*Salt River First Nation #195 et al v 5721 NT Ltd. et al* 2022 NWTSC 26

Date:  2022 11 14

Docket:  S 1 CV 2010 000033

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

BETWEEN

SALT RIVER FIRST NATION #195, 4990 NT LTD. AND 4993 NT LTD.

Plaintiffs

- and –

5721 NT LTD., 5780 NT LTD., SLFN LAND CORP (NT) LTD., VITI INVESTMENTS LIMITED, RAM MUDALIER, JAMES SCHAEFER, RAYMOND BEAVER, MELVIN WANDERINGSPIRIT, DELPHINE BEAULIEU, CHIS BIRD, TONI HERON, SONNY MACDONALD, MICHAEL BEAVER, BARBARA HERON McARTHUR, BETTY TOURANGEAU, FRED DANIELS, KELERA BEGUM MUDALIER, SUSAN FAY MUDALIER, ALLEN SCHAEFER, ALLEN SCHAEFER carrying on business either as AJ’s or as AJ’s CONRACTING, JOHN DOE, JANE DOE, AND ABC CORP.

Defendants

and -

KEN LAVIOLETTE, CRYSTAL CATHOLIC, GLORIA VILLEBRUN, JOLENE BEAVER, RON SCHAEFER, JEFF FRASER AND FREDRICK BEAULIEU

Third Parties

**MEMORANDUM OF JUDGMENT**

**INTRODUCTION**

1. On April 27, 2021, the Plaintiffs filed a Discontinuance of Action. It was served on the defendants Ram Mudalier and Viti Investments Limited (the “Applicants”) through their lawyer on July 14, 2021. This triggered a 30-day limitation period within which the Applicants were required to file and serve a Notice of Intention to Tax in order to seek their costs pursuant to r 312(3) of the *Rules of Supreme Court of the Northwest Territories* (the “*Rules*”)*.* The Applicants did not do so within the 30-day timeframe. They now ask the Court to extend that deadline so they may pursue a taxation of costs.

**FACTS**

1. The facts are not disputed and can be summarized as follows:
   1. By letter dated April 19, 2021 the Plaintiffs advised the Applicants’ lawyer of their intention to discontinue the action and set out an offer respecting costs. The offer would remain open until the earlier of it being withdrawn, rejected, or countered by the Applicants.
   2. The Plaintiffs then filed the discontinuance on April 27, 2021 pursuant to r 309(1)(a). It was not immediately served on the Applicants.
   3. The Applicants’ lawyer responded to the April 19 letter on May 7, 2021, advising he required more time to seek instructions.
   4. The Plaintiffs served the Notice of Discontinuance on the Applicants’ lawyer on July 14, 2021.
   5. On September 1, 2021 the Applicants’ lawyer sent a letter to the Plaintiff’s lawyer enclosing a draft Bill of Costs proposing a higher amount of costs than what the Plaintiffs offered.
   6. The parties exchanged a few more letters containing revised offers and counter offers, with the final letter being sent by the Plaintiffs’ lawyer on March 1, 2022. No settlement was reached on costs.
   7. The Plaintiffs’ lawyer did not at any point in his correspondence waive the 30-day limitation period in r 312(3).
   8. The Applicants filed a Notice of Intention to Tax on October 6, 2022, approximately 15 months after the time for doing so had passed.

**ANALYSIS**

1. The relevant portions of r 312 are as follows:

312. (1) Subject to subrules (2) and (4), where a plaintiff discontinues a proceeding, the defendant is entitled to recover from the plaintiff the costs of the proceeding.

[…]

(3) Subject to subrule (4), a defendant may recover costs entitled to him or her under this rule if, within 30 days after service of the notice of discontinuance, he or she

(a) serves a notice of intention to tax on the party required to pay the costs; and

(b) files the notice of intention to tax with the Clerk.

(4) Subrules (1), (2) or (3) do not apply if

1. the proceeding is discontinued on the consent of all parties; or
2. the Court so orders.
3. The *Rules* provide a framework through which proceedings can be advanced efficiently through the Court. They set out expectations and, in turn, provide a level of certainty to litigants and their legal representatives about what steps must be taken, how they must be taken, and, importantly, when. At the same time, the Court recognizes there are times when unforeseen and unintended circumstances prevent a party from complying with a deadline set out in the *Rules* and that enforcing the deadline may result in an injustice. This is embodied in a number of places throughout the *Rules,* including r 713(2). It expressly permits the Court to extend the time for doing something under a particular rule. This is a discretionary power, however, and, as with all discretionary powers, it must be exercised in a principled and transparent manner which advances the interests of justice and maintains public confidence in the Courts.
4. This Court has not opined specifically on the circumstances under which the limitation in r 312(3) can be extended. The Plaintiffs’ counsel submitted case law from Ontario, including *Marupov v Metron Construction Inc.,* 2013 ONSC 609. That case considered the issue of extending time under r 23.05 of its *Rules of Civil Procedure,* O Reg 575/07 s 6(1), which is substantially similar to r 312(3). It provides:

**23.05** (1) If all or part of an action is discontinued, any party to the action may, within thirty days after the action is discontinued, make a motion respecting the costs of the action

1. In *Marupov,* Master Dash set out plainly what a party seeking to extend the time to seek costs following a discontinuance must demonstrate:

[27] In my view, a party seeking costs of a discontinuance after the 30 day deadline in rule 23.05(1) must provide satisfactory evidence to explain the delay in bringing the motion, explain why they could not have brought the motion within the 30 day deadline set out in the rule and satisfy the court that the plaintiffs have not been prejudiced by the delay. The onus of explaining the delay grows stronger with the passage of time since the discontinuance.

1. While this Court is not bound by *Marupov,* in my view it provides a sound, transparent, and principled framework within which judicial discretion can be exercised. Accordingly, it should apply here.
2. Turning to the case at hand, approximately 16 months have passed since the Plaintiffs served the Notice of Discontinuance on the Applicants. When the matter was argued, the Applicants’ counsel pointed to the age of the suit (it was filed in 2010) and suggested the Plaintiffs would not be prejudiced if the Applicants were permitted to file the Notice of Intention to Tax. She also submitted there had been significant staff turnover in her law firm around the time the Notice of Discontinuance was served, exacerbated by the need for remote work due to the pandemic. None of this is in evidence, however. These are merely representations. The Applicants have only provided a chronology of events in the form of an affidavit which includes correspondence between the parties debating the amount of costs to which the Applicants would be entitled. This is not a satisfactory explanation for missing the filing deadline for what is an uncomplicated document, nor does the evidence address the delay in bringing this application forward.

**CONCLUSION**

1. Extending the 30-day deadline for the Applicants to file and serve a Notice of Intention to Tax cannot be justified on the evidence provided. The application is dismissed.
2. If the parties wish to speak to costs they may make arrangements through the Registry within 30 days of these reasons.

K. M. Shaner

J.S.C.

Dated at Yellowknife, NT, this

14th day of November, 2022

Counsel for the Plaintiffs David C. Rolf, KC

Counsel for the Applicants Shantelle Smith

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| MEMORANDUM OF JUDGMENT OF  THE HONOURABLE K.M. SHANER |