

Calax Construction Inc. v. Lepofsky**(1975), 5 O.R. (2d) 259**ONTARIO
HIGH COURT OF JUSTICE**LERNER, J.**

28TH AUGUST 1974

Contracts – Illegality – Licence requirement – Building contractor not licensed in accordance with municipal by-law – No action lies on building contract.

[Kocotis v. D'Angelo, [1958] O.R. 104, 13 D.L.R. (2d) 69, apld; Day & Night Heating Ltd. v. Brevick (1962), 35 D.L.R. (2d) 436, distd]

APPLICATION to determine a point of law.

Harvin D. Pitch, for plaintiff.

Richard C. Belsito, for defendant.

LERNER, J. (orally):-- This is an application for an order pursuant to Rule 124 to determine a point of law in terms of the following words:

Whether the fact that the plaintiff was not a licensed renovator, as pleaded in paragraph 8 of the Statement of Defence, operates as a complete defence and renders the contract illegal and unenforceable.

If it is established that this defence is a complete bar to the action, that will be the end of this action under the Mechanics' Lien Act, R.S.O. 1970, c. 267, and conceivably the counterclaim.

The plaintiff, pursuant to the statement of claim, claims the balance owing for services performed pursuant to a verbal contract. It appears evident from the material that the plaintiff was not licensed in accordance with the by-law respecting the issue of licences in Toronto as found in By-law 88-69, s. 2 (59). This by-law requires any person engaged in the business of altering, repairing or renovating buildings or structures to be licensed and which by-law in its general strictures further provides that:

... no person shall, within the limits of the Metropolitan Area, carry on or engage in any of the said trades, callings, businesses or occupations until he has procured such license to do so.

The plaintiff had no licence to carry on the occupation which forms the basis of the work contracted for that it is alleged to have done for the defendant and for which it claims the balance of the moneys so earned.

I am faced with the judgment in Kocotis v. D'Angelo [1958] O.R. 104, 13 D.L.R. (2d) 69, which clearly sets out that there is no possibility of making a recovery where the plaintiff has not complied with the

licensing by-law that permits him to carry on such occupation. All of the cases that have been argued, apart from the cases decided since the date of that judgment, are all considered and developed therein. I find that the facts in the case of *Day & Night Heating Ltd. v. Brevick* (1962), 35 D.L.R. (2d) 436, are distinguishable from the facts upon which the judgment in the *Kocotis* case was decided as well as the facts in this case.

Clearly, the by-law here with a carefully worded contract appended thereto was for the protection of the public and some of the problems that appear to have arisen and which caused this action to have been brought might have been avoided if the instructions and requirements of the by-law and the appended contract had been followed. That could only have been, of course, if the plaintiff had been licensed.

I find therefore that the contract upon which this claim is based is illegal and therefore unenforceable because the plaintiff was not a licensed renovator when it was entered into.

As stated by Laidlaw, J.A., in the *Kocotis* case [at p. 116 O.R., p. 78 D.L.R.]: "... the Courts will not give its aid to enforce it."

The action is dismissed.

Proceeding to the counterclaim, *Cheshire and Fifoot, Law of Contract*, at p. 334, 8th ed. (1972), states:

The general principle, founded on public policy, is that any transaction that is tainted by illegality in which both parties are equally involved is beyond the pale of the law. No person can claim any right or remedy whatsoever under an illegal transaction in which he has participated.

Therefore, I think I am on good ground when I say that the counterclaim must be dismissed.

Both parties were at fault and the defendant is taking advantage of the law in his favour in an illegal transaction in which he participated. Both parties are presumed, as are all parties in matters at issue, to know the law and it would be inequitable in my view if I did not exercise my discretion with respect to costs by allowing no costs in the main action to the defendant and similarly on the counterclaim.

Judgment accordingly.