



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: FF MNSC MNSD

This is an application filed by the tenant for review of a September 15, 2011 decision. The applicant relied on sections 79(2)(b) and (c) of the *Residential Tenancy Act* (the “Act”) which provide that the director may grant leave for review if a party has new and relevant evidence that was not available at the time of the original hearing or if the party has evidence that the decision was obtained by fraud.

The decision under review was the outcome of the tenant’s application for an award of damages and return of her security and pet deposits. In the decision under review the Dispute Resolution Officer determined that he had no jurisdiction to hear the applicant’s claim. He found that the applicant shared kitchen facilities on a regular basis with the landlord, who was the owner of the property and, as set out in section 4(c) of the *Residential Tenancy Act*, the Act does not apply to living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation.

The tenant claimed to have new and relevant evidence that was not available at the time of the original hearing. She submitted a copy of a real estate sale listing for the rental property that made reference to the presence of a second lower kitchen in the rental property. She submitted that this refuted the Dispute Resolution Officer’s finding that she shared kitchen facilities with the owner. The listing submitted by the applicant dated back to October, 2010 and it was therefore not new evidence. The tenant said in her submissions that this evidence was unavailable at the time of the original hearing because she received the landlord’s evidence five days prior to the hearing and she was not aware until then that the landlord intended to make a jurisdictional argument.

In order to successfully argue that a review hearing should be granted, the applicant must prove both that the evidence is relevant, and that it was unavailable at the time of the hearing. The evidence was clearly available at the time of the hearing. The matter of the lower kitchen and its significance was the subject of testimony and argument at the original hearing. This ground for review is not designed to provide parties a forum in which to rebut findings by the Dispute Resolution Officer, rather to provide evidence which could not have been presented at the time of the hearing because it was not in existence at that time. If the tenant considered that she had evidence relevant to the

hearing that she did not have time to submit, it was her obligation to seek leave to introduce that evidence at the time of the original hearing. This ground for review is not intended to give the applicant an opportunity, after a decision has been made, to search for evidence that might support her position. The applicant has failed to meet both parts of the test to establish grounds for review and accordingly, I find that the application for review on this ground must fail.

The tenant's further ground for requesting a review is based on her assertion that the Dispute Resolution Officer's decision or order was obtained by fraud. She referred to testimony said to have been given by the landlord that when she was asked whether the downstairs unit had a kitchen the landlord replied that she would not call the downstairs cooking facility a kitchen. The applicant referred to the real estate listing as evidence that the landlord's testimony was fraudulent.

The Residential Tenancy Policy Guideline #24 concerning Review applications contains the following passage:

A party who is applying for review on the basis that the arbitrator's decision was obtained by fraud must provide sufficient evidence to show that false evidence on a material matter was provided to the arbitrator, 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 arbitrator, and from which the arbitrator 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 arbitrator finds that the applicant has met this burden, then the review will be granted.

The tenant had a full opportunity at the original hearing to dispute the landlord's testimony that the lower cooking facility was "not really a kitchen". The evidence provided by the tenant was not a new and material fact or a newly discovered and material fact. The tenant had an opportunity to raise these matters at the original hearing and to rebut the landlord's testimony about the status of the lower kitchen. Whether or not the lower cooking facility is properly described as a kitchen, the Dispute Resolution Officer found as a fact that the applicant had unrestricted access to the landlord's kitchen and used the kitchen on a regular basis; it was upon the finding that this kitchen was shared with the landlord that the decision was based, not upon the presence or absence of a lower kitchen. These were facts known to the applicant at the time of the original hearing. The application for review is an attempt to reargue the

issue of jurisdiction. The tenants' application for review on the ground that the DRO's decision was obtained by fraud is denied.

For the above reasons I dismiss the application for review. The original decision dated September 15, 2011 is confirmed.

Dated: October 05, 2011.

Residential Tenancy Branch