



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Review Consideration Decision

Dispute Codes: FF MNDC MNR MNSD OPR

Introduction

This is an application filed by the tenant for review of a decision of an Arbitrator dated December 2, 2013. Pursuant to the decision an order of possession and a monetary order were issued in favour of the landlord.

Division 2, Section 79(2) of the *Residential Tenancy Act* provides 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.

Issues

The application for review is filed on the basis of grounds # 1 and # 3.

Facts and Analysis

Was the tenant unable to attend the original hearing because of circumstances that could not be anticipated and were beyond her control?

In order to meet this test, the tenant must establish that the circumstances which led to the inability to attend the hearing were both:

- beyond the control of the tenant, and
- could not be anticipated

In the decision the Arbitrator documents that the application for dispute resolution and notice of hearing were served by way of registered mail. The Canada Post website informs that the documents were “successfully delivered” on October 24, 2013.

In her application for review the tenant states that her reasons for not attending the hearing were as follows:

I was told not to attend hearing as it was no longer taking place. We made a mutual agreement for me to leave end of December.

As to testimony or additional evidence the tenant would have provided in the event of her attendance to the hearing, in her application for review she states as follows:

A letter that was taped to my door stating she was allowing me to be there till end of December.

I find there is no evidence of a “mutual agreement to end a tenancy” form signed by the parties. Further, the hearing was not formally cancelled by the landlord, and the tenant did not apparently exercise due diligence by contacting the Residential Tenancy Branch to confirm for herself whether or not the hearing had been cancelled. In the result, the application must fail on this ground.

Does the tenant have evidence that the decision and orders were obtained by fraud?

A party applying for review on grounds that the 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 the 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 was obtained by fraud. Fraud must be intended. A negligent act or omission does not constitute fraud. The burden of proving fraud is on the party applying for review.

A copy of the landlord's letter, as above, which is dated November 30, 2013, is included with the tenant's application for review and reads as follows:

If you want to stay through December, you have to allow me to show the place when I need to so I can rent it out for Jan 1st. I will try to give you 1 day's notice each time.

In support of her application for review on this ground, the tenant claims as follows:

[The landlord] failed to mentioned [sic] she was going through with the hearing nor did she inform her agent that she was allowing me to stay.

She held info from her agent Van Evictions & lied to me.

With my evidence they would have allowed me to stay till end of Dec.

I note that the landlord's apparent openness to the possibility that the tenant may stay in the unit "through December," is conditional upon the tenant being prepared to "allow [the landlord] to show the place when I need to..." There is no evidence before me as to what transpired between the parties between the time when the landlord wrote her letter on November 30, 2013, and December 13, 2013 when the tenant documents that she was served with the order of possession. Specifically, it is unknown whether the parties were able to work cooperatively with each other. In the result, I find that the tenant has failed to meet the burden of proving that the decision or orders were obtained by fraud, and the application must therefore fail on this ground.

Finally, section 81 of the Act speaks to **Decision on application for review**, in part:

81(1) At any time after an application for review of a decision or order of the director is made, the director may dismiss or refuse to consider the application for one or more of the following reasons:

(b) the application

- (i) does not give full particulars of the issues submitted for review or of the evidence on which the applicant intends to rely,
- (ii) does not disclose sufficient evidence of a ground for the review,

- (iii) 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, or...

Decision

For the reasons set out above, the application for review is hereby dismissed. The original decision and orders dated December 2, 2013 are hereby 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: December 17, 2013

Residential Tenancy Branch