



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes MNSD, FF

Basis for Review Consideration

Section 79(2) of the Residential Tenancy Act (the “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.

The Landlord has applied on grounds 2 and 3 above.

Issues

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

Does the Landlord have evidence to prove the Decision was obtained by fraud on behalf of the Tenant?

Applicant’s Submission

In this Application the Landlord has applied for a review consideration of the Decision dated September 10, 2013 (the “Decision”).

The Landlord and the Tenant had been involved in one prior hearing, in which the Landlord obtained an order of possession and a monetary order for unpaid rent up to July 15, 2011 (the “First Hearing”).

In the First Hearing the Landlord was granted leave to apply for further loss of rent from after July 15, up to October 31, 2011, which was the end of the fixed term lease.

The Decision dealt with the Landlord making this second claim for unpaid rent from mid July to October 2011. The Decision dismisses the Landlord's claims.

In her submissions for this review consideration the Landlord has provided evidence she alleges is new, and enclosed a copy of a MLS listing showing the rental unit for sale, a copy of an email from a realtor, copies of the "for rent" ads on a popular Internet website, an email from a previous renter, and a draft of an email sent to the Tenant setting out alleged deficiencies in the rental unit after the Tenant vacated.

As for the allegation of fraud, the Landlord alleges the Tenant was not truthful when the Tenant informed the Arbitrator that they did not get copies of the Landlord's evidence.

The Landlord also alleges the Tenant committed fraud when the Tenant testified the rental unit was for sale in September of 2011.

The Landlord further alleges the Tenant committed fraud in that she did not acknowledge receiving a copy of an email setting out the alleged deficiencies in the rental unit after the Tenant vacated.

Analysis

Based on the above, and the submissions, evidence and Decision, and on a balance of probabilities, I find the Landlord's application for review consideration must be dismissed.

Policy guideline 24 explains that to be successful on a ground of having new and relevant evidence, the Applicant must prove as follows:

"New and relevant evidence

A review may be granted on this basis if the applicant can prove each of the following:

- he or she has evidence that was not available at the time of the original hearing;
- the evidence is new;
- the evidence is relevant to the matter described in the initial application;
- the evidence is credible; and
- the evidence would have had a material effect on the original decision.

Prior to a hearing, parties must collect and supply all relevant evidence to the hearing. Evidence refers to any oral statement, document or thing that is introduced to prove or disprove a fact in a dispute resolution hearing. Letters, affidavits, receipts, records, audio, video, and photographs are examples of documents or things that can be evidence." [Reproduced as written.]

I find that all of the evidence submitted by the Landlord was in fact available to the Landlord prior to the hearing.

The Landlord would have to prove a loss of rent and would have had to prove she mitigated her losses. The evidence the Landlord submits now *might have* supported some of those requirements at the hearing; however, the Landlord did not submit this evidence for the hearing and is not able to now submit it in support of rearguing her claims. Having found this is not new evidence, but evidence available to the Landlord prior to the hearing, I dismiss this portion of the Landlord's Application.

As to the claims of fraud, policy guideline 24 explains fraud as follows:

“Decision obtained by fraud

Fraud is the intentional use of false information to obtain a desired outcome.

Fraud must be intended. An unintended negligent act or omission is not fraudulent.

Intentionally providing false testimony would constitute fraud, as would making changes to a document either to add false information, or to remove information rendering the document false. Fraud may arise where a witness has deliberately misled the proceeding by the concealment of a material matter that is not known by the other party beforehand and is only discovered afterwards.

The application for the review consideration must be accompanied by sufficient evidence to show that false evidence on a material matter was provided to the RTB, and that this evidence was a significant factor in the making of the decision. The application package must show the newly discovered and material facts were not known to the applicant at the time of the hearing, and were not before the RTB. The application package must contain sufficient information for the person conducting the review to reasonably conclude that the new evidence, standing alone and unexplained, supports the allegation that the decision or order was obtained by fraud.

A review may be granted if the person applying for the review provides evidence meeting **all three** of the following tests:

1. information presented at the original hearing was false;
2. the person submitting the information knew that it was false; and,
3. the false information was used to get the outcome desired by the person who submitted it.” [Reproduced as written.]

The Decision sets out that the Landlord was not able to prove how the Tenant was served with the evidence. The Decision sets out the following:

“The tenant testified that she had not received any written evidence from the landlord. The landlord was uncertain as to whether she had sent her written evidence to the tenant. She testified that she thought that she had sent it to the tenant “around the same time” as she sent her dispute resolution hearing package to the tenant. She had no precise details as to how or when she provided her written evidence to the tenant. Since the landlord could not demonstrate how or if she had provided her written evidence to the tenant and the tenant denied having received it, I advised the parties that I would not be considering the landlord’s written evidence.” [Reproduced as written.]

I find the Decision found the Landlord failed to prove service of the evidence on the Tenant. I do not find the Decision based this on the testimony of the Tenant, but rather the Landlord’s inability to explain how the Tenant was served. I do not find fraud on this issue.

The Decision sets out that the Landlord failed to prove she had adequately mitigated her losses. The Decision finds the Landlord pursued a much higher rate of rent than what the tenancy agreement than that charged to the Tenant, and therefore, did not adequately mitigate her rent losses for the period following July of 2011.

The Decision of the Arbitrator does not set out that it relied on the Tenant’s evidence that the rental unit was still listed for sale in September.

In fact this portion of the Decision deals with the Landlord’s claims for July loss of rent. In testimony set out in the Decision, the Landlord testified that the rental unit was still for sale for a portion of July, and in fact the Landlord has submitted evidence showing the rental unit was listed for sale until July 24, 2011. The Arbitrator found it was unlikely someone would rent in July knowing the rental unit was for sale. Therefore, I find the Landlord has failed to prove the Tenant’s statements about the rental unit being for sale in September would have influenced any findings for loss of rent in July.

As to the Tenant denying receiving a copy of an email from the Landlord setting out deficiencies in the rental unit, I note the email supplied by the Landlord is not in the approved form of a condition inspection report in any event. The Decision sets out there was a dispute between the parties as to whether or not the Landlord provided copies of the condition inspection reports to the Tenant. I also note the Arbitrator relied on the oral testimony of the Tenant as to the specific details of the condition of the rental unit at the start of the tenancy.

In any event, I do not find that the Landlord has sufficient evidence to prove she sent a copy of the draft email to the Tenant or that she complied with the requirements of the

Act in providing the Tenant with an incoming and outgoing condition inspection report in accordance with the Act or regulation. I do not find the evidence submitted by the Landlord, standing alone and unexplained, supports the allegation that the Decision was obtained by fraud

Lastly, I am not satisfied that that even if the submissions of the Landlord were accepted (which they are not), there is any basis on which the Decision should be set aside or varied.

For all of the above reasons, I dismiss the Application for review consideration of the Landlord.

Conclusion

I dismiss the Application for Review Consideration. The original decision made on September 10, 2013 is confirmed.

This decision is final and binding on the parties, unless otherwise provided under the Act, and is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: October 08, 2013

Residential Tenancy Branch

