



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: FF MNDC MNR MNSD OPR

Introduction

On June 06, 2012, a hearing was conducted to resolve a dispute between these two parties. The landlord had applied for an order of possession and a monetary order for unpaid rent. The tenant did not attend the hearing. The Dispute Resolution Officer granted the landlord's application. The tenant 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 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

Was the applicant unable to attend the hearing because of circumstances that could not be anticipated and were beyond her control? Does the applicant have new and relevant evidence that could change the decision? Does the applicant have evidence that the Dispute Resolution Officer's decision was obtained by fraud?

Facts and Analysis

The applicant states in her application that she did not attend the hearing because her two young children were gravely ill with the flu and one of them began to vomit shortly before the hearing. The applicant states that by the time she dealt with the child, it was too late to join the hearing.

In answer to the question regarding what evidence the applicant would have presented had she attended the hearing, the applicant states that she would have notified the Dispute Resolution Officer about the landlord's refusal to accept rent from her. The applicant filed copies of her rent cheque history from Social Services that indicate that the rent cheques for the months of April, May and June 2012 were mailed to the landlord but as of June 12, 2012, remain uncashed.

The Dispute Resolution Officer considered all the evidence before him, in the making of his decision and made his decision based on the fact that the tenant did not make application for dispute resolution to cancel the notice to end tenancy. In such situations, the *Residential Tenancy Act* provides that the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice and must vacate the rental unit by that date. Therefore, even if the applicant had attended the hearing, her testimony regarding the outstanding rent cheques would not have changed the decision of the Dispute Resolution Officer. Accordingly, I find that the application for review on this ground must fail.

New and Relevant Evidence

Residential Tenancy Policy Guideline #24 provides as follows:

“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.

In order to successfully argue that a review hearing should be granted on the grounds of new and relevant evidence, the applicant must prove that there is new evidence that is relevant and that it was unavailable at the time of the hearing.

On the ground for review, that the applicant has new and relevant evidence that was not available at the time of the original hearing, the applicant provided printouts from the Ministry of Social Services indicating that the rent cheques for April, May and June were mailed to the landlord but were not cashed by him.

On this ground for review I find that the applicant has not provided any new evidence. A

printout of her rent cheque history was available at the time of the hearing.

Again, the Dispute Resolution Officer made his decision based on the fact that the tenant did not make application for dispute resolution to cancel the notice to end tenancy. Therefore, even if the applicant had presented a copy of her rent cheque history during the hearing, her testimony regarding the outstanding rent cheques would not have changed the decision of the Dispute Resolution Officer.

I find that the tenant has not submitted any new evidence and therefore has failed to meet the criteria of the test to establish grounds for review in this tribunal 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".

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 Dispute Resolution Officer, and from which the Dispute Resolution Officer 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.

On this ground for review, that the Dispute Resolution Officer's decision was obtained by fraud, the applicant refers to the rent cheques provided to the landlord but not cashed by him. She states that the landlord provided false testimony about unpaid rent.

Again, the Dispute Resolution Officer made his decision based on the fact that the tenant did not make application for dispute resolution to cancel the notice to end tenancy. Therefore, even if I accept the tenant's allegation that the landlord committed fraud, it will have no effect on the decision.

The tenant has not provided me with new evidence to support the allegation that the decision under review was obtained by fraud. The evidence filed with the application for review consists of documents which were in existence and could have been obtained at the time of the hearing. The tenant has not proven any new or newly discovered material facts and how that evidence could have been a significant factor in the making

of the decision. The application discloses insufficient evidence that the decision under review was obtained by fraud; and therefore, fails to satisfy the inherent burden of proof.

The *Act* also 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.

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 applicants are free to apply for judicial review in the Supreme Court, which is the proper forum for bringing allegations of error.

Decision

For the above reasons I dismiss the application for leave for review.

The decision made on June 06, 2012 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: June 21, 2012.

Residential Tenancy Branch