



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: FF MND MNDC MNR MNSD OPB OPR

Introduction

On December 14, 2011, a hearing was conducted to resolve a dispute between these two parties. Both parties had made application. The landlord did not attend the hearing. The Dispute Resolution Officer awarded the tenant a monetary order in the amount of \$1,260.00. The landlord has applied for a review of this 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.

The applicant applied for an extension of time to file the application for review. The applicant relies on sections 79(2)(a)(b) and (c) of the *Residential Tenancy Act* (the "Act"). Section 79(2)(a) provides that the director may grant leave for review if a party was unable to attend the hearing because of circumstances that could not be anticipated and were beyond the party's control. Section 79(2)(b) provides 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. Section 79(2)(c) provides that the director may grant leave for review if a party has evidence that the arbitrator's decision or order was obtained by fraud.

Issues

Does the applicant have exceptional circumstances that prevented him from applying for a review within the fifteen day time frame? Was the applicant unable to attend due to circumstances that were unanticipated and beyond his control? Does the applicant have new and relevant evidence that was not available at the time of the hearing? If so will

this evidence when presented change the decision? Does the applicant have evidence that the decision was obtained by fraud?

Facts and Analysis

Extension of Time

Although the applicant applied for an extension of time in which to file for review, because he applied within four days of receiving the decision, I find that an extension of time is unnecessary as he cannot be said to have filed beyond the statutorily prescribed timeframe which is based on receipt of the decision or order.

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.

In his application for review, the applicant states that the reason for not attending the hearing is that at the time of the hearing, his daughter was *“unstable due to her mental illness, and then we have to comfort her for a period of time”* The landlord did not include any documents to verify the seriousness of the illness. In his written statement he refers to his daughter’s medical history which implies that this illness was ongoing.

An arbitration hearing is a formal, legal process and parties should take reasonable steps to ensure that they will be in attendance at the hearing. This ground is not intended to permit a matter to be reopened if a party, through the exercise of reasonable planning, could have attended.

The applicant for review stated that he was unable to attend due to issues with his daughter’s mental illness. The landlord had the option of calling in to request an adjournment of the hearing or have an agent represent him at the hearing. The landlord chose neither option. I find that the applicant has not established that the circumstances which led to the inability to attend the hearing were beyond his control.

The landlord states that had he attended he would have presented a water bill that was unpaid by the tenant and would have also presented the property manager’s report to verify the actual move out date of the tenant. The landlord did not file these documents into evidence prior to the hearing even though they were in existence. In the absence

of the landlord at the hearing, the Dispute Resolution Officer considered the evidence filed by the landlord which consisted only of photographs, in the making of the decision.

The Dispute Resolution Officer made her decision based on section 38 of the *Residential Tenancy Act*. Even if the landlord had attended the hearing, I find that the evidence he states that he would have provided, would not have changed the decision of the Dispute Resolution Officer.

Section 81(1) (b) (iii) of the Act allows the director to dismiss an application for review if 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. Accordingly, I find that the application for review on this ground must fail.

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 hearing;
- the evidence is new,
- the evidence is relevant to the matter
- the evidence is credible, and
- the evidence would have had a material effect on the decision

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

On this ground for review, that the applicant has new and relevant evidence that was not available at the time of the original hearing, the applicant states that he has a water bill that is unpaid by the tenant, the move out inspection report to verify the date the tenant moved out and an email that allows the tenant to pay a reduced rent. The landlord attached these documents to his application.

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 arbitration hearing. It also includes evidence which the applicant could not have discovered with due diligence before the arbitration hearing. New evidence does not include evidence that could have been obtained before the hearing took place.

It is up to a party to prepare for an arbitration hearing as fully as possible. Parties should collect and supply all relevant evidence, prior to the arbitration hearing. I find that this evidence that the tenant states is new was in existence at the time of the hearing and is therefore not new.

The applicant has failed to prove that he has new and relevant evidence that was not available at the time of the hearing and accordingly, I find that the application for review on this ground must fail.

Decision Obtained by Fraud

This ground applies where a party has evidence that the Dispute Resolution Officer's decision was obtained by fraud. Fraud is the intentional "false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive".

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 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.

On the ground for review, that the dispute resolution officer's decision was obtained by fraud, the applicant states that the tenant committed fraud when she presented herself as a single parent even though she lives with her boyfriend. The landlord states she lied to gain sympathy and that she signed a two year contract with a reduced rent and then failed to fulfil the contract after taking advantage of the reduced rent.

The Dispute Resolution Officer reviewed all the evidence and made her decision based on the evidence before her. The applicant has failed to prove that the false evidence on a material matter provided to the Dispute Resolution Officer, was a significant factor in the making of the decision. Therefore, I find that the application for review on this ground must fail.

This ground for review is not designed to provide parties a forum in which to rebut findings by the Dispute Resolution Officer or to allege an error of fact or law. The applicant is free to apply for judicial review in the Supreme Court, which is the proper forum for bringing allegations of error. The applicant has failed to prove that the

arbitrator's decision was obtained by fraud. Therefore, I find that the application for review on this ground must fail.

Decision

The landlord's application for review is dismissed. **The decision made on December 14, 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: January 06, 2012.

Residential Tenancy Branch