



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: CNR FF

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 and could not have been obtained through due diligence.**
3. A party has evidence that the director's decision or order was obtained by fraud.

This is an application for review consideration by the tenant with respect to a hearing held on March 25, 2013 to deal with applications from both the landlord and the tenant. The hearing related to a 10-Day Notice to End Tenancy for Unpaid Rent dated March 2, 2013.

The tenant had applied to dispute the Notice but did not appear at the hearing and the tenant's application was therefore dismissed. The landlord, who did attend, was granted a monetary claim and an order of possession.

The tenant made this application for review consideration of the decision on the basis that the tenant was prevented from appearing at the hearing through circumstances that could not be anticipated and were beyond the tenant's control.

In the tenant's Application for Review Consideration, she indicated that, sometime prior to the hearing date, the landlord agreed to cancel their dispute resolution hearing, and also consented to maintain the tenancy. The tenant's position is that the tenant had relied upon the landlord's information and was thereby deprived of the opportunity to attend the hearing to defend against the 10-Day Notice to End Tenancy for Unpaid Rent and the landlord's monetary claims.

In addition, the tenant's Application for Review Consideration is also based on new and relevant evidence that the tenant states was not available at the time of the original hearing and could not be obtained through due diligence.

Issue(s) to be Decided

- Was the tenant unable to attend the hearing due to circumstances that could not be anticipated and were beyond the tenant's control?
- Does the tenant have new and relevant evidence that was not available at the time of the hearing?

Background and Evidence

The tenant's Application for Review Consideration indicated that the tenant did not attend the hearing because the landlord agreed not to pursue the eviction based on the fact that the parties reached a mutual agreement to continue the tenancy.

The tenant's written submission attached to the Application for Review Consideration, indicated that the landlord and tenant,

"came to verbal and text agreement and he said I did NOT have to move and we agreed we were not going to carry on hearing b/c understanding was reached. there for was not aware hearing still took place until I received April 23/2013 (evening)"

(Reproduced as written)

In support of the above, the tenant provided written testimony from a third party witness, who describes herself as a "good family friend" of the tenant. According to this written testimony, the witness was present on March 24, 2013, when the tenant paid to the landlord an unspecified amount of money, for rental arrears. The witness statement alleged that she was also physically present on April 14, 2013 when the tenant paid an additional amount for rent, at which time she apparently overheard the landlord tell the tenant that "everything was ok" and reassure the tenant that she could remain.

Along with the above evidence attached to the tenant's request for Review Consideration, the tenant also submitted photos of text messages between the tenant and the landlord dated April 24, 2013. The tenant's text message to the landlord appears to support the allegation that the parties had previously engaged in some discussion about repayment of the arrears and the possibility of continuing the tenancy.

Analysis

The burden of proof is on the Applicant to prove that the criteria justifying a review of the original decision has been met under the Act.

Application Deadline

Section 80 of the Act states that a party must make an application for review of a decision or order within 2 days after a copy of the decision or order is received by the party when the matter relates to a Ten Day Notice to End Tenancy for Unpaid Rent to end a tenancy under section 46 [*landlord's notice: non-payment of rent*].

The original decision was rendered on March 25, 2013 and was mailed to the tenant on that date, or shortly thereafter. However, the tenant indicated in her Application for Review Consideration, that she did not receive the original dispute resolution hearing decision until April 23, 2013.

I note that section 90 of the Act deems that a mailed document is served on the 5th day after it is mailed. I find that there was no explanation given by the tenant to account for the fact that the March 25, 2013 decision was received April 23, 2013, and it is not clear why the mail containing the dispute resolution decision arrived from the Residential Tenancy Branch approximately a month later.

That being said, I will extend the benefit of the doubt to the tenant and accept that she did receive the hearing decision on the stated date of April 23, 2013 and submitted the Application for Review Consideration within the 2-day deadline under the Act.

Unable to Attend

To support a Review of the decision, the tenant is required to prove that she was not able to attend the hearing due to circumstances beyond the tenant's control. In this case the tenant alleges that the landlord had *verbally* agreed not to proceed with the eviction and to cancel the hearing.

I find that the testimony from the tenant's witness confirmed that the landlord was overheard saying that the tenant could stay and that everything was okay. However, whether the conversations in question occurred on March 24, 2013 or April 14, 2013, I find that the witness did not directly observe the landlord specifically stating that they would cancel the dispute resolution hearing scheduled for March 25, 2013.

In any case, the portion of the witness statement relating to the verbal exchange that occurred on April 14, 2013, alleging that she observed the conversation and payment towards arrears, relates to a conversation and payment that transpired three weeks after the hearing date. Therefore, I find that this portion of the witness testimony would

not be relevant to the issue of the tenant's inability to attend the hearing held on March 25, 2013.

Given the above, I do not find the written witness statement to be sufficient evidentiary proof that the parties had agreed to waive the 10-Day Notice and cancel the hearing.

I also find that the tenant's evidence showing text messages between the parties only served to verify that the two parties discussed the eviction and the arrears owed by the tenant on April 24, 2013. I find that this text-message exchange occurred long after the hearing had already been completed and thus it would not be relevant to support the tenant's inability to attend the hearing held on March 25, 2013.

New and Relevant Evidence

In regard to new and relevant evidence, I find that an applicant is required prove that he or she has located unheard evidence that was not available at the time of the original arbitration hearing and that could not be obtained through due diligence prior to the hearing.

I find that the witness testimony dated April 24, 2013 was written a month after the hearing had already been concluded. Although this evidence is "new", I find that any relevant witness testimony could have been obtained by the tenant through due diligence prior to the hearing date and could have been submitted and presented at the hearing.

I find that the text communications in evidence were also created after the hearing and therefore could not be considered as relevant to the issue under dispute.

In addition to the above, I find that, after the 10-Day Notice to End Tenancy for Unpaid Rent dated March 2, 2013, was served, the tenant had 5 days under section 46 the Act to pay the arrears in full to cancel the Notice. After adding 3 days to the service for posting the Notice, the 5 days expired on March 10, 2013. Even if I accept the testimony provided by the witness who alleged that an unspecified payment was made to the landlord on March 24, 2013, and a second payment was made on April 14, 2013, I find that these payments for the rent arrears were made beyond the statutory deadline to cancel the 10-Day Notice. Given the above, I find that the landlord would be entitled to an Order of Possession whether or not the tenant proved she had paid the arrears in full on March 24, 2013, and whether or not the tenant successfully attended the hearing held on March 25, 2013.

Section 81(1) of the Act states that the director may dismiss or refuse to consider the application, if the application does not give full particulars of the issues submitted for review or of the evidence on which the applicant intends to rely, if the application does

not disclose sufficient evidence of a ground for the 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, or if the application is frivolous or an abuse of process.

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

There is no valid basis to support that reconsideration is warranted based on the tenant being unable to attend the hearing due to circumstances beyond the tenant's control nor based on new and relevant evidence. Accordingly, I hereby dismiss this application without leave.

CONCLUSION

The tenant's application for Review Consideration was not successful and the decision, monetary order and order of possession issued on March 25, 2013, stand.

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: April 29, 2013

Residential Tenancy Branch