



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Introduction

On August 06, 2014, a hearing was conducted to resolve a dispute between these two parties. The landlord had applied for a monetary order. Both parties attended the hearing. The Arbitrator dismissed the landlord's application and awarded the tenant the return of the security deposit. The landlord 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.

The applicant relies on sections 79(2)(b) and (c) of the *Residential Tenancy Act*.

Issues

Does the applicant have new and relevant evidence that was not available at the time of the hearing? Does the applicant have evidence that the Arbitrator's decision was obtained by fraud?

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 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. On this ground for review, the applicant states the following:

Tenant did know how to fix hot tub – stated the opposite in hearing

Tenant refused to answer calls and emails at time of incident resulting in loss of property

Tenant omitted that there were several conversations that he offered to do simple work then changed his mind

The applicant has attached copies of a conversation by email between the two parties. The emails are dated October 07, 2013. The landlord has also filed a copy of a telephone bill dated November 25, 2013.

“New” evidence includes evidence that has come into existence since the arbitration hearing. New evidence does not include evidence that could have been obtained before the hearing took place.

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 provided a telephone bill and emails of conversations that took place several months prior to the hearing. The landlord has underlined a portion of the email conversation in which the tenant states:

I don't think the pump is gone. Just a couple jets need replacing. It still sucks to the filter but with the jets missing inside parts it sucks the pressure out and makes the water leak. Other than that the hot tub works great. Simple repair I think a I have owned hot tubs in the past.

Since the email conversation is dated October 06 and 07, 2013 and the telephone bill is dated November 26, 2013, and the hearing took place on August 06, 2014, I find that this is not new evidence and therefore the landlord has failed to meet the test to establish grounds for review in this tribunal. Accordingly, I find that the application for review on this ground must fail.

I also find that even if the landlord had filed this evidence prior to the hearing, it would not have changed the decision because the Arbitrator found that the tenant acted in accordance with the landlord's instructions to empty the tub for the winter and switch off the breaker. The Arbitrator further found that the landlords had submitted insufficient evidence to show that they provided instructions to the tenants on the method of

winterizing the hot tub and that the landlords had failed to substantiate that they have sustained a loss or provide any proof that the tenants actually damaged the hot tub. Based on these findings the Arbitrator dismissed the landlord's application.

Section 81(1) (b) (iii) of the Act 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. 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 Arbitrator's decision was obtained by fraud. 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 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.

On this ground for review, that the Arbitrator's decision was obtained by fraud, the applicant states that the tenant committed fraud when he provided false testimony as follows:

Tenant claimed to know nothing about hot tubs. Denied several conversations where he was volunteering to make simple repair to hot tub

In this case, the Arbitrator heard testimonies of both parties and found that the landlord had failed to prove that the tenant had damaged the hot tub.

With respect to the matters the applicant asserts are fraudulent, they were not matters unknown to the applicant at the time of the original hearing. They were in existence and could have been addressed at the original hearing. The applicant may disagree with the Arbitrator's findings of fact, but he had an opportunity to respond to the tenant's evidence at the hearing.

The applicant has not provided me with new evidence to support the allegation that the decision under review was obtained by fraud. 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. 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.

This ground for review is not designed to provide parties a forum in which to rebut findings by the Arbitrator, to reargue the case or to allege an error of fact or law, but to provide evidence which could not have been presented at the time of the hearing because it was not in existence at that time. The applicant is free to apply for judicial review in the Supreme Court, which is the proper forum for bringing allegations of error.

The application discloses insufficient evidence that the decision under review was obtained by fraud; and therefore, fails to satisfy the inherent burden of proof. Accordingly, I find that the application for Review on this ground must also fail.

The original decision dated August 06, 2012 stands.

Dated: September 05, 2014

Residential Tenancy Branch