

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**GSD PROJECTS LTD.**

**Plaintiff**

**-v-**

**BRAD ANSTEY, AMRA INVESTMENTS LTD., AND  
STANTON PLAZA DEVELOPMENT LTD.**

**Defendants**

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**Transcript of the Reasons for Decision held before the  
Honourable Justice A. M. Mahar, sitting in Yellowknife, in the  
Northwest Territories, on the 11<sup>th</sup> day of October, 2019**

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**APPEARANCES:**

T. Kruger:

Counsel for the Plaintiff

C. Buchanan:

Counsel for the Defendant, Stanton Plaza

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**RULINGS, REASONS**

Order re withdrawal of discontinuance

7

1 THE COURT: GSD Projects and Anstey. Thank you.  
2 Good morning.  
3 T. KRUGER: Good morning, Your Honour.  
4 C. BUCHANAN: Morning.  
5 THE COURT: You are appearing as agent for –  
6 C. BUCHANAN: For Ed Gulberg, yes.  
7 THE COURT: Okay. Good. So Mr. Buchanan will be  
8 noted as agent for Mr. Gulberg. This is simply a matter  
9 that is before me for a decision. We are ordering a  
10 transcript of today's proceedings for my review.  
11 This matter was heard, I believe it was  
12 two weeks ago. Is that correct –  
13 T. KRUGER: One week ago, Sir.  
14 THE COURT: Even better. Thank you, Mr. Kruger. I  
15 have come to a decision.  
16 This application flows from a contract that  
17 was entered into between GSD Projects Limited and  
18 Brad Anstey and Amra Investments Limited for work on  
19 the Fatburger restaurant. This contract was entered  
20 into in January 2015.  
21 Fatburger occupies leased premises in  
22 the Stanton Plaza. And the landlord is Stanton Plaza  
23 Developments Limited. GSD did not have a contract  
24 with Stanton Plaza or Stanton Developments Limited;  
25 the contract was simply with the leaseholders who were  
26 Brad Anstey and Amra Investments.  
27 An issue arose because of a lack of

1 payment which is alleged against Brad Anstey and  
2 Amra Investments Limited, that forms the substance of  
3 a substantive action, which is not part this particular  
4 proceeding, but it is part of the proceedings more  
5 generally.

6 This particular proceeding is in relation to  
7 a mechanic's lien that was filed against the landlord's  
8 property, Stanton Plaza Developments. This was filed  
9 in September of 2016 for an amount of approximately  
10 \$180,000.

11 Towards the end of the September 2018  
12 GSD Projects Limited undertook another contract with  
13 one of the other leaseholders in the Stanton Plaza, this  
14 being Domino's Restaurant. This was for a sum of, I  
15 believe, \$575,000 in terms of general contract work.

16 When their employee attempted to enter  
17 onto the premises, he was told by the owner of the  
18 plaza that he would not be allowed onto the plaza  
19 grounds. I am not exactly sure what negotiations took  
20 place, but what I do know is that GSD Projects Limited  
21 was advised that unless they withdrew the lien against  
22 the property, that GSD Projects would not be allowed to  
23 enter onto the premises of Domino's Restaurant.

24 GSD Projects Limited, through counsel  
25 filed a notice of discontinuance on October 1<sup>st</sup>, 2018. In  
26 September of 2019, September the 25<sup>th</sup>, GSD Projects  
27 Limited brought on a motion to withdraw the

1 discontinuance. They make the claim that the  
2 discontinuance was entered into under a false assertion  
3 by the landlord and under duress, and they ask me to  
4 apply rule 315, which reads that "the Court may in the  
5 interests of justice allow a party to withdraw a  
6 discontinuance."

7 I note as well that there is now a limitation  
8 period that has run under the *Mechanic's Lien Act*; an  
9 action must be commenced within 90 days after the  
10 filing of the lien. There is no contract, as I indicated,  
11 between Stanton Plaza and GSD Projects and there  
12 was no other avenue as conceded by counsel, through  
13 which GSD could bring suit against a landlord.

14 I appreciate the assistance of case law  
15 that was filed by counsel in this matter. A case referred  
16 to the judgment in *Neis v. Yancay*, (1999 ABCA 272) by  
17 Madam Justice Russell. I adopt the reasoning in  
18 paragraph 27 which reads,

19  
20 Master Funduk adopted the test for the  
21 withdrawal of a discontinuance equivalent  
22 to that enunciated in ***Basarsky v.***  
23 ***Quinlan, supra***, stating that "where a  
24 limitation period has accrued, a  
25 discontinuance can be withdrawn only if  
26 there are 'very special circumstances'"  
27 such as where a plaintiff discontinued the

1 wrong action, or where the defendant  
2 breached conditions upon which the  
3 discontinuance was given. Special  
4 circumstances have also been defined to  
5 include cases of “inadvertence, mistake  
6 or misapprehension of relevant  
7 procedural matter. Such circumstances  
8 suggest oversight rather than the sort of  
9 substantive mistakes of law in this case...  
10 Hence, I agree with Master Funduk that  
11 special circumstances in the nature of a  
12 slip must be established before a  
13 discontinuance may be withdrawn.  
14 Therefore, special circumstances must  
15 include an absence of actual prejudice to  
16 the defendant: **Basarsky v. Quinlan**, as  
17 well as a consideration of the  
18 circumstances giving rise to the  
19 discontinuance.

20  
21 GSD Projects in this case made a decision, clearly on  
22 the advice of counsel since the discontinuance was  
23 filed through counsel, to acquiesce in the request of the  
24 landlord to withdraw the lien against the property. The  
25 fact that a limitation period has now lapsed means that  
26 an order allowing the removal of the discontinuance or  
27 the withdrawal of the discontinuance would have

1 serious prejudice to Stanton Plaza Developments.

2 No matter what the actual legal  
3 ramifications are of the landlord's actions in this case, it  
4 is clear to me that the landlord at least believed that  
5 they were acting as of right in refusing entry onto  
6 private premises. This is a commercial property; it is  
7 open to the public, but it is a commercial private  
8 property.

9 I will start by saying that the following  
10 comments are not instrumental in my decision. The  
11 reason I am making this decision is with respect to the  
12 prejudice that has been shown as against Stanton  
13 Plaza Developments. But I was thinking about the  
14 issue of misleading versus false versus the other sorts  
15 of issues that were raised by counsel during the  
16 application; and I found it hard to see how on the one  
17 hand a party can argue that they are within their rights  
18 to file a lien against a property, but that since the  
19 property owner is not a party to a contract between a  
20 leaseholder and the contractor, the landlord would not  
21 have the right to not allow someone onto that same  
22 property in a different lease.

23 If anybody had a right to refuse the  
24 landlord's request that GSD Projects Limited not be  
25 allowed onto the property of Domino's, my take on it is  
26 that that would be Domino's as the leaseholder, not the  
27 electrical contractor.

1 I am not exactly sure because I do not  
2 know what sort of conversation took place between the  
3 landlord and GSD Projects Limited, but it is not  
4 surprising to me that a landlord in a business would not  
5 want to engage in a further relationship with a  
6 contractor who has already placed a lien against their  
7 property.

8 The issue is at least arguable, and this is  
9 probably why GSD Projects entered the discontinuance  
10 with the advice of counsel; because it is clearly not as  
11 simple an issue as the landlord has no right to do this.  
12 Otherwise GSD would have been advised otherwise  
13 and something different would have taken place. The  
14 fact that nearly a year went by between the filing of the  
15 discontinuance and the application to withdraw that  
16 discontinuance tells me that whatever consideration  
17 was received by GSD Projects Limited, it was likely  
18 completed because that is enough time that another  
19 contract could have been completed.

20 Again, this is not the reason for my  
21 decision but is simply a comment that I make with  
22 respect to what has been alleged as against the  
23 landlord. I am not sure that the landlord's position is as  
24 clearly wrong as counsel for the plaintiff alleged, and it  
25 was something that I would out of necessity need to get  
26 into in more detail if I was going to make a ruling on  
27 that.



1 I am not making that ruling at this point in  
2 time. As I indicated, the limitation period has  
3 substantially expired. The timing of the application is  
4 some distance from that limitation period. It is not a  
5 question of having just barely expired and there is not a  
6 lot of prejudice in that that is significant prejudice.

7 And on that basis I am not going to allow  
8 the withdrawal of the discontinuance.

9 In terms of costs, there is nothing unusual  
10 about this application; costs will simply go on a party  
11 and party basis as against the plaintiff.

12 T. KRUGER: Just to clarify, costs in cause?

13 THE COURT: Mr. Kruger, I will hear from you on that  
14 in – the cause as it relates to Stanton Plaza is  
15 essentially over, is it not?

16 T. KRUGER: I – I suppose it would be, yes.

17 THE COURT: Okay. And so I think we will simply say  
18 costs at this point on a party and party basis.

19 T. KRUGER: Very well. Thank you.

20 THE COURT: Thank you.

21 THE COURT: And as I indicated the last time, well  
22 argued on both of your parts.

23 T. KRUGER: Thank you.

24 THE COURT: It was interesting so thank you.

25 Mr. Buchanan, thank you.

26 C. BUCHANAN: Thank you.

27 THE COURT: Mr. Buchanan, can I leave it to

1                   Mr. Gulberg, then, to take out the order?  
2           C. BUCHANAN:        Yes.  
3           THE COURT:        I do not know that you need an order  
4                   since I simply just disallowed the withdrawal of the  
5                   discontinuance. I do not think you need an order to that  
6                   effect. My judgment is the order. I have ordered a  
7                   transcript. Mr. Kruger, would you require an order, do  
8                   you think?  
9           T. KRUGER:        Um, I – I don't think so, although I'll  
10                   discuss with Mr. Gulberg and if, ah --  
11           THE COURT:        If one is required, I will be happy to sign  
12                   it.  
13           T. KRUGER:        Very well.  
14           THE COURT:        Thank you.  
15           T. KRUGER:        Thank you.  
16           THE CLERK:        All rise. Court is adjourned to 11:00.

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18           **(PROCEEDINGS CONCLUDED)**

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**CERTIFICATE OF TRANSCRIPT**

Neesons, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability. Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 5<sup>th</sup> day of November, 2019.

  
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Kim Neeson  
Principal