Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: FF MND MNR MNSD

Introduction

This is an application by the tenants for a review of a decision rendered by a Dispute Resolution Officer (DRO) on November 7, 2011, as amended by a correction of the Residential Tenancy Branch on November 18, 2011, with respect to an application for dispute resolution by the landlords.

A DRO may dismiss or refuse to consider an application for review for one or more of the following reasons:

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

Issues

Division 2, Section 79(2) under the *Residential Tenancy Act* (the *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.

The application requested a review on the basis of all three of the above-noted grounds for review.

The initial application for review was not accompanied by any written statement from the tenant confirming that her spouse was acting on her behalf. I proceeded to consider this application for review once the Residential Tenancy Branch (RTB) received written confirmation from the tenant, AG, (shown as AGB on the original decision) that she wished to proceed with this application for review using her spouse as her agent.

Facts and Analysis – Unable to Attend

In order to meet this test, the application 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.

A hearing is a formal, legal process and parties should take reasonable steps to ensure that they will be in attendance at the hearing.

In the Application for Review Form, the tenant was asked to list the reasons that a party was unable to attend the November 7, 2011 hearing. The tenant's agent (the tenant's spouse) responded as follows:

> *I was not notified of any dispute, therefore could not attend. If I was issued an order of dispute or hearing I surely would have attended. The landlord had both a forwarding address for me for the remainder of the summer as well as my home address for the month of September onward...*

In the attachments to the application for review, the tenant's spouse provided a number of documents that he alleged demonstrated that the landlords did not send the application for dispute resolution to the tenant's correct address. One of these documents was an August 2, 2011 letter from the tenant noting that for the purposes of returning her damage deposit, the landlords should send her damage deposit to a new address in Coquitlam (her present address), if the landlord returned it after August 12, 2011. The tenant's spouse maintained that the landlord never sent anything to this Coquitlam address until the tenant received an "order to pay" on December 1, 2011. The tenant's spouse also provided a copy of the landlords' letter to the tenant at her Coquitlam address postmarked November 24, 2011. The tenant's spouse stated that this demonstrated that the landlords "clearly had correct address but chose not to serve anything to it until after the hearing." He asserted that this demonstrated that the landlords committed fraud in failing to serve their application for dispute resolution to the most recent address the tenant had provided the landlords.

In reviewing this matter, I find that the tenant provided the landlord with a forwarding address in the State of Washington by the time the move-out condition inspection report was finalized on July 31, 2011. The landlord submitted into written evidence for the original hearing a copy of the tenant's signed July 31, 2011 letter identifying the address in Washington as the location where the landlord could send her security deposit. As part of the original hearing, the DRO considered the landlord's written evidence of her service of a copy of the original and amended dispute resolution hearing packages to the tenant at the same forwarding address in the State of Washington provided by the tenant on July 31, 2011. The landlord provided copies of the Canada Post Customer

Receipt and Tracking Number for the mailing of the landlords' original dispute resolution hearing package on August 3, 2011 and the amended application on October 12, 2011.

In this situation, two different forwarding addresses were apparently provided by the tenant to the landlord within a three-day period. The tenant's spouse maintained that the landlord was aware of the revised forwarding address and sent copies of the dispute resolution hearing package, including the Notice of Hearing, to an incorrect forwarding address.

I find that the best evidence of the tenant's provision of her forwarding address is the address that the tenant provided on July 31, 2011. There is no doubt or dispute that this forwarding address was given to the landlord on July 31, 2011. The tenant's spouse provided no details regarding how, when or if the tenant's August 2, 2011 letter with the revised forwarding address was provided to the landlord. Given that the landlord applied for dispute resolution on August 3, 2011, it is very possible that the landlord did not yet have the tenant's August 2, 2011 letter by that date if it was provided through the mail. In addition, since the new forwarding address was only to take effect after August 12, 2011, I find that the landlords' original application for dispute resolution of August 3, 2011 would have been deemed served to the tenant at her correct forwarding address in the State of Washington on August 8, 2011, five days after its mailing. In accordance with section 90 of the *Act*, the tenant is deemed to have received the landlords' original application for dispute resolution before the August 12, 2011 date the tenant identified in her August 2, 2011 letter when she would be at her new forwarding address in Coquitlam. Thus, even if the landlords had her August 2, 2011 letter before they applied for dispute resolution, I find that they still served the tenant with the application for dispute resolution at her correct address before August 12, 2011. The only substantive difference between the original and amended applications for dispute resolution would appear to have been an increase in the landlords' requested monetary award for cleaning from $100.00 to $142.40 for cleaning/repairs.

I do not find that the landlord's subsequent mailing of a letter to the tenant's address in Coquitlam in late November 2011 demonstrates that the landlord knew on August 3, 2011 or even on October 12, 2011 that the tenant was no longer receiving her mail at the Washington State address. I find that the landlords sent the original copy of the dispute resolution hearing package to the tenant at an address the tenant provided to the tenant three days after the end of this tenancy. Under these circumstances, I find that the tenant's application has not identified sufficient evidence to enable me to order a review of this decision on the basis of a party being unable to attend the hearing.

Facts and Analysis – 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 arbitration hearing;
- the evidence is new;
- the evidence is relevant to the matter which is before the DRO;
- the evidence is credible, and
- the evidence would have had a material effect on the decision of the DRO.

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

It is up to a party to prepare for a dispute resolution hearing as fully as possible. Parties should collect and supply all relevant evidence at the dispute resolution hearing. "Evidence" refers to any oral statement, document or thing that is introduced to prove or disprove a fact in a hearing. Letters, affidavits, receipts, records, videotapes, and photographs are examples of documents or things that can be entered into evidence.

Evidence which was in existence at the time of the original hearing, and which was not presented by the party, will not be accepted on this ground unless the applicant can show that he or she was not aware of the existence of the evidence and could not, through taking reasonable steps, have become aware of the evidence.

"New" evidence includes evidence that has come into existence since the dispute resolution hearing. It also includes evidence which the applicant could not have discovered with due diligence before the hearing. New evidence does not include evidence that could have been obtained before the hearing took place. Evidence that "would have had a material effect upon the decision of the DRO" is such that if believed it could reasonably, when taken with the other evidence introduced at the hearing, be expected to have affected the result.

In response to the instruction to list each piece of new and relevant evidence which was not available at the time of the original hearing, the tenant's spouse responded as follows:

- *copies of messages left for landlord stating the intent to end tenancy and also requesting them to answer the door so I could serve notice.*
- *email from landlord stating no damage the day after I moved out to a potential tenant.*
- *witness stating landlord would not answer the door after I had left a message saying I needed to see them to end tenancy.*

In addition, the tenant's spouse attached a narrative statement and additional attachments. These attachments included transcripts of text messages that the tenant's spouse maintained were sent prior to July 1, 2011. The tenant's spouse asserted that the landlords avoided service of the tenant's written notice to end tenancy before July 1, 2011 so as to make the tenant responsible for rent in August 2011. The final of these text messages on June 30, 2011 at 8:59 p.m. asserted that because the landlords would not answer their door the text message and a notice posted on the landlords' door would constitute the tenant's written notice to end this tenancy on July 31, 2011.

I dismiss the claim by the tenant's spouse that evidence of texts sent to the landlord and a written notice posted on the landlords' door on June 30, 2011 constituted some form of written notice to the landlord to end this tenancy by July 1, 2011 in order to avoid responsibility for rent owing for August 2011. Service by text messaging does not meet the statutory requirement under section 52 of the *Act* that tenants can only end their tenancies by providing **written** notice to the landlord. Section 90(c) of the *Act* establishes that a document, including a written notice to end tenancy, posted on a landlords' door is only considered served on the third day after its posting. Section 45(1) of the *Act* requires a tenant to end a month-to-month (periodic) tenancy by giving the landlord notice to end the tenancy the day before the day in the month when rent is due. In this case, in order to avoid any responsibility for rent for August 2011, the tenant would have needed to serve the landlord with her notice to end this tenancy before July 1, 2011. Posting a notice on a door a few hours before July 1, 2011 would not meet the requirements under section 45(1) of the *Act*. I find that this evidence is not at all relevant to the matter that was before the DRO and would not have had a material effect on her decision.

With respect to the claim by the tenant's spouse that there was no damage to the rental unit, I note that in a July 31, 2011 letter the tenant admitted that "a walk through has taken place on July 31st, 2011." Emails submitted by the tenant's spouse following that inspection in support of the tenant's assertion that the rental unit was left in good condition may or may not be credible. I also note that the photographs of the rental unit attached to the review application are very small and lack detail. There is no certainty

as to whether the photographs attributed by the tenant's spouse to the landlord's photographs were taken at the end of the tenancy or at some other time.

For the reasons outlined above, I find that the tenant has not demonstrated that the new evidence is relevant to the matter that was before the DRO, nor would it have had a material effect on the decision of the DRO. I dismiss the tenant's application for review on this ground as the tenant's application has failed to meet at least two of the five criteria outlined above that would enable me to grant the request for a review of the November 7, 2011 decision. I find that the tenant's application has not identified sufficient evidence to enable me to order a review of this decision on the basis of new and relevant evidence.

Facts and Analysis - Fraud

This ground applies where a party has evidence that the DRO's decision was obtained by fraud. Fraud must be intended. A negligent act or omission is not fraudulent.

A party who is applying for review on the basis that the DRO's decision was obtained by fraud must provide sufficient evidence to show that false evidence on a material matter was provided to the DRO, and that the evidence was a significant factor in making 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. The party must prove that these new and material facts were not before the DRO, and from which the DRO 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 DRO finds that the applicant has met this burden, then the review will be granted.

A review hearing will likely not be granted where a DRO prefers the evidence of the other side over the evidence of the party applying. It is not enough to allege that someone giving evidence for the other side made false statements at the hearing.
In this portion of the application for review, the tenant's spouse basically reiterated much of what was covered in the other two portions of the application. Many of the tenant's spouse's allegations regarding fraud are directed at his claim that the landlords tried to evade service of the tenant's written notice to end this tenancy. Other claims by the tenant's spouse were directed at the allegation that the rental unit was in much better condition than the landlord portrayed at the original hearing. In general, the tenant's spouse alleged that there has been a pattern of lies, untruths and dishonesty committed by the landlords.

I find that the allegations outlined by the tenant's spouse in the application for review and attachments fall short of demonstrating fraud on the landlord's behalf and fail to identify new and material facts, or newly discovered and material facts. Even now, the tenant's spouse has not submitted sufficient substantive evidence that would have had an impact on the outcome of the original hearing. His claim that the landlords have been deceitful on their own does not entitle the tenant to a reconvened hearing.

With respect to this ground for review, I find that the tenant's spouse has basically applied for review on the basis that the landlords lied to the DRO. As noted above, an application for review for fraud will not be granted if the applicant claims that the other party made false statements at the hearing. I find that the tenant's application has not identified sufficient evidence to enable me to order a review of this decision on the basis of fraud.

Overall, I find that the tenant's spouse has not provided credible evidence to dispute either the DRO's finding with respect to the timing of the tenant's provision of her written notice to end this tenancy or the landlords' damage claim. I also find that the tenant's application discloses no basis on which, even if the submissions in the application were accepted, the decision or order of the DRO should be set aside or varied.

The original decision is therefore confirmed.

I also note that the tenant's spouse attempted in the application for review to ask "to reverse both the decision as well as the order to pay and that you order the Landlord to return double the original damage deposit back, a total of $1150.00 to AG..." I am not at liberty to reverse the decision or order nor can I issue an order requiring the landlord to return double the original security deposit to the tenant. The landlord's application has been heard by a DRO and the tenant's application for review does not enable me to overturn an existing decision and issue a reversal of her decision. The issue of the tenant's security deposit and the landlord's monetary award for damage is *res judicata* meaning the matter has already been conclusively decided and cannot be decided again.

Decision

The decision made on November 7, 2011 as corrected on November 18, 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: December 09, 2011

Residential Tenancy Branch