



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: MNDC MNSD

Introduction

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 applies for review on the following grounds:

- A party has new and relevant evidence that was not available at the time of the original hearing.
- A party has evidence that the director's decision or order was obtained by fraud.

An Arbitrator may dismiss or refuse to consider an application for review for one or more of the following reasons:

- the issues raised can be dealt with under the provisions of the Legislation that allow an Arbitrator to correct a typographical, arithmetical or other similar error in the decision or order; clarify the decision, order or reasons, or deal with an obvious error or inadvertent omission in the decision, order or reasons;
- the application does not give full particulars of the issues submitted for review or of the evidence on which the applicant intends to rely;
- the application does not disclose sufficient evidence of a ground for review;
- the application discloses no basis on which, even if the submission in the application were accepted, the decision or order of the Arbitrator should be set aside or varied;
- the application is frivolous or an abuse of process;

- The applicant fails to pursue the application diligently or does not follow an order made in the course of the review.

Issues

Does the applicant/landlord have new and relevant evidence that was not available at the time of the original hearing? Has the applicant/landlord supplied sufficient evidence to show that the Decision and/or Order obtained was obtained by fraud?

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 original arbitration hearing;
- the evidence is new;
- the evidence is relevant to the matter which is before the Arbitrator;
- the evidence is credible; and
- the evidence would have had a material effect on the decision of the Arbitrator

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

It is up to a party to prepare for an arbitration hearing as fully as possible. Parties should collect and supply all relevant evidence to the arbitration hearing. "Evidence" refers to any oral statement, document or thing that is introduced to prove or disprove a fact in an arbitration hearing. Letters, affidavits, receipts, records, videotapes, and photographs are examples of documents or things that can be evidence.

Evidence which was in existence at the time of the original hearing, and 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.

"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. New evidence does not include evidence that could have been obtained before the hearing took place.

Evidence is "relevant" that relates to or bears upon the matter at hand, or tends to prove or disprove an alleged fact.

Evidence is “credible” if it is reasonably capable of belief.

Evidence that “would have had a material effect upon the decision of the Arbitrator” is such that if believed it could reasonably, when taken with the other evidence introduced at the hearing, be expected to have affected the result.

A mere suspicion of fresh evidence is not sufficient.

Decision Obtained by Fraud

This ground applies where a party has evidence that the Arbitrator’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.” Intentionally false testimony would constitute fraud, as would making changes to a document either to add false information or to remove information that would tend to disprove one’s case. Fraud may arise where a witness has deliberately misled the Arbitrator 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 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 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 Arbitrator, and from which the Arbitrator 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. 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.

It is not enough to allege that someone giving evidence for the other side made false statements at the hearing, which were met by a counter-statement by the party applying, and the whole evidence adjudicated upon by the Arbitrator. A review hearing will likely not be granted where an Arbitrator prefers the evidence of the other side over the evidence of the party applying.

Facts and Analysis

The hearing in this matter was held over the course of three days (October 17, 2012, November 23, 201 and December 17, 2012). A Decision and Order were rendered on December 27, 2012. In his Application for Review the landlord/applicant states that he received the Decision/Order on January 3, 2013. The Application for Review Consideration was filed on January 16, 2013 within the proper time limit.

The Decision/Order under review is a Decision to grant the tenant/respondent a monetary award in the sum of \$11,237.00 based on a finding that the tenant established a claim against the landlord for "...\$950.00 for the return of double the security deposit, \$287.00 for reimbursement for storage unit rental that the tenant paid the landlord for, and \$10,000.000 in aggravated damages, inclusive of all items missing or damaged as a result of the landlord's illegal eviction".

New Evidence

Under this ground the landlord/applicant states that he now has two letters from persons who were at the location on August 25, 2010. Further, the landlord/applicant states that he was including proof that the tenant's evidence was not served in accordance with "... the L.T.B. [sic] Rules of Procedure and a claim that Rule 11.5, paragraph must be applied".

With respect to the landlord's submission that the tenant's evidence was not properly served on him, this hearing took place over the course of 3 separate days, if there was evidence that the landlord did not receive, the time to object to the inclusion of that evidence was at the time of the hearing.

With respect to the two letters now submitted as "new and relevant evidence", I find that the landlord has failed to show that this evidence meets all of the five criteria set out above that would allow me to grant a review on the ground of "new and relevant evidence". I find that the landlord/applicant has failed to show that the evidence now submitted was not available at the time of the original hearing or that it would have had a material effect on the Decision of the Arbitrator.

The landlord's application for review on this ground is dismissed.

Fraud

Under this ground under the instruction to list “Which information submitted for the initial hearing was false and what information would have been true?” The landlord submits:

I have a letter from the owner of “Dee’s Pink Steel”. In the evidence provided by the tenant he states that he witnessed his personal belongings being loaded into her vehicle. This letter refutes that claim. This letter could have come earlier but the tenant’s evidence was not received as required by Sec. 3.5, paragraph (c). In sufficient time was allowed to examine the tenant’s evidence any response would have also contravened Sec. 3.5.

The landlord/applicant goes on to say that the tenant would have known the information was false because:

The tenant could not possibly have witnessed the event as she stated. She did not attend the residence on the day in question and as her vehicle is boldly emblazoned with “Dee’s Pink Steel”, a case of mistaken identity is impossible.

And, the information was used to get the desired outcome as:

The tenant used this false information to bolster his claim for lost and stolen items.

I find that the applicant has provided insufficient evidence to show that false evidence on a material matter was provided to the Arbitrator, and that the evidence was a significant factor in the making of the Decision. Further, the tenant has failed to prove new and material facts, or newly discovered and material facts, which were not known to him at the time of the hearing, and which were not before the Arbitrator from which the Arbitrator 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. As set out above, if the landlord/applicant did not receive the tenant’s evidence the time to raise that matter was during one of the three hearing days, not after the Decision has been rendered.

Overall the application does not disclose sufficient evidence of a ground for review, nor does the application disclose any basis upon which, even if the submissions in the application were accepted, the Decision or Order of the Arbitrator should be set aside or varied.

The original Decision and Orders dated December 27, 2012 are therefore confirmed.

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: February 04, 2013

Residential Tenancy Branch