



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: MNR OPR

This is an application filed by the tenants for review of the September 27, 2013 decision of an Arbitrator. The applicants relied on sections 79(2)(b) and (c) of the *Residential Tenancy Act* (the "Act") which provide that the director may grant leave for review if a party has new and relevant evidence that was not available at the time of the original hearing, or if the party has evidence that the decision was obtained by fraud.

The decision under review was the outcome of applications by the tenants and by the landlord. The landlord applied for a monetary award and an order for possession. The tenants applied for a monetary award and other relief. In the decision under review the landlord was granted an order for possession effective September 30, 2013 and she awarded a total of \$150.00 and was directed to retain the said sum from the tenants' security deposit in satisfaction of the award.

In their application for review the tenants claimed to have new and relevant evidence that was not available at the time of the original hearing. They submitted two pages of photocopied photographs consisting of six photographs. In their catalogue of the images, four were reported to have been taken on July 27, 2013 and two were taken on October 2, 2013. In the review application the tenants said, as follows under the heading; "New and Relevant evidence":

The Landlord and we submitted photos of the basement wall showing that the drywall and insulation had been replaced on the wall only. The photos also show the Landlord's cupboards that are stored against that wall and our cardboard boxes stored against the framed section.

When we moved the cardboard boxes on October 2 we discovered the missing used insulation from the ceiling hidden beneath the Landlord's countertop. This is shown in photo #1.

In the decision under review there was an extensive discussion concerning the installation of drywall and insulation. The arbitrator reported a portion of the tenants' testimony as follows:

The tenants acknowledged that they had not seen insulation or drywall on the ceiling of the storage room previously but, to them, it appears as though these materials had been there at one time. Further, there is a pile of discarded drywall on the property. The tenants stated the room above the storage room is cold and the tenants fear the pipes that run along the ceiling of the storage room will freeze.

The tenants have submitted that the photographs constitute new and relevant evidence, not available at the time of the original hearing. The policy guideline with respect to review consideration applications contains the following passage:

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.

The issue raised by the tenants on this review was known to the tenants before the hearing on September 19th and it was incumbent upon them to collect and submit all the relevant and available evidence before the hearing. The review process is not intended to provide the parties with an opportunity to reargue matters dealt with at the original hearing, or to submit additional evidence that could have been, but was not provided. I find that the tenants have not shown that they have new and relevant evidence that was not available at the time of the original hearing and the Review Application is denied on this ground.

The tenants' further ground for requesting a review is based on their assertion that the Arbitrator's decision or order was obtained by fraud. In the letter submitted as part of the review application they said that the landlord provided false testimony about drywall, saying that it had been left by a commercial tenant when in fact it was used drywall removed from the ceiling. The tenants said that the pictures showed four sheets of used drywall left over after the landlord replaced the drywall in the wall area. The tenants asserted that this supported their view that the landlord gave false testimony that the ceiling had never been drywalled and insulated. The tenants said:

We believe this evidence show the landlord fraudulently obtained an order of possession by this false testimony. As the Landlord was the one who removed the drywall and insulation, she certainly knew that the testimony was false. Based on this false testimony the arbitrator concluded that the ceiling had not been previously insulated and upheld the Landlord's 10 day notices.

In the decision under review the arbitrator did not make the finding alleged by the tenants. The Notice to End Tenancy was not upheld, based on a finding with respect to the ceiling insulation. The arbitrator found that the tenants did not apply to dispute the 10 day Notice to End Tenancy within the time provided by the *Residential Tenancy Act*. She further found that it was not open to her to amend the tenants' application for dispute resolution to include a dispute to the Notice to End Tenancy as part of their application. She therefore found, in her decision, pursuant to section 46(5) of the *Residential Tenancy Act* as follows:

Since the tenants did not pay the outstanding rent indicated on the Notice or file to dispute the Notice within the time limits provided under the Act and an extension of time to permit the tenants to dispute the Notice is not permissible, I find the tenants are conclusively presumed to have accepted that the tenancy would end on the effective date of the Notice. Accordingly, I find the tenancy ended on August 31, 2013 – the effective date of the August 8, 2013 Notice.

With respect to allegation of fraud, the Residential Tenancy Policy Guideline #24 concerning Review applications contains the following passage:

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.

The tenants have not alleged any new and material fact or a newly discovered and material fact in support of their claim that the decision under review was obtained by fraud. The issues raised in this review consideration application involve facts known to the applicants at the time of the original hearing. The review application amounts to an attempt to re-argue matters dealt with at the original hearing; I find that the tenants have not provided new evidence, unavailable at the time of the original hearing that would permit me to conclude that the decision was obtained by fraud; furthermore the issue of the ceiling insulation was actually peripheral to the granting of an order for possession; the order for possession was given because the tenants did not dispute the Notice to End Tenancy within the time permitted by the Act.. The tenants' application for review consideration on the ground that the DRO's decision was obtained by fraud is denied.

For the above reasons I dismiss the application for review consideration. The original decision and order dated September 27, 2013 are 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: October 11, 2013

Residential Tenancy Branch