



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: FF MNR MNSD OPC OPR

Introduction

This is an application filed by the tenant on February 17, 2012 for review of a Dispute Resolution Officer decision and order dated February 6, 2012 on the above noted matter.

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

In this application the tenant relies on the second ground; new and relevant evidence not available at the time of the original hearing.

Facts and Analysis

The tenant provided a 4 page statement, in which explaining in part that she experienced resistance from two witnesses, a project manager and a Strata Council member, whose written assessments would have supported the tenant's position at the hearing that the tenancy was frustrated as a result of a major flood. The tenant submitted that in spite of several requests, these witnesses were reluctant and declined to provide critical information before the hearing. She submits that since the decision favoured the landlord, the witnesses are now more sympathetic to her situation and have provided new and relevant evidence. In that same letter, the tenant named a third witness, a Professor of Respiratory Medicine; however she does not explain why this aspect of the evidence was not available at the time of the original hearing.

The tenant also provided a letter from a law firm, retained by the tenant to make submissions concerning this review consideration. In that letter, 5 distinct new witnesses were identified with the following explanations:

Witness #1's evidence was not available because the information did not come to the tenant until February 17, 2012.

Witness #2's evidence was not available because it was forwarded to the tenant on February 20, 2012, despite the tenant's numerous requests before the hearing.

Witness #3's evidence was is new because that witness believed that the tenant's available evidence was sufficient to establish that the unit was inhabitable, and having been notified of the decision that witness is now willing to prepare a written statement.

Witness #4's evidence is new because the tenant did not know this witness' identity prior to the hearing, and the tenant had no information in order to locate him.

Witness #5's evidence is new because the tenant was only able to obtain it by February 16, 2012.

In that same letter, the tenant's law firm quoted; the Residential Tenancy Policy Guideline #34, which states in part that where a contract is frustrated, the parties are discharged or relieved from fulfilling their obligations under the contract; and Section 11.2 of the Guide for Landlords and Tenants which states in part that the tenancy agreement ends when the unexpected occurs, and that neither the landlord nor the tenant is required to give the other a notice to end tenancy.

The tenant also provided the new evidence as stated above from the 5 witnesses.

It was not disputed by the parties that as a result of the flood, the unit was temporarily inhabitable; and this wasn't disputed by the Dispute Resolution Officer either. The Dispute Resolution Officer stated that the tenant did not prove that the tenancy was frustrated. After reviewing the tenant's submissions, including those from the law firm she retained, I should mention that a review consideration is not an opportunity to re-argue the case.

Nevertheless, Residential Tenancy Policy Guideline #24 addresses the grounds for review. Concerning new and relevant evidence the guideline states in part:

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 to 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...

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 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, such as photographs that could have been taken or affidavits that could have been sworn before the hearing took place.

In order to be considered new, the applicant must prove that:

- The evidence 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.
- The evidence would have a material effect on the decision.

It is abundantly clear that the evidence presented in this application was not new. The tenant was aware of its existence; rather the tenant relies on the fact that she could not avail herself of it on time for the hearing.

The tenant did not raise these concerns during the hearing, or inform the Dispute Resolution Officer that she was waiting for more evidence. The tenant did not request an adjournment and provides no explanation as to why she did not, and why these aspects of submitting relevant evidence were not contemplated during the hearing.

Decision

For the above noted reasons I find that the tenant’s application does not meet the criteria for new and relevant evidence.

The decision made on February 6, 2012 is hereby confirmed.

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: February 23, 2012.

Residential Tenancy Branch