



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes FF MNSD

Introduction

On December 11, 2012, a hearing was conducted to resolve a dispute between these two parties. The tenant had applied for the return of the security deposit and the recovery of the filing fee. Both parties attended the hearing. The Arbitrator granted the tenant's application. The landlord 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)(b) and (c) of the *Residential Tenancy Act* (the "Act").

Issues

Does the applicant have new and relevant evidence that was not available at the time of the hearing? Does the applicant have evidence that the Arbitrator's decision was obtained by fraud?

Facts and Analysis

New and Relevant Evidence

Leave may be granted on this basis if the applicant can prove that:

- he or she has evidence that was not available at the time of the hearing;

- the evidence is new,
- the evidence is relevant to the matter before the Dispute Resolution Officer,
- the evidence is credible, and
- the evidence would have had a material effect on the decision.

Only when the applicant has evidence which meets all five criteria will a review be granted on this ground.

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 has provided a copy of the tracking slip and a print out of the track history of the evidence package mailed to the tenant on December 03, 2012. The applicant states that the package was available for pick up by the tenant eight days prior to the hearing date but was not picked up.

The applicant adds that page 5 of the evidence package proves that applicant JT did not sign the lease. The applicant does not explain how this is relevant to the decision and what effect it would have had on the decision.

“New” evidence includes evidence that has come into existence since the arbitration hearing. New evidence does not include evidence that could have been obtained before the hearing took place. The tracking slip, track history and lease were all in existence and available 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, I find that the applicant has not provided any new evidence and therefore has failed to meet 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 Arbitrator’s decision was obtained by fraud. A party who is applying for review on the basis that the Arbitrator’s decision was obtained by fraud must provide sufficient evidence to show that false evidence on a material matter was provided to the Arbitrator, and that that evidence was a significant factor in the making of the decision. The burden of proving this issue is on the person applying for the review. If the Arbitrator finds that the applicant has met this burden, then the review will be granted.

On this ground for review, that the Arbitrator’s decision was obtained by fraud, the applicant states the following:

1. The tenant filed false evidence indicating that SB and JT were both tenants on the lease. The applicant states that JT was not named on the lease and therefore was not a tenant
2. The tenants lied about having no knowledge of the landlord's evidence package. The landlord states that the tenants simply chose to avoid service by not picking up the evidence package.

The Arbitrator based her decision on section 4.1(a) of the *Residential Tenancy Branch Rules of Procedure* which provides that all evidence must be received by the Residential Tenancy Branch and must be served on the other party as soon as possible and at least (5) days before the dispute resolution proceeding.

The landlord mailed his evidence package on December 03, 2012. Section 90 of the *Residential Tenancy Act* provides that a document given or served by mail is deemed to be received on the 5th day after it is mailed. In this case, the evidence package was deemed received on December 08, 2012. Since the hearing was held on December 11, 2012, the evidence package was not served in a timely manner in keeping with section 4.1(a) of the *Residential Tenancy Branch Rules of Procedure*.

Accordingly this evidence was not considered in the making of the decision. However the Arbitrator considered the landlord's testimony given during the hearing and made her decision based on the landlord's testimony and section 38 of the *Residential Tenancy Act*.

I find that even if the Arbitrator considered the late evidence filed by the landlord and accepted that JT was not a tenant, it would not have had any effect on the decision.

The applicant has not provided me with new evidence to support the allegation that the decision under review was obtained by fraud. The applicant 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.

This ground for review is not designed to provide parties a forum in which to rebut findings by the Arbitrator or to allege an error of fact or law, but to provide evidence which could not have been presented at the time of the hearing because it was not in existence at that time.

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

The application discloses insufficient evidence that the decision under review was obtained by fraud; and therefore, fails to satisfy the inherent burden of proof. Accordingly, I find that the application for Review on this ground must also fail.

Therefore, **I dismiss the application for Review and confirm the original decision dated December 11, 2012.**

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: January 03, 2013.

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Residential Tenancy Branch