



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards

## REVIEW CONSIDERATION DECISION

Dispute Codes: CNR LAT O RR

### Introduction

On July 04, 2012, a hearing was conducted to resolve a dispute between these two parties. Both parties had made application. The landlord had applied for an order of possession and a monetary order for unpaid rent and the filing fee. The tenant had applied to cancel the notice to end tenancy and for an order to be allowed to change locks. 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 tenant unable to attend due to circumstances that were unanticipated and beyond his control? Does the tenant 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 tenant have evidence that the decision was obtained by fraud?

### **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.

In his application for review, the tenant states that the reason for not attending the hearing is because according to an information sheet from the Residential Tenancy Branch, he did not have to attend if he had paid rent. The tenant states that he had paid rent and therefore did not attend the hearing. The tenant adds that a rent receipt was attached to his application. In answer to the question of what evidence the applicant would have presented had he attended the hearing, the applicant states that he would have presented his rent receipt.

In her decision dated July 04, 2012, the Dispute Resolution Officer found that the Notice of Hearing documents were deemed sufficiently served in accordance with section 89 of the *Residential Tenancy Act*. The tenant received the landlord's application for dispute resolution and was aware that the landlord intended to request an order of possession based on the notice to end tenancy for nonpayment of rent for June.

Based on the evidence in front of her, the Dispute Resolution Officer found that rent for June in the amount of \$412.50 was not paid by the tenant and further found that the landlord was entitled to compensation in this amount.

I find that the tenant was properly served with the documents and therefore was aware that the landlord was going to testify that the tenant had not paid rent for June. Despite this knowledge, the tenant chose not to attend the hearing. Therefore I find that the tenant has not established that the circumstances which led to the inability to attend the hearing were both beyond his control and could not be anticipated.

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 has evidence that 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, and
- the evidence would have had a material effect on the decision of the Dispute Resolution Officer

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 has attached a copy of a notice to end tenancy with an effective date of July 12, 2012 for rent owed in the amount of \$850.00. The date of the notice is blacked out. The tenant has also attached a copy of his statement of direct deposit that states that \$886.42 was deposited into his personal bank account. Again, the date on this document is blacked out.

The tenant does not explain the relevance of this evidence and the effect it would have on the decision. In addition, the dates of this evidence are blacked out and therefore I am unable to determine whether these documents are new evidence and whether they were available at the time of the hearing. Therefore 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 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”.

Fraud may arise where a witness has deliberately misled the Dispute Resolution Officer by the concealment of a material matter that is not known by the other party beforehand and is only discovered afterwards. Fraud must be intended. A negligent act or omission is not fraudulent.

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 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 alleges that the landlord committed fraud by testifying that the tenant owed rent for June 2012. The Dispute Resolution Officer made a decision based on the notice to end tenancy for non payment of rent and the undisputed testimony of the landlord. The tenant may disagree with the Dispute Resolution Officer's findings of fact, but he had an opportunity to respond to the landlord's evidence at the hearing, if he had attended.

With respect to the matter the tenant asserts is fraudulent, it was not a matter unknown to the tenant at the time of the original hearing. It was in existence and could have been submitted at the original hearing. However the tenant chose not to attend the hearing and therefore was unable to present his arguments. The tenant has not provided me with new evidence to support the allegation that the decision under review was obtained by fraud. The dates on the evidence filed with the application for review are blacked out and therefore I am unable to determine the relevance of this evidence and whether this evidence was in existence 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 applicants have failed to prove that a fraud was perpetrated and accordingly, 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

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

### **Decision**

The tenant's application for review is dismissed.

**The decision made on July 04, 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: July 24, 2012.

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Residential Tenancy Branch