



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: FF MND MNDC MNR MNSD O

Introduction

On September 16, 2013 a hearing was conducted to resolve a dispute between these parties. The landlord had applied for a Monetary Order for damage, unpaid rent and money owed or compensation for damage or loss. The landlord also applied for an Order to keep the security deposit. The Arbitrator largely dismissed the landlord's application and granted a Monetary Order for the security deposit to be returned to the tenant. 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.

Issues

The applicant relies on sections 79(2)(b) and (c) of the *Residential Tenancy Act* (the "Act"). The party has new and relevant evidence that was not available at the time of the original hearing. The party has evidence that the arbitrator's decision or order 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 has evidence that was not available at the time of the original 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.

On this ground for review, that the applicant has new and relevant evidence that was not available at the time of the original hearing, the applicant has attached a copy of the original decision with underlined areas, a copy of an advertisement to rent the unit; a picture of a door and frame, data provided by Community Resources pertaining to availability of rental accommodation in the area, a copy of a rent receipt dated April 29, 2013.

The landlord submits that the picture of the door frame shows the door shut and an air gap around the door which shows that the door can close freely without touching the frame. The landlord submits this is relevant because it shows that the door frame could not have been damaged by the door rubbing on the frame.

The landlord submits that the advertisement for the rental of the unit was not available at the time of the hearing because the landlord did not discover it in the 'trash can' of the landlord's computer until after the hearing had concluded. The landlord submits that

this is relevant because the landlord stated at the hearing that the unit had been advertised on Kijiji following notice from the tenant to end the tenancy and the tenant stated at the hearing that she had looked for the advert but could not find it.

The landlord submits that the evidence showing availability of rental accommodation in the area was not submitted at the hearing because the landlord only learned this information was available to the landlord after the hearing. The landlord submits that this evidence is relevant because during the hearing the landlord was asked to provide possible reasons the landlord had been unable to rent the suite. The landlord had stated that she did not know why; however, guessed that it could be due to a high number of vacancies. The landlord submits that this evidence confirms that there was in fact a shortage, not excess of one bedroom suites available. The landlord submits that the excess units were a main contributing factor that the landlords claim for a loss of rent for June was denied.

The landlord submits that the rental receipt was not submitted to the hearing because the landlord did not realize it was relevant due to the fact the landlords claim for lost rent was based on the written tenancy agreement and not on the subsequent verbal agreement for an increase. The landlord submits that this evidence is relevant because the tenant verbally claimed during the hearing that she gave Notice as a result of the increase. If this was the case, the tenant had opportunity to give a full months notice on April 29 or April 30 but did not do so. The landlord submits that this is also relevant because it contradicts hearing evidence of the tenants written Notice to end tenancy.

I have reviewed the evidence and submissions of the landlord. 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.

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, such as photographs that could have been taken or affidavits that could have been sworn, before the hearing took place.

Evidence in existence at the time of the original hearing 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.

It is my decision that the evidence provided is not considered to be new evidence. I find the evidence could have been provided prior to the hearing and with regard to the evidence showing availability of rental accommodation the landlord could have obtained this through due diligence prior to the hearing. Consequently the landlord's application 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 landlord alleges that the tenant committed fraud by saying that the tenant could not find the advert for the rental of the unit. However, the landlord has no evidence that the tenant committed fraud knowingly and that the tenant simply just did not see the advert placed on Kijiji. The landlord did not provide a copy of any advertisements for the rental unit at the hearing.

The landlord submits that the tenant fraudulently stated that the tenant did not know how the doorframe was damaged as no furniture was moved against this area. The landlord has submitted no evidence to prove that the tenant knowingly gave false information or was aware how the doorframe became damaged. It was found at the hearing that on a balance of probabilities the landlord did not substantiate her claim that the tenant caused this damage. The applicant has the burden of proof and when it is one person's word against that of the other then the burden of proof has not been met. The landlord did not provide sufficient documentary evidence to support her claim at the hearing.

The landlord submits that at the start of the tenancy the tenant stated that she would be living alone and asked for a rent reduction from the asking price of \$600.00. The landlord submits that the tenant's boyfriend was also living in the unit from the start of the tenancy and the tenant knew this information given at the hearing was false. The landlord submits that the tenant let the landlord enter into an agreement to rent the suite that the landlord would not have knowingly entered into, as the suite was for one

person. I am unclear where the tenant has committed fraudulent statements in the hearing concerning her boyfriend living in the suite. If the tenant's boyfriend had moved into the suite the landlord would have been at liberty to serve the tenant with a One Month Notice to End Tenancy due to additional occupants. As stated at the hearing the landlord did not show that the tenancy agreement provided for additional rent to be charged for additional occupants. The landlord has not shown that fraudulent statements were made at the hearing concerning this matter.

The landlord submits that the tenant stated the tenancy ended as the landlord had told the tenant she would have to pay an additional \$125.00 for the tenant's boyfriend to occupy the suite. However, the landlord submits that the tenant ended the tenancy due to failed negotiation for an additional parking space and the placement of a shed. The landlord submits that the tenant knew this information was false because the tenant paid the additional rent of \$125.00 on April 29 for Mays rent and a post dated cheque for Junes rent of \$675.00. The tenant did not end the tenancy due to this. The tenant only provided written Notice after the landlord refused the tenants request for the additional parking space and building of the shed and contradicts the reason given on the tenants notice to end tenancy. The landlord submits that this false information led the Arbitrator to view the landlord as a bully who took advantage of the tenant and influenced the findings of the Arbitrator and the landlord's minimal success in this hearing. I find the tenants Notice does indicate that the tenant ended the tenancy due to the landlord's refusal to allow another parking space and for the building of a shed. At the hearing the tenant stated that she ended the tenancy because of the rent increase to allow the tenants boyfriend to occupy the suite. The landlord had provided documentary evidence at the hearing in the form of the tenants Notice which indicates the reason the tenant gave Notice to end the tenancy. I find the tenant has contradicted herself at the hearing as to the true purpose of ending the tenancy. However, the landlord was in attendance at the hearing and could have brought this contradiction to the attention of the arbitrator at that time.

The landlord submits that the tenant failed to disclose that they were in agreement that the landlord would obtain a quote for the cleaning of the patio and deduct that amount from the tenant's security deposit. The tenant implied that she was denied opportunity to clean the patio. The landlord submits that the move out inspection report supports the tenant's agreement to a deduction. I fail to find how the tenant has provided fraudulent testimony. It has been documented in the Decision that the landlord agreed at the hearing that the tenant was denied permission to clean the patio. When a tenant signs the move out inspection report agreeing the landlord may make deductions from the security deposit there must be an amount agreed upon in writing. As this was not done then I do not see how the tenant has made a fraudulent statement.

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 and accordingly, I find that the application for review on this ground must fail. This ground for review is not designed to provide parties a forum in which to rebut findings by the Arbitrator or to allege an error of fact or law.

Decision

The landlord's application for review is dismissed.

The decision made on September 16, 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 16, 2013