



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute codes: MNSD

Introduction

On September 02, 2011 a hearing was held by conference call as a result of that hearing the decision and order was issued on September 15, 2011.

This is an application for review of that decision.

Division 2, Section 79(2) under the *Residential Tenancy Act* says a party to the dispute may apply for a review of the decision. The application must contain reasons to support one or more of the grounds for review:

1. A party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control.
2. A party has new and relevant evidence that was not available at the time of the original hearing.
3. A party has evidence that the director's decision or order was obtained by fraud.

Issues

The applicant/landlord is claiming:

- She was unable to attend the original hearing due to circumstances that could not be anticipated and were beyond her control.
- She has new and relevant evidence that was not available at the time of the hearing.
- She has evidence that the decision was obtained by fraud.

Facts and Analysis

The application contains information under Reasons Number 1, 2, & 3

Reason one- Unable to attend

The applicant claims that because the mail was sent to an address where she does not reside, she did not receive the notice of hearing and therefore did not attend the hearing however I have examined the tenancy agreement and the address for the landlord listed on the tenancy agreement is the address to which the tenant served notice of hearing.

Further there was a co-respondent who was living at the address to which the documents were served, and although the landlord claims he was only a tenant, he is listed alongside the applicant on the tenancy agreement as a superintendent/property manager and therefore is considered a landlord under the Definition of Landlord in the Residential Tenancy Act.

Therefore since the notice of hearing was sent by registered mail to the address provided by the landlord it's considered served five days after mailing even if the landlord fails to pick up that registered mail.

I am not willing to grant a new hearing under reason one.

Reason two- new and relevant evidence

The legal test for fresh evidence was referred to in Gallupe v. Birch (April 30, 1998) Doc. Victoria 972849 (BCSC), wherein the test established by R. v. Palmer [1980] 1 SCR 759 was approved ,and is stated to be as follows:

1. the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial, provided that general principle will not be applied as strictly in a criminal case as in civil cases;...
2. the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial:
3. the evidence must be credible in the sense that it is reasonably capable of belief, and it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

In this case it is my finding that the applicant has not shown that the “new evidence” could not, with due diligence, have been presented at the original hearing had she or her agent attended.

I am not willing to grant a new hearing under reason two.

Reason three- fraud

To prove an allegation of fraud the parties must show that there was a deliberate attempt to subvert justice. 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 that 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.

It is my finding that the applicant has not shown sufficient evidence to prove that the original decision was obtained by fraud, she has made allegations of fraud but has provided insufficient evidence to support those allegations.

Decision

The application for new hearing is dismissed

The decision and order issued on September 15, 2011 stands.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: October 24, 2011.

Residential Tenancy Branch