



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: DRI FF

Introduction

This is an application by the tenant seeking a Review Consideration of the decision rendered by the arbitrator on March 13, 2013. The original hearing was to deal with the tenant's application disputing an additional rent increase, but the arbitrator found that the tenancy was not under the jurisdiction of the Residential Tenancy Act and was beyond the authority of the arbitrator to determine.

According to section 79(2) of the *Residential Tenancy Act*, a party to the dispute may apply for a review of the decision. The application for Review Consideration must contain reasons to support one or more of the following 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.

In this application, the tenant has applied for review under grounds (b) and (c).

Issues

Has the applicant for review provided sufficient evidence to support one of the indicated grounds for review?

Facts and Analysis

Evidence

Under the heading "C2. NEW AND RELEVANT EVIDENCE" on the application for Review Consideration, the applicant is asked to: "**List each item of new and relevant evidence and state WHY it was not available at the time of the hearing and HOW it is relevant.**"

The tenant listed four pieces of new evidence, copies of which were attached to the Request for Review consideration.

This evidence included 3 letters written by the tenant to the landlord in January and February of 2002. The tenant indicated that the letters, referenced above, were:

“NOT AVAILABLE DUE TO FILE BEING IN MY EXWIFE’S COMPUTER STORAGE AND HER BEING IN THE U.S.”

Other new evidence attached to the Request for Review Consideration consisted of a copy of a *“Notice of Violation”* dated November 22, 2011, regarding Fire By-Law infractions. On the Notice of Violation document, beside the space titled, *“Person Notice Given To”* the name of the tenant was written and his *“Title”* was shown as *“manager”*. According to the tenant, this piece of evidence could not be presented at the hearing because it was:

“ NOT AVAILABLE DUE TO RECORD LOSS”

In regard to making an application for Review Consideration, based on the ground of new and relevant evidence, I find that the applicant must prove that he or she has evidence that was not available at the time of the original arbitration hearing and could not be obtained through due diligence prior to the proceedings.

I find that the tenant’s request for the original hearing was filed with the Residential Tenancy Branch, on January 22, 2013, and the hearing was scheduled to proceed on March 13, 2013, approximately 7 weeks later.

Rule 3.4 of the *Residential Tenancy Branch Rules of Procedure* require, to the extent possible, an applicant must file copies of all available documents, photographs or other evidence at the same time as the application is filed.

Rule 3.5(a) states that evidence that is not available to be filed with the application, but which the applicant intends to rely upon to support their claim, must be received by the Residential Tenancy Branch and be served on the respondent as soon as possible, and at least (5) days before the dispute resolution proceeding as those days are defined the “Definitions” part of the Rules of Procedure.

I note that the **Landlord and Tenant Fact Sheet** contained in the hearing package makes it clear that *“copies of all evidence from both the applicant and the respondent and/or written notice of evidence must be served on each other and received by RTB as soon as possible.”* The *NOTICE OF A DISPUTE RESOLUTION HEARING* sheet giving the date and time of the hearing along with the phone number and participant access code for the teleconference, also contains guidance under the heading

“GENERAL INFORMATION about your responsibility and the hearing”. This section of the document states, in part:

“Evidence to support your position is important and must be given to the other party and to the Residential Tenancy Branch before the hearing. Instructions for evidence processing are included in this package. Deadlines are important”

It is the responsibility of the participant to prepare for an arbitration hearing as fully as possible. Parties should collect and supply all relevant evidence for 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 reasonable steps, have become aware of the evidence.

In this situation I find that the tenant has provided additional evidence that clearly was in existence at the time that the tenant filed the application on January 22, 2013. I find that, during the following seven weeks prior to the hearing, the tenant could likely have obtained this missing evidence that was apparently located and submitted with the Request for Review Consideration 12 days after the hearing decision was released. I find that this data is not new and that, on a balance of probabilities, it could have been obtained through due diligence prior to the hearing.

I find that the tenant has not submitted sufficient proof to establish that a review is warranted based on the ground of new evidence.

Fraud

In regard to the tenant's claim of fraud, the tenant listed arguments to support that the premises were not used as a commercial tenancy.

When claiming fraud, as a basis to review the decision, it is not enough to merely argue that the opposing party made false or misleading statements at the hearing.

During a dispute resolution hearing, it is a principle of natural justice that each party is completely at liberty to give his or her own version of the facts as they see them. Then the other party has an equal opportunity to refute the testimony or argue against any evidence presented. The fact that one party continues to dispute the evidence and testimony of the opposing party and disagrees with the outcome of a hearing, are not factors that will suffice to make this a case of fraud.

Moreover, I find that the tenant did have a fair opportunity to refute the landlord's testimony and make these same arguments to the arbitrator on March 13, 2013, during the proceedings. I find that the tenant's testimony on this subject was already heard

and duly considered by the arbitrator and the arbitrator apparently preferred the evidence of the landlord over that of the tenant.

I therefore do not accept the tenant's claim that the arbitrator's decision was obtained by fraud and find that a review is not warranted on this ground.

Given the above, I find that the tenant's evidence submitted with the Request for Review Consideration does not support the claim that there is new and relevant evidence, nor that the arbitrator's decision was obtained by fraud on the part of the landlord.

Pursuant to *Section 81(b) (ii)* of the *Residential Tenancy Act*, I must dismiss this application for review on the basis that it does not disclose sufficient grounds for a review. I find that the Applicant has not succeeded in demonstrating that the evidence contained in this Application would meet the criteria for granting a review under the ground cited.

Accordingly, the landlord's application for Review Consideration is hereby dismissed without leave and the original decision issued on March 13, 2013 remains in force.

Decision

The landlord's request for Review Consideration is not successful and the application is dismissed.

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: March 26, 2013

Residential Tenancy Branch