Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: CNC LRE LAT RR

Introduction

This is an application by the female tenant (the tenant) for a review of a decision rendered by an Arbitrator on November 21 2013 (the original decision), with respect to applications for dispute resolution from the landlord and the tenants.

An Arbitrator may dismiss or refuse to consider an application for review for one or more of the following 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.

Issues

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's application for review was based on the second and third grounds as outlined above.

Facts and Analysis –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 a dispute resolution hearing as fully as possible. Parties should collect and supply all relevant evidence at the dispute resolution hearing. "Evidence" refers to any oral statement, document or thing that is introduced to prove or disprove a fact in a hearing. Letters, affidavits, receipts, records, videotapes, and photographs are examples of documents or things that can be entered into 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 dispute resolution hearing. It also includes evidence which the applicant could not have discovered with due diligence before the hearing. New evidence does not include evidence that could have been obtained before the hearing took place. 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.

The application for review form asks the applicant to "List each item of new and relevant evidence and state why it was not available at the time of the hearing and how it is relevant." The applicant/tenant responded as follows:

> *Emails from witnesses that show the landlord's evidence is false (my friend saw everything)*
> - *Letter from my mom showing that I was not home Sept. 28, and she will be a witness in person testifying on my behalf...*

The tenant also attached many documents and digital evidence in support of her application for review.

I find that many of the tenant's attachments and digital evidence have no relevance to the reasons identified by the Arbitrator for allowing the landlord's application to end this

tenancy and issue an Order of Possession. Some of the tenant's evidence dates back as far as February 2006.

In the original decision, the Arbitrator provided the following explanation for her decision to disregard the tenant's evidence package that was submitted late.

> *In this case, the tenant stated they filed their evidence package late, however, this was not received by the Arbitrator. The landlord stated they did not receive the tenants' evidence package until the morning of the scheduled hearing. Under the Residential Tenancy Branch Rules of Procedure the tenants were to provide their evidence at least five (5) days before the dispute resolution proceeding. As a result, the tenants' evidence was excluded as it would be administrative unfair to the landlord and any adjournment would be unfair and prejudicial to the landlord.*

Based on this portion of the original decision, I find that much of the tenant's current application for review on the basis of new and relevant evidence relates to material that she attempted to have considered at the original hearing. Although the tenant provided a detailed explanation for why her evidence was late, I note that she applied for dispute resolution on October 11, 2013, over five weeks before the original hearing was convened. With a few exceptions, I find that the evidence that the tenant has submitted as new and relevant evidence existed at the time of the original hearing, but was provided to both the landlord and the Residential Tenancy Branch (the RTB) too late to be considered at that hearing. The review process is not designed to enable parties to circumvent the deadlines for providing evidence in advance of their hearings.

In the original decision, it is clear that the key reason identified by the Arbitrator for allowing the landlord's application to end this tenancy was the tenant's failure to apply to cancel the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) within the 10-day time period allowed under the *Act*. In the Background and Evidence section of her decision, the Arbitrator reported the following sworn testimony provided by the parties at the November 21, 2013 hearing (the original hearing).

> *The landlord's agent stated the tenants filed outside the time limited as they had received the notice to end tenancy on September 28, 2013.*
>
> *The landlord's agent stated on September 27, 2013, she contacted the tenants to inform them that they would be attending the rental unit on September 28, 2013, to serve them with a notice to end tenancy.*

> *The landlord's agent stated on September 28, 2013, they attended the tenants' rental unit with a witness and spoke to the female tenant thru the door, and the tenant refused to open the door to accept service of the notice to end tenancy.*
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> *The landlord's agent testified as a result they taped the notice to the door, however, they just went down the hallway and waited for a minute or two, when they witnessed the female tenant opened the door and retrieved the notice.*
>
> *The female tenant acknowledged she received the notice on September 28, 2013, however, stated that it is assumed they received in on the October 1, 2013…*

The above evidence proved critical to the Arbitrator's decision as she found "that the landlord has provided sufficient evidence to show that the tenants had received the notice to end tenancy on September 28, 2013, which was witnessed." The original decision also noted that "The tenant also acknowledged receiving the notice on September, 28, 2013, although argued it was not assumed received until October 1, 2013. " The Arbitrator stated that " the deemed service provision under the *Act*, only applies when there is no evidence of when the actual document was received and the deemed service provision is rebuttal when there is evidence to the contrary, such as in this case." The Arbitrator reached the following conclusions and findings.

> *The tenant acknowledged she received the notice to end tenancy on September 28, 2013, under the provisions of the Act the tenant had ten days to file an application for dispute resolution which was October 8, 2013. The tenants' application for dispute resolution was filed on October 11, 2013, which is outside the time limited permitted under the Act. The tenants did not apply to allow more time to make an application to cancel a notice to end tenancy.*
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> *Therefore, as the tenants did not apply to dispute the notice within 10 days after it was received on September 28, 2013, they were presumed to have accepted the notice and were required to move out of the rental unit on the effective vacancy date of the notice, which was October 31, 2013...*

For the above reasons, the Arbitrator dismissed the tenants' application to cancel the 1 Month Notice and issued a 2-day Order of Possession.

In the copy of the 1 Month Notice the tenant attached to her review application, the tenant wrote that she received it on October 1, 2013. In her application for review, she also noted that her mother had provided a letter stating that the tenant was not home on

September 28, 2013, and would give sworn testimony to this effect if a new hearing were convened. She also attached an email from one of her friends, SB, who stated in that email that she was staying at the tenant's rental premises on September 27 and 28, 2013, and that it was she (SB) and not the tenant who was present when the landlord posted the 1 Month Notice on the tenant's door. SB also stated in her email that she removed the 1 Month Notice from the tenant's door, brought it into the rental unit and "left it on the table where it would be seen." All of this new evidence is clearly at odds with the tenant's own sworn testimony provided at the hearing in which the Arbitrator noted that the tenant acknowledged that she did receive the 1 Month Notice on September 28, 2013.

I find that the only relevant portion of the material provided by the tenant in support of her application is the material she has submitted with respect to whether she received the 1 Month Notice on September 28, 2013, as she stated at the original hearing, or on October 1, 2013, as she is now maintaining. Since she acknowledged at the hearing that she had received the 1 Month Notice on September 28, 2013, I find little credibility to her current claim that she was not home that day and did not receive the 1 Month Notice until October 1, 2013. If that were the case, the tenant would surely have testified to that effect at the original hearing. However, even if that were the case, and the email from her friend, SB, provided an accurate account of how the 1 Month Notice was brought into the rental unit, it would also appear to me that the landlord's observation of the removal of the 1 Month Notice posted on the door shortly beforehand would also constitute service of the document to the tenant on September 28, 2013 in accordance with section 88(e) of the *Act*. The Arbitrator's decision noted that the tenant believed that she was not deemed served with that Notice until October 1, 2013, thus allowing her additional time to apply for dispute resolution. However, the Arbitrator provided a thorough explanation in her decision as to why she found that the tenant was served with the 1 Month Notice on September 28, 2013. I find that this portion of the tenants' application, the only one that has any relevance to the reason for the dismissal of the tenants' application to cancel the 1 Month Notice, is more in the nature of attempting to revise the tenant's own sworn testimony she gave at the hearing. The review process is not intended to enable parties to correct or revise their own sworn testimony once they receive an unfavourable decision.

Finally, I note that, with the exception of the evidence regarding the date that the 1 Month Notice was received, there is nothing in the tenant's application for review or in the material she attached to that application that would have had a material effect on the original decision of the Arbitrator.

As noted above, an applicant for review on the basis of new and relevant evidence needs to meet all five of the criteria in order to obtain a review hearing. In this case, I find that the tenant has failed to meet most of the five criteria outlined above that would enable me to grant her request for a review of the original decision. I dismiss the tenant's application for review on the basis of new and relevant evidence because I find that the application discloses insufficient evidence of this ground for review. Overall, I also find that the tenant's application is unclear.

Facts and Analysis - Fraud

This ground applies where a party has evidence that the Arbitrator's decision was obtained by fraud. 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 the evidence was a significant factor in making 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.

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. 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.

In this case, the tenant claimed that she had emails from witnesses showing that the landlords knowingly falsified information about notices, service and police visits, among other items. She also claimed that the landlords gave false evidence about disturbances, slandered her and forged documents.

A dispute resolution hearing is a formal adjudicative process. It is up to each party to present their cases for consideration by the Arbitrator. I find that much of the tenant's claim under this ground is an assertion that the landlord's representatives presented false evidence to the Arbitrator. As noted above, an application for review for fraud will

not be granted if the applicant claims that the other party made false statements at the hearing and that her testimony should have been accepted instead.

Neither the information now submitted, nor the tenant's description of the issues demonstrates fraud as outlined above. The tenant's allegations that the Arbitrator based her decision and order on fraudulent evidence submitted by the landlords is more in the nature of an attempt to address issues that had no bearing on the reason identified in the Arbitrator's decision for ending this tenancy. As was noted above, the Arbitrator relied on the sworn testimony of the parties at the hearing in which the landlord's representative testified that he watched the tenant open the door after he posted the notice to end tenancy on the tenant's door and retrieve the notice to end this tenancy. The Arbitrator also reported that the female tenant gave sworn testimony that she received the landlord's notice to end tenancy on September 28, 2013. It was the female tenant's own sworn testimony that formed the basis for the Arbitrator's finding that the 1 Month Notice was served on September 28, 2013. I find no relevance to the tenant's application that the original decision was based on fraud. The material she has provided has little if any bearing on the Arbitrator's decision.

I find that the tenant has not submitted sufficient evidence to demonstrate that the original decision was obtained by fraud. I dismiss the application for review on the basis that the application discloses insufficient evidence of any ground for review.

Overall, I also find that the tenant's application is unclear, including sometimes illegible comments handwritten on documents dating as far back as February 23, 2006. The relevance of most of the information provided by the tenant to the decision reached by the Arbitrator is very questionable at best.

For the reasons outlined above, the original decision is therefore confirmed.

Decision

The decision and Order made on November 21, 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: December 06, 2013