



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW DECISION

Dispute Codes: CNC FF LAT O OLC RP SS

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 applicants apply 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

Do the applicants have new and relevant evidence that was not available at the time of the original hearing?

Have the applicants provided sufficient evidence to show that the Arbitrator's Decision and/or Order been 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 party 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.

Analysis

The Decision/Order under review is a Decision to dismiss the applicants/tenants' application seeking an Order to cancel a Notice to End Tenancy given for cause in addition to seeking Orders to have the landlord comply with the Act, to allow the tenants to change the locks on the rental unit, to have the landlord make repairs and for recovery of the filing fee paid. Having dismissed the tenants' applications including the application to cancel the Notice to End Tenancy and the landlords having made a request for an Order of Possession at the hearing, the Arbitrator granted an Order of Possession effective May 31, 2013.

New Evidence

In their Application for Review the applicants did not complete the Application or respond to the questions asked instead noting that the Reviewing Arbitrator should refer to "attached sheets". The applicants have also submitted rental receipts, and personal bank statements.

With respect to the written submissions contained in the "attached sheets" I find these are merely an attempt to rebut the Decision and reargue the case which was now been decided. With respect to the evidence submitted as being new, I find that it does not meet the five criteria set out above that would allow me to grant a Review. In particular, the tenants have not shown that the receipt and bank statements now provided:

- were not available at the time of the original arbitration hearing;
- that they are new; or
- that they would have had a material effect on the decision of the Arbitrator

The Application for review on this ground is therefore dismissed.

Fraud

The tenants did not respond to the questions in the Application for Review however they have supplied a written submission which I find amounts to a re-argument of the case already decided and a rebuttal to the Decision rendered.

The bank statements now provided show direct deposit payments, which the tenants have highlighted as payments with respect to their rent made on dates other than those recorded in the Decision.

I refer to the Decision of the Arbitrator under review in which he states in part:

Both parties provided written evidence that the tenants have been late in paying their monthly rent very frequently. The landlords entered **undisputed** sworn testimony and written evidence of the following late rental payments for the period from November 2012 until April 2013:

Date of Tenants' Direct Deposit Rent Payments	Amount of Payment
November 13, 2012 Rent Payment	\$500.00
November 14, 2012 Rent Payment	450.48
December 6, 2012 Rent Payments (\$500.00 & \$450.48 = \$950.48)	950.48
January 10, 2013 Rent Payment	500.00
January 15, 2013 Rent Payment	450.48
February 11, 2013 Rent Payments (\$500.00 & \$450.48 = \$950.48)	950.48
March 11, 2013 Rent Payments (\$500.00 & \$450.48 = \$950.48)	950.48
April 3, 2013 Rent Payment	950.48

The landlords entered written evidence of copies of their bank account transactions for each of the above deposits.

The tenants did not dispute the agent's assertion that each of the above rent payments were by way of direct deposits by the tenants into the landlords' bank account. **The tenants did not dispute** the landlords' claim that their Agreement calls for the tenants' payment of rent by the first of each month, **nor did they dispute** the landlords' sworn testimony and detailed written evidence that they have been typically late in paying their monthly rent.

(emphasis added)

And:

The most credible sworn testimony I heard from the tenants during this hearing was Tenant MFK's admission near the end of this hearing that the tenants have been "struggling to pay rent" during their tenancy.

The Decision shows that it was made based on evidence which was not disputed by the tenants at the hearing as well as on a finding of credibility.

With respect to the Application for Review on the ground of fraud I am not satisfied that a fraud has occurred. I find that the applicants have not met the burden of proving 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 I, in conducting this 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.

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 rendered April 30, 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: May 29, 2013

Residential Tenancy Branch