



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: FF MND MNDC MNR MNSD

Introduction

This application was filed by the Tenant, requesting a review consideration of the Decision made on November 29, 2012. The Decision/Order under review is a decision on cross applications. The Tenant sought a monetary award in the equivalent of double the amount of the security deposit and for return of an overpayment of one month's rent in the amount of \$1,350.00. The Landlord sought a Monetary Order for unpaid rent, damages and compensation for damage or loss; and to apply the security deposit against his monetary award.

The Tenant was awarded return of the security deposit, but his application for return of overpaid rent and for compensation in the equivalent of double the amount of the security deposit was dismissed. The Landlord's claim was dismissed in its entirety.

In his Application for Review, the Tenant acknowledged that he received the Decision on December 10, 2012.

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 Tenant has applied based on grounds 2 and 3 for review consideration.

Issues

Does the Tenant have new and relevant evidence that was not available at the time of the original Hearing?

Does the Tenant have evidence the director's Decision or Order was obtained by fraud?

Facts and Analysis

New and relevant evidence

In his Application for Review Consideration, the Tenant submits that the following new and relevant evidence was not available at the time of the Hearing:

“1. Written notice to end tenancy with a forwarding address. This evidence was not submitted previously as lack of notice was not an issue pointed out in [either of the cross applications]. The Landlord’s Application for Dispute Resolution notes that a notice to end tenancy was provided. It is relevant as it provides proof that written notice was given.

2. Affidavit of [the Tenant’s spouse] with exhibits. It was not available as lack of notice was not thought to be a point of issue. It is relevant as it provides sworn witness testimony regarding the notice to end tenancy.”

(reproduced as written)

The Residential Tenancy Policy Guideline #24 defines new evidence as evidence that has come into existence since the Dispute Resolution Hearing. It also includes evidence which the applicant could not have discovered with due diligence before the Dispute Resolution Hearing.

Evidence in existence at the time of the original Hearing 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.

I find that the Tenant’s notice to end the tenancy is not new evidence because it was in existence at the time of the Hearing. Therefore, I find that the Tenant’s application for Review Consideration on this ground is dismissed.

Fraud

The Tenant’s Application for Review Consideration indicates, in part:

“The landlord testified at the hearing that a written notice to end tenancy was not given. The tenant did provide a written notice to end the tenancy to the landlord more than 30 days prior to the move-out date.

The landlord stated in his own Landlord’s Application for Dispute Resolution..... that a notice to end tenancy was given. Please see attached Affidavit....”

In the decision dated November 29, 2012, the landlord was allowed to keep the tenant's rent cheque (the cheque was cashed by the landlord sometime in September, 2012) in the amount of \$1,350.00 for the period of July 15, 2012 to August 14, 2012, based on his testimony that a notice to end tenancy was not provided by the tenant."

(reproduced as written)

The Landlord's Application for Dispute Resolution, the Landlord states on page two:

Date the Notice to End Tenancy referred to in this Application was served:

15/[unreadable number]/2012

How was it served? By letter – (by his words)

It is this statement of the Landlord's that the Tenant submits he relied on and therefore did not provide a copy of his written notice to end tenancy which included his forwarding address. The Affidavit included with the Tenant's Application for Review Consideration, states, in part:

"On or about May 30, 2012, at 5:15 p.m. I personally witnessed the Tenant hand deliver written notice to the Landlord to end the tenancy at the Apartment effective July 14, 2012. Attached as Exhibit A to this my affidavit is a copy of the written notice provided to the Landlord, wherein a forwarding address was provided."

(reproduced as written)

The Decision indicates that the Landlord testified that the Tenant did not give written notice and that he did not supply his forwarding address.

Based on the above, I find there is insufficient evidence of fraud on behalf of the Landlord. There is simply not enough information or facts to clearly establish the Landlord was fraudulent.

However, in this case I find that the Tenant had cause to reasonably believe that the Landlord had admitted that he received the Tenant's written notice to end the tenancy and therefore the Tenant did not provide a copy of the notice in evidence. **I find that the Decision and Orders *may have been different if the Arbitrator had the Tenant's written notice to end the tenancy before her while making her determinations.*** In the interest of procedural fairness, I allow the Application for Review on this basis.

Decision

Based on the above application and on a balance of probabilities, I find that a new hearing, pursuant to the provisions of Section 82(2)(c) of the Act, is appropriate. I grant the Tenant's application.

I order that the new Hearing take place at the time and date set out in the attached Notice of Hearing.

Notices of the time and date of the new Hearing are included with this Review Consideration Decision for the Tenant to serve to the Landlord within 3 days of receipt of this Decision. The Tenant must also serve a copy of this Decision to the Landlord.

Each party must serve the other with any evidence that they intend to reply upon at the new hearing and provide copies to the Residential Tenancy Branch. Fact sheets are available at <http://www.rto.gov.bc.ca/content/publications/factSheets.aspx> that explain evidence and service requirements. If either party has any questions they may contact an Information Officer with the Residential Tenancy Branch at:

Lower Mainland: 604-660-1020

Victoria: 250-387-1602

Elsewhere in BC: 1-800-665-8779

I further order that the Decision and Order made on November 29, 2012, are suspended until the outcome of the new Hearing.

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: December 21, 2012.

Residential Tenancy Branch