



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Pursuant to Division 2, Section 79(2) of the Residential Tenancy Act, SBC 2002, c. 78, as amended.

On February 13, 2013, the Residential Tenancy Branch received an Application for Review from Tenant.

Dispute Codes FF LRE MNDC OLC RP RR

Subject:

Decision dated: February 21, 2013

Other Party: NACEL PROPERTIES LTD., Landlord

Introduction

On January 09 and 16, 2013, hearings were conducted to resolve a dispute between these two parties. The tenant had applied for a monetary order and for an order directing the landlord to carry out repairs, set conditions on the landlord's entry and reduce rent. The Arbitrator granted a portion of the tenant'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)(b) and (c) of the *Residential Tenancy Act* (the "Act"). 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

Does the tenant have new and relevant evidence that was not available at the time of the hearing? Does the tenant 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 Arbitrator,
- 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 lists the following:

1. Receipts for accommodation costs for the period of November 07 -21, 2012
2. Timesheets from employment for the month of November 2012, that indicate that the number of hours worked in November were less than 40
3. A letter from the applicant's employer that states that the employer is in the business of providing temporary staffing to their clients and has engaged the services of the applicant on a contract basis

It is up to a party to prepare for an arbitration hearing as fully as possible. Parties should collect and supply all relevant evidence, prior to the arbitration hearing. 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.

On the ground for review, that the applicant has new and relevant evidence that was not available at the time of the hearing, I find that all the evidence listed above existed in November 2012 and was available at the time of the hearing on January 16, 2013. Accordingly I find that the applicant has not provided any new evidence.

The tenant has not submitted 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.

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

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 alleges that the landlord committed fraud by denying knowledge of a leak that occurred on September 18 and by stating that the carpet in the area of the leak was in good condition without carrying out tests for harmful substances. The applicant also states that the landlord claimed that a replacement of the carpet was not required even though the carpet had been in contact with potentially harmful and hazardous substances from a toilet leak which was unsafe in a home that housed young children.

The applicant also comments on evidence that was presented during the hearing regarding the replacement rental unit provided to the tenant. The tenant points out that images 11 and 12 of the evidence package were key pieces of evidence that would demonstrate that the replacement unit was unfit for occupation.

With respect to the matters the tenant asserts is fraudulent, these matters were not unknown to the tenant at the time of the original hearing. They were in existence and could have been addressed at the hearing.

The Arbitrator based his decision on Sections 32 and 28 of the *Residential Tenancy Act* and *Residential Tenancy Policy Guideline 6*.

Regarding the replacement of the carpet, the Arbitrator preferred the testimony of the landlord and found that the tenant had failed to provide sufficient evidence to prove that the carpet needed repair or replacement. The Arbitrator also found that the landlord had taken very reasonable steps in offering the tenant alternative accommodation for the period of the repairs and that the tenant rejected the offer and failed to allow the landlord any opportunity to find other alternative accommodation.

The tenant may disagree with the Arbitrator's findings of fact, but he had an opportunity to respond to the landlord's evidence at the hearing.

The tenant has not provided me with new evidence to support the allegation that the decision under review was obtained by fraud. 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. Accordingly, for all the above reasons, 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 January 24, 2013.

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 21, 2013