[2020] NZTT Palmerston North 4212382

TENANCY TRIBUNAL AT Palmerston North

APPLICANT: Jena Ngawini Mazal Bennett

Tenant

RESPONDENT: Shelley Naylor Realty Limited

Landlord

TENANCY ADDRESS: 78 Fairs Road, Milson, Palmerston North 4414

ORDER

1. The application for rehearing is dismissed.

Reasons:

1. Both parties attended the hearing. Mr and Ms Patterson represented the landlord applicant. The tenant attended with a support person from Manawhatu Tenants Union.
2. On 12 December 2019 the Tribunal made an order against the landlord for compensation and exemplary damages. The hearing had been held on 27 November 2019 to consider the tenant's application filed on 10 October 2019.
3. On 11 March 2020 the landlord applied out of time for a rehearing on the grounds that an alleged miscarriage of justice had occurred. Pursuant to section 105(2) Residential Tenancies Act 1986 ("RTA") the Tribunal allowed the application to be considered, despite it being outside of the prescribed 5 day time limit.
4. On 18 March 2020 the Tribunal ordered that the application for a rehearing be heard and it subsequently was on 28 May 2020.

The law

5. Section 105(1) RTA provides that the Tribunal has the power to order a rehearing where "*a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur*".

6. Usually the party applying for the rehearing must show that something went wrong with the Tribunal's procedure, for example, that they did not receive notice of the hearing or they were not able to properly present their case.

7. A rehearing may also be granted where there is new evidence that was not reasonably available at the first hearing, if it could have affected the outcome. The applicant must show that all reasonable diligence was used to present all the relevant evidence at the initial hearing and there is a particular explanation as to why the evidence only came to light after the hearing.

8. The District Court has held that if the Tribunal was simply wrong in its findings of fact, or its application of the law, this is not sufficient to establish a miscarriage of justice: a rehearing is not an alternative to an appeal. Furthermore, a rehearing will not be granted just because a party is unhappy with the decision, or to give them a second opportunity to present their case.

9. The threshold is set high in s105 RTA. It is only a *substantial* wrong or miscarriage of justice that will warrant a rehearing. This has been interpreted by the Tribunal as a *"considerable, overwhelming and obvious"* wrong, or a *"complete failure of justice".*

10. The following cases in particular have established these principles: *McMillan* v *Wellington City Council* [2003] DCR 50(Judge Tuohy), *Full House Management Ltd* v *Brooks* (Wellington Tenancy Tribunal, TT 274/06, 4 July 2006), and *Heath* v *Wood* (Wellington District Court, Minute No. 2, CIV. 2009 085 040, 28 April 2009, Judge Broadmore).

11. If an applicant considers that the Tribunal erred in law, then their recourse is with the District Court pursuant to s117 RTA: "*…any party to any proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in the proceedings may appeal to a District Court*…"

Has a substantial wrong or miscarriage of justice occurred?

12. To establish the grounds for a rehearing, the landlord relies on the following submissions:

    (i) A letter from the insulation installer that purportedly contradicts oral evidence the tenant gave at the initial hearing;

    (ii) Photos of the underfloor insulation;

    (iii) Security stays that were present on the windows but not disclosed at the hearing;

(iv) A lack of discussion about the tenant's use of heating;

(v) Evidence from the property manager contradicting an alleged discussion with the tenant about the mould;

(vi) Evidence from the property manager contradicting an alleged discussion with the tenant about the clothesline; and

(vii) Emails indicating that the insulation installers at attempted an earlier installation than the date discussed at the hearing.

The property manager's evidence

13. Firstly, I consider the bases of claim that rely on the property manager's evidence. That is, submissions above numbered (v) and (vi) and to an extent (iii) and (vii).

14. The property manager, Ms Clark was not present at the initial hearing as she was away on a course. She was however in the employ of the landlords throughout this process. The landlord had not sought an adjournment on the grounds that her evidence was needed and she was unavailable on the scheduled date.

15. There were approximately 6 weeks between the filing of the application and the hearing during which Ms Clark could have discussed the application with the landlord. It was open to the landlord to provide a written statement from her, her notes, correspondences and reports.

16. I am therefore not satisfied that the evidence from Ms Clark was not reasonably available for the hearing. It is therefore not new evidence and does not provide a basis for a rehearing.

Photos

17. The landlord submitted that photos of the insulation were not considered at the hearing. In fact they do form part of the evidence on the court file upon which the original decision was made. The photos are therefore not new evidence.

Advice from the insulation installer

18. At the hearing the tenant gave oral evidence of a discussion she had with an insulation installer regarding the presence of orange mould in the premises. The landlord approached the company after the hearing and wishes to produce a letter from them. The landlord submits that the letter is "new" evidence as they had not known of the tenant's discussion prior to the hearing.

19. In considering this evidence I firstly need to be satisfied that it could not have been produced with reasonable diligence by the landlord prior to the hearing.

Secondly, I need to be satisfied that it could have affected the original decision had it been available for the hearing.

20. I find that it was not reasonable to expect the landlord to have contacted the insulation installers about their view on the mould prior to the hearing. They were not aware of the alleged discussion and the initial application did not indicate this evidence. I therefore find that the letter is new evidence.
21. In considering whether the letter would have affected the original decision, I note that the finding was that there was mould on the curtains only. There was no finding made as to the orange mould the alleged discussion referred to.
22. In this hearing, I considered a raft of evidence, of which the alleged conversation was a part. Each bit of evidence was given the respective weight it deserved depending on it's form. Hearsay evidence, which this conversation was, is always given the least weight.
23. I do not consider that the conversation the tenant had with the installer was sufficiently influential on the decision. The finding was that there was black mould present, not orange mould. If this letter was accepted thereby nullifying the alleged discussion, I am not satisfied that the decision would have been any different.
24. This letter whilst being "new" evidence, is not sufficiently weighty to affect the decision. Therefore, the letter is not grounds for a rehearing.

Heating discussion

25. The landlord's perspective is that the tenant's use of heating was not sufficiently discussed at the hearing, although there is acceptance that it was discussed.
26. Because it was discussed and there is no 'new' evidence available on the matter, I do not find that this is a ground for a rehearing.

Emails

27. The landlord became aware after the hearing that the insulation installers had potentially attempted to conduct the insulation prior to 1 July 2020. Emails on their system indicated this, but were not conclusive.
28. If the insulation installers had attempted to install prior to 1 July 2020, this would have affected the decision that the landlord was in breach of s45(1A) RTA.
29. This evidence was not presented at the hearing, however I find that it was available. The landlord had in their possession the emails as they were between their company and the tenant. They were aware that insulation, or lack thereof, was an issue for the hearing and evidence regarding it should be tendered.

30. Because this information could have been obtained prior to the hearing, I do not find accept that it is sufficiently “new” to warrant a rehearing.

31. For the reasons above, I am not satisfied that a miscarriage of justice may have occurred and a rehearing is declined.

32. The application is dismissed.

K Lash
3 June 2020

Please read carefully:

Visit justice.govt.nz/tribunals/tenancy/rehearings-appeals for more information on rehearings and appeals.

Rehearings

You can apply for a rehearing if you believe that a substantial wrong or miscarriage of justice has happened. For example:

- you did not get the letter telling you the date of the hearing, **or**
- the adjudicator improperly admitted or rejected evidence, **or**
- new evidence, relating to the original application, has become available.

You must give reasons and evidence to support your application for a rehearing.
A rehearing will not be granted just because you disagree with the decision.
You must apply within five working days of the decision using the Application for Rehearing form: justice.govt.nz/assets/Documents/Forms/TT-Application-for-rehearing.pdf

Right of Appeal

Both the landlord and the tenant can file an appeal. You should file your appeal at the District Court where the original hearing took place. The cost for an appeal is $200. You must apply within 10 working days after the decision is issued using this Appeal to the District Court form: justice.govt.nz/tribunals/tenancy/rehearings-appeals

Grounds for an appeal

You can appeal if you think the decision was wrong, but not because you don't like the decision. For some cases, there'll be no right to appeal. For example, you can't appeal:

- against an interim order
- a final order for the payment of less than $1000
- a final order to undertake work worth less than $1000.

Enforcement

Where the Tribunal made an order about money or property this is called a **civil debt**. The Ministry of Justice Collections Team can assist with enforcing civil debt. You can contact the collections team on **0800 233 222** or go to justice.govt.nz/fines/civil-debt for forms and information.

Notice to a party ordered to pay money or vacate premises, etc.

Failure to comply with any order may result in substantial additional costs for enforcement. It may also involve being ordered to appear in the District Court for an examination of your means or seizure of your property.

If you require further help or information regarding this matter, visit tenancy.govt.nz/disputes/enforcing-decisions or phone Tenancy Services on 0800 836 262.

Mēna ka hiahia koe ki ētahi atu awhina, kōrero ranei mo tēnei take, haere ki tenei ipurangi tenancy.govt.nz/disputes/enforcing-decisions, waea atu ki Ratonga Takirua ma runga 0800 836 262 ranei.

A manaomia nisi faamatalaga poo se fesoasoani, e uiga i lau mataupu, asiasi ifo le matou aupega tafailagi: tenancy.govt.nz/disputes/enforcing-decisions, pe fesootai mai le Tenancy Services i le numera 0800 836 262.