

STATE OF MICHIGAN
COURT OF APPEALS

R. KENNY LETHERER, PATRICIA
LEATHERER, and CYNTHIA MICOFF,

UNPUBLISHED
September 17, 2002

Plaintiffs-Appellees,

v

ALGER GROUP, LLC,

No. 233042
Saginaw Circuit Court
LC No. 00-036337-CZ

Defendant-Appellant.

Before: Markey, P.J., and Cavanagh and R. P. Griffin*, JJ.

PER CURIAM.

Defendant appeals as of right the grant of summary disposition in favor of plaintiffs. We affirm in substantial part, but remand for amendment of the judgment of foreclosure.

In a previous litigation between the parties (*Letherer I*), plaintiffs were granted an equitable lien over properties owned by defendant. Plaintiffs had originally owned the properties, but sold them to a third party. The third party agreed to execute mortgages on the properties to secure \$2,000,000 owed to plaintiffs, but sold the properties to defendant without having done so. In this action, plaintiffs sought a judgment of foreclosure on the equitable lien, which the trial court granted following plaintiffs' motion for summary disposition. Defendant appeals.

Defendant first contends that it was error for the trial court to grant plaintiffs a judgment of foreclosure because defendant was a bona fide purchaser without notice of the earlier, unrecorded mortgage on the properties. This argument is precluded because the foreclosure was on the equitable lien granted in the first action, *Letherer I*, by a judgment that was not appealed, is res judicata, and not subject to collateral attack in this case. See *Gursten v Kenney*, 375 Mich 330, 334-335; 134 NW2d 764 (1965); *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995); *SS Aircraft Co v Piper Aircraft Corp*, 159 Mich App 389, 393; 406 NW2d 304 (1987); *Troy Bldg Inspector v Hershberger*, 27 Mich App 123, 127; 183 NW2d 430 (1970), quoting *Knibbe v Warren*, 2 Mich App 241, 244; 139 NW2d 344 (1966).

Next, defendant argues that the trial court erred because the judgment of foreclosure provided for a money judgment in excess of the value of the property secured by the mortgages,

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

contrary to MCL 565.6 which provides that mortgages are “non-recourse indebtedness.” Defendant did not raise this argument below, therefore, our review is for plain error. See *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Plain error was not established because the issue whether defendant was bound by the terms of the share purchase agreement between plaintiffs and the third-party was litigated in *Letherer I*, and resulted in a judgment that was not appealed. See *Gursten, supra*.

Defendant next contends that the judgment of foreclosure should be reversed because it makes no distinction between the developed and undeveloped portions of the cemetery properties, and foreclosure of developed cemetery property is prohibited by MCL 128.112. Plaintiffs concede that the judgment of foreclosure may encompass developed cemetery property that is subject to MCL 128.112. Therefore, pursuant to MCR 7.216, we remand this matter to the trial court with instructions to amend the judgment to require a determination of properties subject to MCL 128.112 before a foreclosure sale, and prohibit foreclosure on any such properties.

Defendant next argues that the trial court clearly erred when it awarded attorney fees and costs to plaintiffs. We disagree. Although attorney fees are not recoverable unless an exception exists under common-law, statute, or court rule, *Popma v Auto Club Ins Ass’n*, 446 Mich 460, 474; 521 NW2d 831 (1994), contract provisions that provide for the payment of reasonable attorney fees are enforceable. *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984). Here, the share purchase agreement contained a clause providing for “reasonable attorney fees and related costs,” and in *Letherer I*, the trial court held that defendant was bound by the terms of that agreement. This issue may not be relitigated now. See *Gursten, supra*.

Finally, defendant contends that the judgment contained numerous factual errors and should be reversed. In particular, defendant claims that the judgment of foreclosure is fatally inaccurate because it indicates that “no payments have been made on the promissory note pursuant to a Purchase Agreement.” However, a dispute over the amount of the equitable lien granted in the first action, *Letherer I*, is not properly before this Court. See *Gursten, supra*.

Affirmed in substantial part, but remanded for amendment of the judgment of foreclosure consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Robert P. Griffin