

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000935-MR

HERMAN D. FENTRESS AND  
ELAINE FENTRESS

APPELLANTS

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE EDWIN M. WHITE, JUDGE  
ACTION NO. 03-CI-01462

KEVIN HENDERSON AND  
KATHLEEN HENDERSON

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM AND JOHNSON, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

EMBERTON, SENIOR JUDGE: In January, 2003, Kevin and Kathleen Henderson entered into a sales and purchasing contract for the purchase of real property owned by Herman and Elaine Fentress for a purchase price of \$126,500. The contract further stated that its enforceability was conditioned on the property appraising at that amount. After the property failed to appraise for the purchase price and several offers and counter-

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

offers were made and rejected, the Hendersons filed the present action seeking a return of their \$2,000 deposit, costs, and reasonable attorney's fees. The sole issue raised concerns the court's award of attorney's fees in the amount of \$2,500.

The contract contains two provisions pertinent to this appeal. The first specifically addresses attorney's fees and states: "In the event a lawsuit is filed to enforce any term of this agreement, the losing party agrees to pay the reasonable attorney fees of the successful party in the litigation." The second provides that the deletion, alteration, or unenforceability of any provision of the contract, "shall not affect the enforceability" of the contract. Although courts are permitted to exercise discretion to award attorney's fees when equity warrants, attorney's fees are generally not allowable in the absence of a statute or contract expressly providing they be awarded.<sup>2</sup> In this case, the contract specifically provides for such fees and leaves no room for interpretation. The provision unambiguously states that the fees can be recovered by the party prevailing in any litigation to enforce the contract.<sup>3</sup>

The contract is a standard real estate contract containing no provision that offends public policy or any statute. The Fentresses concede this point. The argument is

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<sup>2</sup> Batson v. Clark, 980 S.W.2d 566, 577 (Ky.App. 1998).

<sup>3</sup> First Commonwealth Bank of Prestonsburg v. West, 55 S.W.3d 829 (Ky.App. 2001).

made, however, that the circuit court declared that the contract was "null and void" because the property did not appraise for the amount of the purchase price and, therefore, the entire contract, including the attorney's fees provision, is not enforceable.

The circuit court's use of the words "null and void" is misplaced. In Commonwealth v. Whitworth<sup>4</sup> the court explained that the term "void", although it has a number of definitions, generally means that a contract is useless, ineffective or lacking in legal force or validity. And while often used together, "void" and "null" appear in Blacks Law Dictionary to be synonymous. A contract is void ab initio when it seriously offends law or public policy as opposed to one that is merely voidable at the election of one party to the contract.<sup>5</sup>

There is no factual or legal basis on which the court could find the entire contract void; it does, however, contain a condition precedent that, when unsatisfied, rendered the agreement to purchase the property unenforceable. When a condition precedent to the performance of a real estate contract fails, the contract to sell and purchase will not be enforced

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<sup>4</sup> 74 S.W.3d 695 (Ky. 2002).

<sup>5</sup> Id. at 700.

and the deposit refunded.<sup>6</sup> There is no dispute that the property appraised for less than the sale price. While the reasoning of the circuit court could have been more legally accurate with the omission of the terms "null and void", it properly held that the Hendersons were entitled to a refund of their \$2,000 deposit.

The attorney's fees provision in the contract is obviously separable from that binding the parties to the sale of the property. When the litigation ensued over the return of the deposit money and the Hendersons were successful, both contingencies were met as agreed upon by the parties. Although the provision binding the parties to the sale and purchase of the property is not enforceable because a condition precedent has not been satisfied, all conditions precedent to the enforcement of the attorney's fees provision have been met and the circuit court properly enforced that provision.<sup>7</sup>

The judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT

J. Michael Hearon  
DEATHERAGE, MYERS, SELF, &  
LACKEY  
Hopkinsville, Kentucky

BRIEF FOR APPELLEE:

James T. Kane  
LAW OFFICES OF STEPHEN  
UNDERWOOD  
Hopkinsville, Kentucky

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<sup>6</sup> See Hopkins v. Performance Tire & Auto Service, 866 S.W.2d 438, 441 (Ky.App. 1993).

<sup>7</sup> See Lewis by Lewis v. West American Ins. Co., 927 S.W.2d 829 (Ky. 1996).