



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Nacel Properties
and [tenant name suppressed to protect privacy]

REVIEW DECISION

Dispute Codes: CNR

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

Has the applicant supplied sufficient evidence to show that the decision/order 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.

Analysis

The Decision/Orders under review are a Decision to issue an Order of Possession based on a 10 day Notice to End Tenancy given for unpaid rent, permission to retain the security deposit and a monetary Order to recover the balance of unpaid rent and the filing fee paid for the application.

In her Decision the Arbitrator found:

Although the Tenant disputed the Notice, the Tenant has not disputed that approximately \$1,000.00 is owed in rent. Given this evidence, I find that the Notice is valid in relation to an amount of unpaid rent and Landlord is therefore entitled to an Order of Possession. The Tenant's application is dismissed.

Having found based on the tenants' testimony that there were rental arrears the Arbitrator dismissed the tenants' applications seeking to cancel the Notice to End Tenancy given for unpaid rent.

With respect to the application for review on the basis of new evidence that was unavailable at the time of the original hearing the tenants state only that they "...obtained intent to rent however landlord has not provided other evidence to us..." By way of documentation attached to the application for review there is a Certificate of Marriage, a Disposition from the Review Board in the part of Part XX.1 (Mental Disorder) of the Criminal Code, a facsimile from St. James Community Service Society, a letter signed by two individuals one who appears to be a tenant named in this application, an Elections BC voter information document, a brochure from Elections BC, a "Tenant Inquiry Page 2 Arrears" document and a Tenancy Agreement dated March 12, 2011.

With respect to the tenants' submissions I find that the application does not meet the five criteria set out above that would allow me to grant a review under the ground of "new and relevant evidence" in particular the tenants have failed to show that the evidence was not available at the time of the original arbitration hearing, that the evidence is new, that the evidence is relevant to the matter which was before the

Arbitrator or that the evidence would have had a material effect on the decision of the Arbitrator.

As set out above, this tenancy ended based on the tenants' own evidence that there were rental arrears. I find that in their application for review on the ground of fraud the tenants have failed to show that false evidence on a material matter was provided to the Arbitrator. Further the tenants have failed to prove new and material facts, or newly discovered and material facts, which were not known to them 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.

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 May 16, 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: June 05, 2013

Residential Tenancy Branch

