

Thompson Thrift Construction, Inc. (“TTC”) sought to foreclose its mechanic’s lien on a parcel of real estate on which Bank of Indiana, N.A. (the “Bank”) held three mortgages. TTC now appeals the trial court’s grant of summary judgment² in favor of the Bank and raises the following restated issues:

- I. Whether the trial court erred in granting summary judgment when it determined that the Bank was not required to record a release of prior mortgages upon the subject real estate; and
- II. Whether the trial court erred in granting summary judgment when it determined that three prior-dated and recorded real estate mortgages to the Bank were superior liens to a subsequently filed mechanic’s lien.

We affirm.

FACTS AND PROCEDURAL HISTORY

Reel Time Logistics, Inc. (“Reel Time”) was organized in March of 2004, with Ryan B. Turner (“Turner”) and Kent D. Lawson (“Lawson”) as its sole principals, shareholders, officers, and directors. Reel Time owned real estate located at 1077 South Hunt Street, Terre Haute, Vigo County, Indiana (“Real Estate”). The Bank held a mortgage on the Real Estate in the amount of \$181,316.00 (“First Mortgage”), which it recorded on September 26, 2007. On or about October 16, 2007, TTC entered into a contract with Reel Time to construct a commercial warehouse/office facility (the “Warehouse”) on the Real Estate. Reel Time borrowed additional money from the Bank, and on October 31, 2007, the Bank recorded a second mortgage for Reel Time on the Real Estate in the amount of \$855,000.00 (“Second Mortgage”).

² The trial court’s order was captioned, “Partial Summary Judgment and Decree of Foreclosure, Order of Sale, and Judgment on Guarantee.” *Appellant’s App.* at 15. However, the trial court expressly stated, “there is no just reason for delay and this Summary Judgment and Decree of Foreclosure is now declared a ‘final judgment’” *Id.* at 28. As such, TTC appeals pursuant to Indiana Trial Rule 54(b).

During this same time, in December 2007, Turner and Lawson organized RTL Property Management Group, LLC (“RTL”) for the purpose of owning the Real Estate. As with Reel Time, Turner and Lawson were the sole members, principals, and managers of RTL.

TTC began construction of the Warehouse on March 10, 2008, and the City of Terre Haute issued a “Certificate of Use and Occupancy” for the completed improvement on August 12, 2008. That same day, Reel Time transferred by corporate warranty deed the improved Real Estate to RTL, and RTL, in turn, leased the Real Estate back to Reel Time. Also, RTL borrowed \$1,620,000.00 from the Bank (“RTL Mortgage”); this loan was guaranteed by Reel Time, Turner, and Lawson. The RTL Mortgage, the corporate warranty deed, and Reel Time’s lease were all recorded on August 27, 2008.

Subsequently, RTL failed to make the required payments on the RTL Mortgage. This triggered the Bank to accelerate the maturity date of the loan and to declare the entire amount due and owing. RTL’s default, in turn, caused Reel Time to be liable on its guarantee of the RTL Mortgage.

Meanwhile, Reel Time failed to pay TTC the remaining \$293,843.61 that was due under their contract for construction of the Warehouse. To secure this debt, TTC recorded a mechanic’s lien against the Real Estate in the amount of \$293,843.61 (“Mechanic’s Lien”). The Mechanic’s Lien was recorded on October 3, 2008.

On April 30, 2009, TTC filed a complaint to foreclose on the Mechanic’s Lien, claiming that it was superior to the First Mortgage, Second Mortgage, and RTL Mortgage (collectively, the “Three Mortgages”). On May 15, 2009, the Bank filed its

Counterclaim, Cross-Claim, and Third-Party Complaint seeking foreclosure of the Three Mortgages and asserted that its mortgages were all valid and had priority over the Mechanic's Lien. Both TTC and the Bank obtained default judgments against Reel Time and against RTL. As between TTC and the Bank, the only dispute was whether the Mechanic's Lien had priority over the Three Mortgages. Both TTC and the Bank filed motions for partial summary judgment asserting that their interests in the Real Estate were superior. The trial court granted the Bank's motion finding that the Three Mortgages were valid and had priority over the Mechanic's Lien. TTC now appeals.

DISCUSSION AND DECISION

I. Standard of Review

Our review of a trial court's ruling on summary judgment is de novo. *Univ. of S. Ind. Found. v. Baker*, 843 N.E.2d 528, 531 (Ind. 2006); *Gibson-Lewis, LLC v. Teachers Credit Union*, 854 N.E.2d 392, 394 (Ind. Ct. App. 2006), *trans. denied*. We determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. *Univ. of S. Ind. Found.*, 743 N.E.2d at 531. The party appealing the denial of summary judgment carries the burden of persuading us that the trial court's decision was erroneous. *Owens Corning Fiberglass Corp. v. Cobb* 754 N.E.2d 905, 908 (Ind. 2001). We may affirm judgment upon any theory supported by the evidence. *Keaton & Keaton v. Keaton*, 842 N.E.2d 816, 821 (Ind. 2006).

Here, the trial court's order contained special findings. We have observed that "special findings are not required in summary judgment proceedings and are not binding on appeal." *Gibson-Lewis*, 854 N.E.2d at 394. "However, such findings offer this court

valuable insight into the trial court's rationale for its judgment and facilitate appellate review." *Id.*

II. Release of Prior Mortgages

TTC first argues that the First Mortgage and Second Mortgage were fully paid and, therefore, the Bank was obligated by statute to release them from the Real Estate.³ TTC explains that the Bank's underlying promissory note for the First Mortgage is stamped "PAID OCT 19 2007 BANK OF INDIANA," *Appellant's App.* at 83, and October 19, 2007 is the same date that the Second Mortgage was created. *Id.* at 109. Hence, according to TTC, it follows that the First Mortgage was paid off by the Second Mortgage. Furthermore, TTC observes, the RTL Mortgage has a notation stating, "This note will pay off the following described note(s): ... October 19, 2007 #32105-32163 \$855,000.00," which refers to the Second Mortgage. *Id.* at 136. TTC claims that this notation establishes that the Second Mortgage was also paid off. Accordingly, argues TTC, because the First Mortgage and Second Mortgage were paid off and should have been released, they are not valid mortgage liens on the Real Estate.

The Bank contends that, contrary to TTC's assertion, the First Mortgage and Second Mortgage had not been fully paid off. Instead, the loans were rolled over, and the mortgages were refinanced and replaced with the RTL Mortgage. Consequently, no release of the First Mortgage and Second Mortgage was necessary because they remained valid mortgage liens on the Real Estate. To support its position, the Bank relies on a

³ See Ind. Code § 32-28-1-1(b): "When the debt or obligation and the interest on the debt or obligation that the mortgage, mechanic's lien, judgment, or other lien secures has been fully paid, lawfully tendered, and discharged, the owner, holder, or custodian shall: (1) release; (2) discharge; and (3) satisfy of record, the mortgage, mechanic's lien, judgment, or other lien."

notation in the RTL Mortgage that states, “The remaining balance of the note listed in the above table is \$748,180.90.” *Id.* at 135. The Bank asserts that this statement is evidence of a remaining balance in the Second Mortgage that is close to the same amount deducted from the proceeds of the third loan. Also, the Bank argues that even though the promissory notes secured by the First Mortgage and Second Mortgage were marked as paid, “this is merely an internal refinancing transaction of the Bank to reflect and record that the new refinancing note for \$1,620,000.00 was a cancellation and ‘replacement’ of the previous notes.” *Appellant’s Br.* at 19.

It is clear from the record before us that the indebtedness created by the notes underlying the First Mortgage and the Second Mortgage was not satisfied by payment and that RTL Mortgage and its underlying indebtedness was a refinancing of the prior indebtedness secured by the prior mortgages. Accordingly, there is a no genuine issue of material fact regarding whether the Bank should have released the First Mortgage and the Second Mortgage, and the trial court did not err in granting summary judgment.

III. Priority of Liens

Next, TTC asserts that the Mechanic’s Lien has first priority because it relates back to the time that TTC began to provide labor or materials for the improvement of the Real Estate. *Provident Bank v. Tri-County Southside Asphalt, Inc.*, 804 N.E.2d 161, 163 (Ind. Ct. App. 2004) (citing Ind. Code § 32-28-3-5(b)), *reh’g granted in part*, 806 N.E.2d 802 (Ind. Ct. App. 2004), *trans. denied*. TTC began work on the Real Estate beginning March 10, 2008, and the Bank’s RTL Mortgage was recorded on August 27, 2008. Thus, claims TTC, the Mechanic’s Lien has priority ahead of the RTL Mortgage. We disagree.

Indiana Code section 32-28-3-5(d) states: “The mortgage of a lender has priority over all liens created under this chapter that are recorded after the date the mortgage was recorded, to the extent of the funds actually owed to the lender for the specific project to which the lien rights relate.” In *Harold McComb & Son, Inc. v. JP Morgan Chase Bank, NA*, we held that this section means that: “With regard to commercial property, where the funds from the loan secured by the mortgage are for the specific project that gave rise to the mechanic’s lien, the mortgage lien has priority over the mechanic’s lien recorded after the mortgage.” 892 N.E.2d 1255, 1262 (Ind. Ct. App. 2008). We explained further that this statute does not give absolute priority to earlier-recorded mortgages over later-recorded mechanic’s liens on commercial property. Specifically, “the mortgage of a lender has priority *only* ‘to the extent of the funds actually owed to the lender for the specific project to which the lien rights relate.’” *Id.* at 1260 (emphasis in original).

TTC argues that *McComb* is distinguishable from the present case because in *McComb* the mortgage was executed at about the same time that construction activities began. *Id.* at 1255. Also, in *McComb* there was no subsequent transfer of property to a new owner and there was no recording of a new mortgage after construction had been completed. Furthermore, as indicated in *McComb*, Indiana Code section 32-28-3-5(d) only applies to those loans that “are intended to finance those improvements.” *Id.* at 1262. TTC contends that, in the present case, transfer of the Real Estate to RTL occurred on August 12, 2008, after the “improvements” were already completed as evidenced by the “Certificate of Use & Occupancy” issued by the City of Terre Haute on August 12, 2008. So, TTC asserts, the RTL Mortgage is more accurately identified as an

“acquisition mortgage” instead of a construction mortgage. *Appellant’s Br.* at 10-12. In support of this assertion, TTC also points out that the language identifying the Second Mortgage as a construction loan is absent in the RTL Mortgage. Therefore, argues TTC, Indiana Code section 32-28-3-5(d)’s “specific project” language excludes the Bank’s RTL Mortgage from the lender’s lien priority on the already improved Real Estate. Consequently, concludes TTC, the Bank’s mortgage lien is second in priority to TTC’s Mechanic’s Lien. Again, we disagree.

The Bank’s RTL Mortgage has priority over TTC’s Mechanic’s Lien on the Real Estate. There is no question that the Bank’s RTL Mortgage was recorded before the Mechanic’s Lien or that the Real Estate is commercial in nature. Also, there is no genuine issue of material fact regarding the purpose of the RTL Mortgage to fund the “specific project” or “improvements” made by TTC to the Real Estate. Regarding the RTL Mortgage, the Bank’s Closing Statement shows that \$736,474.00 of loan proceeds were used to pay TTC upon closing for its construction services claim. *Appellant’s App.* at 358-59. Also, affidavits were executed by the owners of RTL at the time that the RTL Mortgage was created seeking “an increase of a current construction mortgage loan amount outstanding to the Bank for a 43,000 square foot warehouse/office facility” and “[A]n increase to permanent financing for a first Commercial Real Estate Mortgage on 1041-1077 Hunt Street, Terre Haute, IN 47803.” *Id.* at 285-88. Finally, an affidavit was executed by the loan officer that processed the RTL Mortgage for the Bank affirming that the loan secured by the RTL Mortgage was for the “specific construction project of Reel Time/RTL for the warehouse/office facility” for Reel Time (which became RTL) on the

[Real Estate] . . . and was, and is, the same project that gave rise to the mechanic's lien(s) recorded [by TTC] after the mortgage(s)....” *Id.* at 289-92. Therefore, Indiana Code section 32-28-3-5(d) applies, and the mortgage lien created by the Bank's RTL Mortgage has priority over the Mechanic's Lien on the Real Estate.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.