



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: FF MND MNR MNSD

Introduction

On October 03, 2013 a hearing was conducted to resolve a dispute between these parties. The landlord had applied for a Monetary Order for damage and unpaid rent or utilities and to keep the security deposit. The Arbitrator granted a Monetary Order and permitted the landlord to keep the security deposit. The tenant did not attend the hearing and has applied for a review of this Decision.

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.

Issues

The applicant relies on sections 79(2)(a) and (c) of the *Residential Tenancy Act* (the "Act"). That the party was unable to attend the hearing because of circumstances that could not be anticipated and were beyond the party's control. The party has evidence that the arbitrator's decision or order was obtained by fraud.

Facts and Analysis

Unable to Attend

In order to meet this test, the application 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.

In this application for review, the tenant states that the reason for not attending the hearing is because the applicant does not understand English and got confused at the hearing time. The applicant waited at home all morning for somebody to call the applicant instead of the applicant calling the number.

The tenant submits that they would have provided call logs for the tenant's friends who tried to contact the landlord during the end of May to early June and the testimony of the tenant's friend who tried to contact the landlord.

If a tenant is provided hearing documents and a Notice of Hearing letter from a landlord; if English is not the first language of the tenant then the tenant should have taken the documents to someone who could have translated them for the tenant. It is not sufficient to say that there was confusion on the part of the tenant that prevented the tenant from dialing into the call instead of waiting for someone to call the tenant. Therefore I find that the tenant has not established that the circumstances which led to the inability to attend the hearing were both beyond the tenants control and could not be anticipated.

Accordingly, I find that the application for review on this ground must fail.

Decision Obtained by Fraud

This ground applies where a party has evidence that the 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”.

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 tenant submits that the landlord claimed they couldn't contact the tenant but the truth is they never tried to contact the tenant. The tenant tried to contact the landlord lots of times but nobody answered. The tenant left at least five messages to ask the landlord to contact the tenant.

The tenant submits that the landlord knew the information was false because they tried to contact the landlord lots of times and the tenants friend even drove to the landlords office to try to find the landlord.

The tenant submits that the false information was used to get the desired outcome as the tenant waited for the landlord on May 31, 2013 but no one showed up. After the

landlord did show up the landlord refused to return the deposit and asked the tenant to pay the rent for June, 2013.

The tenant has provided a copy of the original decision, an invoice from a hotel showing the tenant as a guest between June 02, 2013 and June 07, 2013, five pages of a phone bill with nine highlighted areas showing calls made to the landlord between May 27, 2013 and June 21, 2013, and a witness statement from someone helping the tenant to translate. This statement submits that the owner came to the house and the tenant asked to rent for six more days but the owner said no if they want to continue to rent it must be for one whole month. The tenant has also provided a letter from the tenant to the landlord which states the tenant has moved out of the rental unit on May 31, 2013 according to the rental contract. The tenant has provided some photographic evidence showing the unit at the end of the tenancy.

I have reviewed the tenant's submissions concerning the allegations that the landlord provided fraudulent information at the hearing. The landlord had stated that the tenant had moved out but still remained in possession of the rental unit until June 15 to clean and paint. I have no evidence from the tenant for this review hearing to the contrary and although the tenant has provided a hotel invoice showing the tenant was there from June 02, to June 07, 2013 there is no evidence to show that the tenant did not return to the unit to clean and paint as stated by the landlord at the hearing.

The tenant goes on to provide evidence about contacting the landlord but there was no question raised at the hearing that the tenant had not tried to contact the landlord and therefore no fraud has been perpetrated.

The application discloses insufficient evidence that the decision under review was obtained by fraud; and therefore, fails to satisfy the inherent burden of proof. The applicant has failed to prove that a fraud was perpetrated. If the tenant had attended the hearing the tenant would have been in a position to have argued these matters at that time.

Accordingly, I find that the application for review on this ground must fail.

Decision

The tenant's application for review is dismissed.

The decision made on October 03, 2013 stands.

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: October 24, 2013