



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: FF MND MNDC MNR MNSD

Introduction

This is an application by the Tenants for a review of a decision rendered by a Dispute Resolution Officer (DRO) on February 14, 2012 with respect to the Landlord's application for dispute resolution. The Landlord applied for a Monetary Order for unpaid rent and for compensation for damages to the rental unit. The DRO found that the Landlord was entitled to recover unpaid rent for June, July, August and September 2011 in the amount of \$6,800.00 and the filing fee of \$100.00. The DRO ordered the Landlord to keep the Tenants' security deposit of \$850.00 and pet deposit of \$100.00 in partial satisfaction of this amount and issued a Monetary Order for the balance of \$5,950.00. The Landlord's application for compensation for damages to the rental unit was dismissed without leave to reapply.

Issues

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 Tenants applied for a review on the basis of all three grounds as follows:

Facts and Analysis

1. **Unable to Attend:** The Tenants claimed in their application for review that "We experienced an unexpected death of a family member which involved travelling to Calgary for funeral arrangements, the funeral and subsequent issues surrounding the death of said family member."

RTB Policy Guideline #24 states at p. 1 that "in order to meet this test, the application *and supporting evidence* 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...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 Tenants provided no particulars such as the date of the death of their family member or dates of travel so that it was not possible to determine whether this circumstance occurred long before or shortly before the dispute resolution hearing. In other words, the Tenants did not provide sufficient information or any supporting evidence to determine how the death of a family member resulted in their inability to attend the hearing by teleconference on February 14, 2012. The Tenants provided a copy of an e-mail dated February 9, 2012 to the Landlord asking for an adjournment of the hearing. Consequently, I find that the Tenants knew in advance that they required an adjournment but have provided no submissions as to why they or an agent appointed by them could not attend the conference call on the hearing date to request an adjournment. In the absence of sufficient particulars and any supporting evidence, I find that the Tenants cannot succeed on this ground.

2. **New and relevant evidence:** The Tenants claimed in their application for review that had they attended the hearing, they would have provided evidence that the rental property was under foreclosure and that the Landlord was no longer the owner entitled to receive rents. The Tenants also claimed that they decided to vacate the rental property because there was evidence of mould in the rental unit which they believed caused or contributed to them falling ill.

RTB Policy Guideline #24 states at p. 2 that “a Party must collect and supply all relevant evidence **prior to a hearing**....New evidence includes evidence that has come into existence since (or after) the dispute resolution hearing. It also includes evidence which the applicant could not have discovered with due diligence before the hearing.”

As I understand the Tenants’ argument, they do not dispute that rent for June to September 2011 was not paid but instead argue that the Mortgagee and not the Landlord was entitled to those rents. The Tenants provided a copy of a letter dated May 9, 2011 from a lawyer for the mortgagee advising the Tenants to pay rent to an agent for the mortgagee *pursuant to the standard terms of the mortgage*. However, the copy of the standard mortgage terms allegedly incorporated by reference in the mortgage document that require rents to be paid to the mortgagee is not identified (by DF number) in the registered Mortgage and the copy of the registered Mortgage also *does not* include an assignment of rents. Consequently, it is unclear whether the Landlord was, in fact, prohibited from collecting rents under the terms of the Mortgage. The Tenants provided a copy of a Court Order dated January 9, 2012 granting the Mortgagee conduct of sale of the rental property. However, the Tenants provided no evidence that at any time during the tenancy, the title of the property had vested in the Mortgagee.

In any event, the Tenants' written submissions and evidence indicate that the Tenants were aware during the tenancy that the property was subject to Foreclosure proceedings and that there was a demand that they pay rents to the mortgagee. I find that this evidence is not *new evidence* that has only come into existence since the dispute resolution hearing but rather evidence of which the Tenants were aware prior to the hearing and could have presented at the hearing. As a result, I find that the Tenants cannot succeed on this ground of Review.

3. **Fraud:** The Tenants claimed in their application for review that the application for dispute resolution was not signed by the Landlord and therefore they brought into question the legitimacy of the proceedings. The Tenants also claimed that they could not give the Landlord notice they were vacating because they only had an old work address and a cell phone number for him.

RTB Policy Guideline #24 says at p. 2 that "Intentionally providing false testimony would constitute fraud, as would making changes to a document either to add false information, or to remove information rendering the document false. Fraud may arise where a witness has deliberately misled the proceeding by the concealment of a material matter that is not known by the other party beforehand and is only discovered afterward."

The Decision dated February 14, 2012 indicates that the Landlord attended the hearing on his own behalf. Consequently, in the absence of any evidence that the person who attended the hearing via teleconference to give evidence on behalf of the Landlord was not the Landlord, I find that it is irrelevant if someone completed the application for dispute resolution on his behalf. Furthermore, had the Tenants attended the hearing, they would have been able to counter the Landlord's evidence with their evidence of their alleged inability to provide the Landlord with written notice. For all of these reasons, I find that the Tenants cannot succeed on this ground of Review.

Decision

The Tenants' written submissions alleged that there were circumstances such as mould and foreclosure proceedings that should have relieved them from paying rent. However, these matters are not relevant on this Review application but rather are the basis for a separate (or counter) application for dispute resolution by the Tenants.

The Tenants do not allege that rent *was paid* for June to September 2011 but instead argue that Applicant-Landlord was not entitled to recover the unpaid rent during the Foreclosure proceedings. As indicated above, I find that all of the Tenants' arguments presented on their Review application could have been dealt with at the hearing had the Tenants attended. However, the Tenants provided insufficient evidence to conclude

that there were circumstances that were unforeseen and beyond their control that prevented them or an agent from attending the hearing to request an adjournment. Consequently, I find that the Tenants' application for Review does not disclose sufficient evidence of a ground that would warrant the Landlord's Application for Dispute Resolution being reconvened for hearing and accordingly, the Tenants' Review Application is dismissed without leave to reapply. As a further consequence, the Decision and Order made on February 14, 2012 remains in force and effect.

The grounds for granting a Review of a Decision under s. 79(2) of the Act are strictly limited to the three set out above. If the Landlord was not entitled to make a claim for unpaid rent as the Tenants allege (and I make no finding in that regard), then the Tenants may have to seek a different remedy through the Supreme Court of British Columbia.

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: March 13, 2012.

Residential Tenancy Branch