81(1) (b) of the Act provides, in part, that the director may dismiss or refuse to consider an application for review if

- the application does not give full particulars of the issues submitted for review or of the evidence on which the applicant intends to rely, or
- the application does not disclose sufficient evidence of a ground for the review, or
- the application discloses no basis on which, even if the submissions in the application were accepted, the decision or order of the director should be set aside or varied.

For all of the above reasons I dismiss the application for leave for review. The original decision and order dated **March 11, 2011** are hereby confirmed.

Dated: April 15, 2011.

Residential Tenancy Branch