



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes

OPL, OPC, CNL, CNC, MNDC, RR, OLC, ERP, PSF, MND, MNSD, FF

Basis for Review Consideration

Section 79(2) of the Residential Tenancy Act (Act) states that 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.

Applicant's Submission

The application for review consideration states the decision should be reviewed on the all three grounds.

Unable to attend

On the ground that the applicant was unable to attend due to circumstances that could not be anticipated and were beyond the applicant's control, the applicant states that she is on strong anti-depressant medication and sleeping pills and could not wake up in time for the hearing which was at 10:30 am. The applicant contradicts herself by adding that on the day of the hearing she had to take a car to the air care center and therefore missed the hearing.

Regarding additional evidence or testimony the applicant would have provided had she attended the hearing, the applicant states that she would have testified about the extensive use of the laundry facilities by the tenants.

New and relevant evidence:

The applicant states that she has requested copies of utility bills to prove that the tenants are misusing utilities. The landlord has attached copies of rent receipts to demonstrate that the tenant repeatedly pays rent late. The landlord also states that the tenants are smoking inside the rental unit, are involved in illegal activity, have changed the keys to the basement and have caused damage to the rental unit.

Fraud:

The landlord states that only after she gave the tenant a two month notice to end tenancy, did the tenant started complaining about mould. The landlord alleges that the tenant is growing weed in the rental unit which is the cause of mould. The tenant has also installed an ozone air cleaner and uses incense sticks to mask the odour of weed in the rental unit. The landlord goes on to say that if mould is a problem, the tenant should move out.

Analysis

Unable to attend

The applicant states in her application that she is taking medication for depression and sleeping pills and was unable to wake up in time for the hearing. However she adds that she had taken a car for air care on the day of the hearing and therefore missed the hearing.

In order to meet be granted a review hearing, the applicant must establish that the circumstances which led to the inability to attend the hearing were both:

- beyond the control of the applicant, and
- could not be anticipated.

An arbitration hearing is a formal, legal process and parties should take reasonable steps to ensure that they will be in attendance at the hearing. This ground is not intended to permit a matter to be reopened if a party, through the exercise of reasonable planning, could have attended. The Residential Tenancy Branch provides detailed instructions to the parties to enable them to attend the conference.

The applicant applied for dispute resolution on June 10, 2013 and shortly after was provided with information regarding the date and time of the scheduled hearing which took place on June 18, 2013. The landlord had adequate time to arrange for an agent to represent her at the hearing or could have called in and requested an adjournment. The landlord chose neither option.

I find that carrying out air care of a vehicle at a different time was not something that was out of the control of the landlord. I further find that the applicant has not established that the circumstances which led to the inability to attend the hearing were beyond her control and could not be anticipated. Therefore the application for review on this ground must fail.

This ground is not intended to permit a matter to be reopened if a party, through the exercise of reasonable planning, could have attended, requested an adjournment or had an agent represent her at the hearing.

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.

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 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.

The tenant is awaiting copies of utility bills for the months prior to the hearing. I find that this is not new evidence. The landlord has filed copies of rent receipts to demonstrate late payments of rent. Apart from this evidence not being new, it is also not relevant to the case. The landlord is at liberty to serve the tenant a notice to end tenancy for changing the locks and for late payment of rent and file the receipts as evidence to support the notice.

On the ground for review, that the applicant has new and relevant evidence that was not available at the time of the original hearing, I find that the applicant has not provided any new evidence. All the evidence listed above was in existence at the time of the hearing.

Therefore I find that the landlord has failed to meet the criteria of the test to establish grounds for review in this tribunal and accordingly, I find that the application for review on this ground must fail.

Fraud:

This ground applies where a party has evidence that the decision was obtained by fraud. 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.

On this ground for review, that the Arbitrator's decision was obtained by fraud, the applicant alleges that the tenant committed fraud by complaining about mould after receiving the notice to end tenancy.

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

The landlord 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 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.

The applicant has failed to prove that a fraud was perpetrated and accordingly, I find that the application for review on this ground must fail.

Conclusion

I dismiss the Application for Review Consideration. The original decision and order(s) made on June 18, 2013 are confirmed.

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: July 19, 2013

Residential Tenancy Branch

