**IN THE SUPREME COURT OF GUAM**

**TANAGUCHI-RUTH + ASSOCIATES**
**dba TANAGUCHI-RUTH ARCHITECTS,**
Plaintiff-Appellee,

**v.**

**MDI GUAM CORPORATION dba LEO PALACE RESORT,**
Defendant-Appellant.

# OPINION

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Supreme Court Case No.: CVA03-021
Superior Court Case No.: CV0671-02

Appeal from the Superior Court of Guam
Argued and submitted on October 15, 2004
Hagåtña, Guam


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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; ROBERT J. TORRES, JR., Associate Justice.

**TORRES, J.:**

**[1]** The Defendant-Appellant, MDI Corporation dba Leo Palace Resort ("Leo Palace"), appeals a judgment awarding *quantum meruit* recovery to the Plaintiff-Appellee, Tanaguchi-Ruth + Associates dba Tanaguchi-Ruth Architects ("TRA"), for architectural work performed by TRA on behalf of Leo Palace. Leo Palace's primary contention on appeal is that the trial court erred in allowing recovery because Leo Palace did not receive or use TRA's work, and, therefore, Leo Palace did not receive a benefit from TRA as required for recovery under a *quantum meruit* theory. Leo Palace also challenges the trial court's finding that TRA satisfied its duty to mitigate damages, and finally, challenges the trial court's award of prejudgment interest. We hold that the trial court correctly allowed for *quantum meruit* recovery, but erred in awarding recovery for work performed after TRA became reasonably aware that it could not perform the work within Leo Palace's design budget. We further determine that Leo Palace waived its objection to the trial court's award of prejudgment interest. We affirm the lower court's judgment in part and reverse in part.

## I.

**[2]** The construction project for the Leo Palace Resort Complex in the Manenggon Hills area of Yona commenced in the 1980's. In the late 1980's, TRA was hired by and performed architectural services for Leo Palace for portions of the project. After construction commenced on the project, in the early 1990's, Leo Palace decided to indefinitely postpone the interior finishing of the hotel building (now the Hotel Belvedere) on the Complex. The hotel sat as a shell until November of 2000, at which time Leo Palace decided to complete the interior work.

**[3]** In late 2000, Sumitomo Construction Company contacted and informed TRA that Sumitomo was chosen as the contractor for the construction of the hotel. TRA understood that its role was to take design concepts from other architects hired by Leo Palace and to prepare the construction drawings and specifications to obtain the necessary Guam building permits. TRA began initial preparations, deciding to complete their work in three staggered packages, which would enable the

permits to be acquired in stages. Package 1 entailed converting TRA's early drawings into Computer Assisted Drafting format, and designing the guest rooms. Package 2 covered the common areas and lobbies, while Package 3 encompassed the hotel's restaurants.

**[4]** As originally planned, TRA's fee was to be submitted to Sumitomo, included as part of Sumitomo's total construction costs and be paid for by Sumitomo. TRA submitted to Sumitomo an initial fee proposal for all three packages for $1,285,900.00. Sumitomo found this amount problematic for unstated reasons, and informed TRA that Sumitomo would negotiate a new amount and thereafter submit what they considered an acceptable fee proposal to Leo Palace. TRA and Sumitomo never decided on any set amount for the work for the three packages.

**[5]** TRA eventually came to an agreement with Sumitomo that Sumitomo would guarantee to pay TRA's fees for the Package 1 work. TRA then started work on the Package 1 documents. At some point after TRA started work on Package 1, Leo Palace arranged to pay TRA directly for that portion of the work. During this time, TRA's fee for the Package 1 work was still not made definite.

**[6]** On July 7, 2001, two representatives of Leo Palace, Mr. Ishii and Mr. Hyodo, met with TRA's representative, Mr. Ruth, to negotiate the fee for the Package 1 work, which at that point was approximately 60% completed. The parties reached an agreement on the fee and Leo Palace instructed TRA to complete the Package 1 work, which was due on July 31, 2001.[1] At the July 7, 2001 meeting, Mr. Ishii also requested that TRA submit a quote for the Package 2 work. Up until this point, TRA had been working and corresponding with two architectural firms hired by Leo Palace regarding the scope and ideas for the Package 2 work. These firms were Archiprime ("AP") and Riccardo Tossani Architecture Co. ("RTA").

**[7]** On July 24, 2001, Leo Palace sent TRA a letter, addressed to Mr. Ruth, informing TRA that Sumitomo was to arrange for RTA and TRA "to continue with the application of a building permit for the (phase one) guestrooms." Appellant's Excerpts of Record ("ER"), p. 72 (Letter from Abe to TRA of 7/24/01). The letter further stated:

> However, development of the project has increased at such a rapid rate, therefore it is getting steadily harder (for the above RTA and AP companies) to carry on working together on and after phase two. Kanko Kikaku Sekkeisha Co. (KKS) . . . has been

[1] Leo Palace eventually paid TRA for this work in full in December of 2001.

> chosen to continue and complete the project. The operating arrangement has been concluded and is now contracted to KKS.
>
> KKS would like to continue the project with the guidance of TRA as a local partner, Leopalace . . . has approved of this move without any obligations, and we would appreciate your continuing support of the project. The construction period has a prearranged time limit, therefore, we are theorizing as to apply the original drawings and specifications (of the almost completed phase one) in order to prevent further delays. Please note that KKS will be making use of your preliminary drawings.
>
> We would be grateful if the estimate and invoice could be submitted to the office of Leopalace . . ., situated at MDI GUAM CORPORATION, however this must be sent through the services of KKS.
>
> We would highly appreciate your cooperation in the development of Manenggon Hills and the collaborating local Guam companies.
>
> /s/ Satoshi Abe
> Director

Appellant's ER, p. 72 (Letter from Abe to TRA of 7/24/01).

**[8]** Upon receipt of the July 24, 2001 letter, TRA thereafter commenced work on Packages 2 and 3, apparently under the direction of KKS. Specifically, KKS submitted its conceptual drawings to TRA on September 20, 2001, and requested that TRA complete various items of work utilizing these drawings. At this point the deadline for the completion of the Package 2 and 3 work was October 31, 2001. This deadline reflected the November 1, 2001 deadline for applying for the building permits. Considering these deadlines, upon receipt of KKS's drawings on September 20, 2001, TRA enlisted the help of engineering consultants to work on Packages 2 and 3 while it simultaneously prepared its fee proposal for these packages. The consultants included GK2 Inc., EMC2 Mechanical, Inc., and EMCE, Consulting Engineers. On September 28, 2001, TRA sent Leo Palace its fee proposal for Packages 2 and 3. The proposed fee was $827,000.00. At this point, TRA had incurred $26,050.00 in fees for work already performed on Packages 2 and 3, which included work done by both TRA and its engineering consultants.

**[9]** On October 10, 2001, a representative of KKS left a message with TRA recommending that Mr. Ruth meet with Mr. Ishii on the following Saturday regarding Leo Palace's concerns with TRA's fee proposal. The KKS representative also recommended that TRA call Mr. Ishii prior to Mr. Ishii's arrival on Guam. TRA did not call Mr. Ishii. Notwithstanding this communication by KKS to TRA regarding the concerns over TRA's fee proposal, KKS, on October 11, 2001, sent an email to TRA

indicating that Leo Palace had "accept[ed] to proceed design work based on the original design in order to preserve the permit schedule." Appellee's Supp. Excerpts of Record ("SER"), p. 44 (E-mail from Yukiharu, Architect, KKS to H. Mark Ruth, FAIA and Melet Santos, TRA (Oct. 26, 2001, 9:00 pm)). KKS further instructed TRA to proceed with the layout revisions to the car parking.

**[10]** Mr. Ruth, Mr. Ishii and Mr. Hyodo met on October 15, 2001. At the meeting, Mr. Ishii informed TRA that Leo Palace's budget for the Package 2 and 3 work was between $300,000.00 and $400,000.00. Mr. Ruth knew at this meeting that TRA could not possibly do the work required for $300,000.00 to $400,000.00, but did not disclose this information to Mr. Ishii or Mr. Hyodo.

**[11]** On October 18, 2001, TRA faxed Leo Palace a proposed new fee of $659,000.00. Mr. Ruth, Ishii, and Hyodo met later that day, and Mr. Ishii again informed Mr. Ruth that Leo Palace could not pay more than between $300,000.00 and $400,000.00.

**[12]** Mr. Ruth sent a letter to Leo Palace on October 22, 2001, revising and reducing TRA's fee to $592,000.00. Mr. Ruth also informed Leo Palace that the work for Package 2 was 70% complete for the architectural and structural portions, and 50% complete for the mechanical and electrical portions. Mr. Ruth also stated that they did not want to be responsible for any schedule delays, and that "[a]s required by the schedule, these documents will be complete November 1st. Please advise us in writing if this is not what you wish." Appellant's ER, p. 88 (Letter from TRA to Ishii of 10/22/01).

**[13]** On October 23, 2001, Mr. Ishii faxed a letter to Mr. Ruth, stating that they received the revised estimated design fee for Packages 2 and 3. The letter continued: "However, we regret to say that we are not able to accept your proposal because the Amount is still too high than our budget. Therefore, we herewith inform you not to order the job to your firm this time." Appellant's ER, p. 126 (Letter from Ishii to TRA of 10/23/01).

**[14]** Leo Palace eventually hired another local architecture firm Martin, Cristobal & Laguana ("MCL") to do the Package 2 and 3 work for a negotiated fee of between $320,000.00 and $330,000.00.

**[15]** On November 6, 2001, TRA sent a bill to Leo Palace for work done for Packages 2 and 3, totaling $163,298.00. Leo Palace withheld payment. TRA filed a lien on the property with the Department of Land Management for the outstanding amount claimed.

**[16]** TRA filed an Amended Complaint against Leo Palace on June 12, 2002. The complaint contained three counts: (1) breach of contract; (2) *quantum meruit*/unjust enrichment; and (3) enforcement of lien.

**[17]** After a five-day bench trial, on September 9, 2003, the trial court issued a *Disision yan Otden* ("Decision and Order"). The court denied recovery on the breach of contract claim, but granted recovery on the *quantum meruit* and enforcement of lien counts.[2] The court awarded TRA $146,919.00 for the reasonable value of services rendered (excluding fees and labor performed after October 23, 2001), its costs, plus interest from the date of invoice until paid.

**[18]** The trial court filed a judgment for TRA on September 23, 2003, which was entered on the docket on September 30, 2003. Leo Palace filed the instant appeal.

## II.

**[19]** This court has jurisdiction over final judgments pursuant to Title 7 GCA § 3107(b) and 48 U.S.C. § 1424-1(a)(2), *as amended by* U.S. Pub. L. 108-378 (adopted Oct. 30, 2004).

## III.

### A. Award of *Quantum Meruit* Damages.

**[20]** In its Decision and Order, the trial court found that all the elements for *quantum meruit* recovery were met in this case. The court disagreed with Leo Palace's contention that it received no benefit from TRA's services. The trial court first found that TRA's plans were not used because Leo Palace terminated KKS due to Leo Palace's dissatisfaction with KKS's design and the cost of its design concept. The court next found that, as a matter of law, "[a] benefit is conferred upon the

[2] The trial court first recognized that TRA claimed that there was an "express contract" between the parties with the price to be agreed upon at a later date, (Appellant's ER, p. 49-50 (Decision and Order, Sept. 9, 2003)), and that alternatively, recovery was warranted under "*quantum meruit*." The court determined that if there was in fact an "express contract" between the parties, the "disparity between Defendant's budget and the fee estimate by Plaintiff makes it difficult for the [c]ourt to determine a reasonable price," and that the court therefore could not grant recovery to TRA based upon this theory. Appellant's ER, p. 50 (Decision and Order, Sept. 9, 2003). The trial court further stated that assuming there was an express contract, the only reasonable manner for the court to determine price would be based on the reasonable value of the TRA's services. The court found that this method of determining price was the basis for TRA's *quantum meruit* theory of recovery.

other party whenever a person performs at the request of the other party." Appellant's ER, p. 55 (Decision and Order, Sept. 9, 2003).

**[21]** Leo Palace challenges the award of damages under a *quantum meruit* theory, primarily arguing that recovery under a *quantum meruit* theory is not permissible when an architect's plans are not actually used.[3] Leo Palace contends that simply satisfying the request of another is not a sufficient benefit conferred on the requesting party. Leo Palace maintains it did not receive or use TRA's plans for the Package 2 and 3 work, did not benefit from TRA's services, and should not be required to pay for TRA's services. We disagree.

**[22]** Whether the elements for *quantum meruit* recovery were satisfied is a question of fact reviewed for clear error. *See Biller Assocs. v. Rte. 156 Realty Co.* 725 A.2d 398, 405 (Conn. App. Ct. 1999) ("A determination of a quantum meruit claim requires a factual examination of the circumstances and of the conduct of the parties . . . that is not a task for an appellate court but rather for the trier of fact.") (citations and internal brackets omitted). The question of whether the lower court decided TRA's *quantum meruit* determination in accordance with the governing law is, however, a legal question reviewed *de novo*. *See Fleming v. Quigley*, 2003 Guam 4, ¶ 14 (stating that determination of the legal basis for awarding attorney's fees was a question of law reviewed *de novo*).[4]

**1. Quantum Meruit as a Theory of Recovery.**

**[23]** TRA's Amended Complaint stated a count for "Quantum Meruit/Unjust Enrichment." Appellant's ER, p. 5 (Amended Complaint). As acknowledged by the parties, the nature of the *quantum meruit* theory of recovery has been the subject of much confusion. Leo Palace urges the court to abandon labels placed on theories of recovery. We decline the suggestion. We would do a disservice to the legal field and further confuse the issues herein were we to abandon all

[3] One issue raised in this appeal relates to whether KKS, as agent of Leo Palace, accepted TRA's work. We do not need to examine this issue in light of our ruling regarding the benefit necessary for recovery under a quantum meruit theory.

[4] Leo Palace asserted at oral argument that the question of whether the lower court correctly allowed recovery under a quantum meruit theory presents a mixed question of fact and law, and is thus reviewed is *de novo*. As stated above, the trial court's determination of the elements of quantum meruit is reviewed for clear error, while the legal theories underlying the court's decision are reviewed *de novo*.

distinctions as heretofore recognized within an entire body and philosophy of law pertaining to remedies. Instead, we will attempt to clarify this area of the law.

**[24]** *Quantum meruit*, translated literally from Latin, means, "as much as he has deserved." BLACK'S LAW DICTIONARY, 1255 (7th ed. 1999). The count of *quantum meruit* was historically used to recover "for work and labor done." *Alternatives Unlimited, Inc. v. New Baltimore City Bd. of Sch. Commr's*, 843 A.2d 252, 286 (Md. Ct. Spec. App. 2004) (quoting 1 GEORGE E. PALMER, LAW OF RESTITUTION 7 (1978)). Although TRA's second count was for "Quantum Meruit/Unjust Enrichment," Appellant's ER, p. 5 (Amended Complaint), unjust enrichment is but one theory whereby a plaintiff can recover under *quantum meruit* (i.e., for work and labor done). *Quantum meruit* is not necessarily synonymous with recovery under an unjust enrichment theory. In *Alternatives Unlimited*, 843 A.2d 252 (Md. Ct. App. 2004), the court explained the historical confusion in this area, stating:

> Although the paths of quantum meruit and unjust enrichment have, for at least a century, diverged, they do share a long common ancestry. Some discussions, indeed, still use the terms interchangeably. Some carefully distinguish them. Some do both in successive paragraphs or even successive sentences without seeming to be aware of the slightest inconsistency. It is a field fraught with hidden pitfalls. Saul Levmore, "Explaining Restitution," 71 *Vir. L. Rev.* 65, 66-67 (1985), refers to it as "the remarkably uneven terrain of restitution law."

*Alternatives Unlimited Inc*, 843 A.2d at 284.[5] "Both quantum meruit and unjust enrichment are offshoots of the common law action of Assumpsit . . . ." *Id.*[6] Over time, Assumpsit came to cover three areas: (1) express contracts; (2) implied in fact contracts; and (3) implied in law contracts (i.e., quasi-contracts).[7] *See id.* *Quantum meruit* was one count of the several common and particular

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[5] *See also Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co.*, 695 So. 2d 383, 386 (Fla. Dist. Ct. App. 1997) ("To describe the cause of action encompassed by a contract implied in law, Florida courts have synonymously used a number of different terms—'quasi contract,' 'unjust enrichment,' 'restitution,' 'constructive contract,' and 'quantum meruit.' This profusion of terminology has its roots in legal history.") (footnotes omitted).

[6] "Assumpsit" literally means, in Latin, "he assumed" or "he undertook," and was a form of action which developed for the enforcement of a simple, actual contract (in contrast to one under seal where the action was one on "Covenant"). *Alternatives Unlimited Inc. v. New Baltimore City Bd. of Sch. Commr's*, 843 A.2d 252, 284 (Md. Ct. Spec. App. 2004). Assumpsit eventually expanded from allowing the enforcement of express contracts, to the enforcement of contracts implied from the conduct of the parties, and then to "certain instances of unjust enrichment, where the law was willing to create a contract, as a legal fiction, where none in fact existed." *Id.*

[7] A contract implied in law is synonymous with the term "quasi-contract." *Commerce P'ship*, 695 So. 2d at 386 ("Concerned about the confusion between contracts implied in law and fact, two legal scholars sought to 'extirpate the term 'contract implied in law' from legal usage and to substitute for it the term 'quasi contract'.' 1 *Corbin on*

forms of General Assumpsit.[8] Recovery under this count of Assumpsit was available under a theory of implied in fact contract, or, alternatively, quasi-contract. *Id*. at 285-86, 288; *ProMax Dev. Corp. v. Mattson*, 943 P.2d 247, 259 (Utah Ct. App. 1997) ("Quantum meruit is comprised of two distinct theories: (1) contract implied in law, also known as quasi-contract and (2) contract implied in fact.").

**[25]** The measure of recovery for quantum meruit, whether under the theory of an implied-in-fact contract, or a quasi-contract, is "the value of the services, measuring the value in the labor market where the service itself was sought by the defendant." *Alternatives Unlimited*, 843 A.2d at 288 (quoting 1 Dan B. Dobbs, *Law of Remedies*, 583 (2d ed. 1993)).

**[26]** TRA expressed its *quantum meruit* count under the theory of unjust enrichment. *See* Appellant's ER, p. 5 (Amended Complaint). "Contracts implied in law, or as they are more commonly called "quasi contracts," are obligations imposed by law on grounds of justice and equity. Their purpose is to prevent unjust enrichment. Unlike express contracts or contracts implied in fact, quasi contracts do not rest upon the assent of the contracting parties." *Nursing Care Servs., Inc. v. Dobos*, 380 So. 2d 516, 518 (Fla. Dist. Ct. App. 1980); *see also Alternatives Unlimited*, 843 A.2d at 287 ("The core value served by the development of the implied-in law contract or quasi-contract was a restitutionary value."). By alleging unjust enrichment, TRA therefore sought to recover under a quasi-contract theory.

**2. Elements of Quantum Meruit.**

**[27]** Unlike implied in fact contracts, quasi-contracts are not recognized in Guam by statute. *Cf.* Title 18 GCA § 86101 (1994) ("A contract is either express or implied."); Title 18 GCA § 86103 (1994) ("An implied contract is one, the existence and terms of which are manifested by conduct.") This court has not had occasion to address the quasi-contract theory of recovery; thus, reference to

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*Contracts* § 1.20. As Corbin explains, although the term 'quasi contract' took hold, 'the older term successfully resisted extirpation to the further confusion of law students and lawyers.'").

[8] The common counts were:

> 1) money paid to the defendant's use, 2) money had and received, 3) use and occupation of land, 4) goods sold and delivered, 5) quantum meruit, and 6) quantum valebant ("how much were they [the goods] worth").

*Alternatives Unlimited*, 843 A.2d at 288.

the law in other jurisdictions is appropriate. Where a quasi-contract claim seeks recovery for services rendered (*quantum meruit*),

> [a]s would be expected, the doctrine [applicable] is in accord with that of quasi-contract generally: The essence of *quantum meruit* liability is the receipt of a benefit by one party which would be inequitable for that party to retain. The elements of *quantum meruit* liability distilled from this essence are the performance of services by the plaintiff, the receipt of the benefit of those services by the defendant, and the unjustness of the defendant's retention of that benefit without compensating the plaintiff.

*Midcoast Aviation, Inc. v. Gen. Elec. Credit Corp.*, 907 F.2d 732, 737 (7th Cir. 1990) (quoting *Telander v. Posejpal,* 418 N.E.2d 444, 448 (1981)) (citations and quotation marks omitted); *see also Dudding v. Norton Frickey & Assocs.*, 11 P.3d 441, 445 (Colo. 2000); *ProMax Dev. Corp.*, 943 P.2d at 259.

**[28]** It is undisputed that TRA performed architectural services. The dispute in this case relates to the remaining two elements to recover under a quasi-contract claim, namely, whether Leo Palace received a benefit, and, if so, whether it would be unjust for Leo Palace to retain the benefit without compensating TRA.

**a. Whether Leo Palace Received a Benefit**

**[29]** "The underlying basis for awarding quantum meruit damages in a quasi-contract case is unjust enrichment of one party and unjust detriment to the other party." *Salamon v. Terra*, 477 N.E.2d 1029, 1031 (Mass. 1985); *see also Midcoast Aviation, Inc.*, 907 F.2d at 737. "A person is enriched if the person receives a benefit at another's expense." *First Nationwide Sav. v. Perry*, 15 Cal. Rptr. 2d 173, 176 (Ct. App. 1992) (citing RESTATEMENT OF RESTITUTION § 1 cmt. a (1937)). The legal question raised in this appeal is what constitutes a benefit as contemplated for recovery under *quantum meriut* pursuant to a quasi-contract theory.

**[30]** Leo Palace argues for the rule "that an architect cannot recover in quantum meruit unless his plans are actually used by the defendant." Appellant's Brief, p. 20 (Apr. 16, 2004). Leo Palace maintains that TRA cannot recover under its *quantum meruit* count because Leo Palace did not use or receive TRA's plans for Package 2 and 3 work, and therefore did not benefit from TRA's work.

**[31]** Courts have found, generally, that in terms of recovery under quasi-contract, "[a] benefit denotes any form of advantage." *Dudding*, 11 P.3d at 445; *see also First Nationwide Sav. v. Perry*,

15 Cal. Rptr. 2d 173, 176 (Ct. App. 1992) ("A person is enriched if the person receives a benefit at another's expense. Benefit means any type of advantage.") (citation omitted).

**[32]** Under this definition, if Leo Palace actually used TRA's services and TRA's work product, then Leo Palace would have received a benefit necessary to recover under an unjust enrichment theory. Courts have so held with regard to architectural services. *See e.g.*, *John D. Latimer & Assocs. v. Hous. Auth.*, 297 S.E.2d 779, 783 (N.C. App. Ct. 1982) (finding that because the plans "were received and used by defendant in defendant's H.U.D. application, there was a sufficient showing of benefit to defendant from plaintiff's work."); *Kleinschmidt, Brassette & Assocs., Inc. v. Ayres*, 368 So. 2d 1153, 1156 (La. Ct. App. 1979) (agreeing that the defendant received a benefit because the owner "accepted the final plans" and used the plans to obtain bids for the construction of the home).

**[33]** The trial court's decision does not make clear whether Leo Palace actually received TRA's work product. The trial court made the following factual findings: (1) TRA's "performance throughout the entire time it was responding to work requests from KKS was accepted by KKS, [Leo Palace's] agent," and (2) the "work was accepted and used towards procurement of the Building Permit for the design work of then Package 2." Appellant's ER, p. 54 (Decision and Order, Sept. 9, 2003).

**[34]** We agree that the record supports the trial court's finding that TRA's work was accepted and used by KKS in preparing the permit documents.[9] An obvious question is whether this fact necessarily signifies that Leo Palace accepted and received TRA's work. We find it unnecessary, however, to reach this issue because we agree with the trial court's determination that because Leo Palace requested TRA's services, Leo Palace received a benefit regardless of whether Leo Palace

[9] We note that in its Appellee's Brief, TRA claims that Leo Palace benefited from TRA's work because "Leo Palace used some part of TRA's work when Sumitomo prepared construction cost estimates." Appellee's Brief, p. 30 (June 1, 2004). Citing Mr. Ishii's testimony, TRA contends that Leo Palace used the electrical and mechanical design to obtain cost estimates for this work. Appellee's Brief, p. 30 (citing Tr. vol. III, pp. 109-10). Leo Palace argues that Mr. Ishii's testimony does not support the factual assertion. Upon review of the transcripts, we cannot conclude that Mr. Ishii's testimony can reasonably be interpreted in the manner suggested by TRA.

actually received or used the plans.[10]

**[35]** Leo Palace's contention that a party receives no benefit from the architect's services when an architect's plans are not received or used is appealing when viewing the concept of "benefit" in the sense that the other party has been advantaged. The term "benefit," however, has been expanded to encompass situations where an actual benefit was not incurred. Such expanded view of the term "benefit" was adopted by the trial court.

**[36]** The trial court held that "[a] benefit is conferred upon the other party whenever a person performs at the request of the other party." Appellant's ER, p. 55 (Decision and Order, Sept. 9, 2003). The trial court relied upon several California cases for this proposition. The court cited *Bodmer v. Turnage*, 233 P.2d 157 (Cal. Dist. Ct. App. 1951), *Earhart v. William Low Co.*, 600 P.2d 1344 (Cal. 1979), and Chief Justice Traynor's dissent in *Coleman Eng'g Co. v. N. Am. Aviation, Inc.*, 420 P.2d 713 (Cal. 1967).

**[37]** In *Bodmer v. Turnage*, 233 P.2d 157 (Cal. Dist. Ct. App. 1951), the defendant/owner purchased lots in a desert resort development. *Bodmer*, 233 P.2d at 158. The owner contracted with the plaintiff/architect to conduct preliminary studies, working drawings and specifications for the owner's proposed development of the lots. *Id.* The contract provided that the architect would be compensated 6% of the value of the work as it progressed, but if the work designed by the architect was suspended or abandoned, the architect would be paid for his services. *Id.* The architect prepared a total of five sets of studies and plans, each incorporating changes by the owner, with the final one being approved by the owner. *Id.* The construction on the project was eventually abandoned, and the architect sued the owner for the agreed contracted-upon price for the preliminary studies and for additional sums representing the reasonable value of the work done in preparing the plans and specifications. *Id.* The trial court found in favor of the architect. *Id.*

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[10] TRA also contends that "Leo Palace used TRA's services to determine that KKS's design was too expensive." There is evidence in the record to support this fact as Mr. Ishii testified that Leo Palace informed KKS that if the design did not match the construction budget, the design would not be used. On the one hand, this situation is analogous to cases where an owner declines to use plans because the construction costs would be too high. In these cases, the owner is deemed to have "benefited" from the services of the architect. *See Kleinschmidt, Brassette & Assocs., Inc. v. Ayres*, 368 So. 2d 1153, 1156 (La. Ct. App. 1979). On the other hand, as will be discussed more fully *infra*, if TRA knew of Leo Palace's construction budget in advance, and was told that the design would not be used if it was not within the construction budget, then legal principles would dictate that TRA would not be allowed to recover under *quantum meruit*.

**[38]** On appeal, the owner argued that the architect could not recover because *quantum meruit* required a showing of a benefit to the owner, and the owner "received no benefit from the plaintiff's services since the plans prepared were not as such as he could use." *Id*. The defendant contended that he informed the architect that he could only build as many structures as within his budget of $50,000.00 to $60,000.00. *Id*. at 159. The appellate court found that the evidence instead supported the trial court's finding that the owner ordered plans for the whole project, and not simply parts which would fall within the budget. *Id*. The appellate court further held that the owner "derived the benefit he had in mind, and the fact that he later decided not to use the plans he had ordered in no way indicates an absence of benefit, within the meaning of the *quantum meruit* rule." *Id*.

**[39]** Over a decade after *Bodmer* was decided, the California Supreme Court decided *Coleman Engineering Co. v. North American Aviation, Inc.*, 420 P.2d 713 (Cal. 1967). In *Coleman*, Chief Justice Traynor wrote a dissenting opinion which analyzed the concept of benefit under a quasi-contract claim. This analysis was later relied upon by the California Supreme Court in *Earhart v. William Low Co.*, 600 P.2d 1344 (Cal. 1979), discussed *infra*, when ruling on the precise nature of "benefit" necessary for recovery under a quasi-contact theory.

**[40]** In *Coleman*, Chief Justice Traynor recognized the rule that "[w]hen one person performs services at the request of another, the law raises an obligation to pay the reasonable value of the services." *Coleman Eng'g*, 420 P.2d at 728. He further recognized the requirement in seeking restitution that a benefit be conferred. *Id*. at 729. In explaining how the two principles were rationalized with each other under the Restatement of Restitution, Justice Traynor cited the Restatement's definition of benefit: "a benefit is conferred upon another if a person 'performs services beneficial to *or at the request of the other*." *Id*. (emphasis added) (citing RESTATEMENT OF RESTITUTION § 1 cmt. b (1937)). Justice Traynor further explained that such reasoning was based on a pure legal fiction. Specifically, where the services performed did not confer a benefit on the party requesting them, "it is pure fiction to base restitution on a benefit conferred." *Id*. Instead, recovery is allowed not based on an actual benefit conferred, but based on "a moral obligation to restore to his original position a party who has acted to his detriment in reliance on a representation, technically unenforceable, by another that he will give value for a detriment suffered." *Id*. The Chief Justice cited a case from Connecticut, *Kearns v. Andree*, 139 A. 695 (Conn. 1928), to support

this theory. In *Kearns*, the plaintiff was able to recover for the value of services made to improve a building that the defendant intended to purchase but ultimately did not. *Coleman Eng'g*, 420 P.2d at 729. Although the defendant did not actually benefit from the plaintiff's services, recovery was nonetheless allowed. The rationale of the *Kearns* holding was this:

> [T]he recovery of the reasonable value of services performed, without regard to actual benefit, should be allowed "where the parties have attempted to make a contract which is void because its terms are too indefinite, but where one party has, in good faith, and believing that a valid contract existed, performed part of the services which he had promised in reliance upon it."

*Id.* (citing *Kearns*, 139 A. at 698). Chief Justice Traynor ultimately opined that such rule should have been applied in its case because this rule "places the loss where it belongs – on the party whose request induced performance in justifiable reliance on the belief that the requested performance would be paid for." *Id.*[11]

**[41]** Finally, in *Earhart v. William Low Co.*, 600 P.2d 1344 (Cal. 1979), the California Supreme Court had occasion to revisit the principles announced in *Bodmer* and by Chief Justice Traynor in *Coleman*. The issue in *Earhart* was articulated as follows:

> whether a party who expends funds and performs services at the request of another, under the reasonable belief that the requesting party will compensate him for such services, may recover in quantum meruit although the expenditures and services do not directly benefit property owned by the requesting party.

*Earhart*, 600 P.2d at 1345.

**[42]** There, the plaintiff allegedly expended money at the defendant's request to commence construction of a mobile home park on the defendant's land and an adjacent lot owned by a third party. *Id.* The plaintiff alleged that he entered into a contract with the defendant for the construction of the mobile home park, subject to conditions relating to financing and the procurement of labor and performance bonds for the work. *Id.* at 1346. The defendant also entered into an agreement to purchase the adjacent parcel subject to financing. *Id.* at 1345. The plaintiff asserted that the defendant instructed the plaintiff to commence work on the adjacent lot, waiving the previously

[11] In *Coleman Engineering Co. v. North American Aviation, Inc.*, 420 P.2d 713 (Cal. 1967), the facts involved the construction of an item to be sold to the defendant, and not a request for services. Chief Justice Traynor found this distinction to be unimportant. He opined that the rationale for the rule, which sought to compensate the plaintiff for actions performed in reliance on the defendant's promise, was equally applicable where the request was for an item to be purchased as it was where the request was for a service.

agreed to conditions precedent, to protect the expiration of a special use permit for the construction. The plaintiff commenced the construction and submitted a progress bill to the defendant. The defendant refused to pay, and revealed that he had contracted with another firm for the construction. *Id*. at 1346. The plaintiff sued in *quantum meruit* to recover compensation for the services. *Id*. at 1345. The trial court denied recovery for the sums expended for construction on the lot owned by the third party on the ground that the defendant did not receive a direct benefit from the construction. *Id*. The plaintiff appealed, and the California Supreme Court reversed. *Id*.

**[43]** In its decision, the *Earhart* court discussed an earlier case of *Rotea v. Izuel*, 95 P.2d 927 (Cal. 1939), wherein the court, relying on the historical basis of unjust enrichment of money had and received, held that there can be no *quantum meruit* recovery where the defendant does not receive a direct benefit. The *Rotea* court found that the benefit received in satisfaction of obtaining compliance with a request to perform services for a third person was only an "incidental benefit," and thus did not support recovery under a *quantum meruit* theory. *Earhart*, 600 P.2d at 1348. The *Earhart* court recognized that the holding in *Rotea* requiring a direct benefit has since been criticized "for its harshness," with commentators criticizing the requirement as "purely an historical one." *Id*. (quoting Comment, Quasi-Contracts (1940) 28 Cal. L. Rev. 528, 530 & n. 18.).

**[44]** The *Earhart* court found that

> [e]ven under contemporary authorities, the [*Rotea*] court could have recognized, consistent with the orthodox principle of unjust enrichment, that a defendant who receives the satisfaction of obtaining another person's compliance with the defendant's request to perform services incurs an obligation to pay for labor and materials expended in reliance on that request.

*Id*. In support of this proposition, the *Earhart* court cited comment b to the Restatement of Restitution § 1, wherein it is stated that a "person confers a benefit on another if he . . . performs services beneficial to or at the request of the other . . . ." *Id*. (quoting RESTATEMENT OF RESTITUTION § 1 cmt. b (1937)) (ellipses in original). The court interpreted the Restatement as recognizing that "performance of services at another's behest may itself constitute 'benefit' such that an obligation to make restitution may arise." *Id*. The court found that other courts, including *Bodmer*, have adopted this rule. Furthermore, the court stated that the issue of "whether we should broaden the basis of quasi-contractual recovery so as to prevent any unconscionable injury to the plaintiff" was not novel in California, as it was expressly discussed in Chief Justice Traynor's dissent

in *Coleman. See* discussion, *supra*. The court summarized Justice Traynor's opinion as "cogently urg[ing] that we abandon the unconscionable requirement of 'benefit' to the defendant and allow recovery in quantum meruit whenever a party acts to his detriment in reliance on another's representation that he will give compensation for the detriment suffered." *Id*. at 1349-50.

**[45]** Finally, the *Earhart* court rationalized its holding by analogizing the ruling with other "parallel contractual doctrines" based upon a theory of "justifiable reliance," including theories of recovery for part performance of an invalid contract and promissory estoppel. *Id*. at 1351. Surveying prior case law as well as the "equitable foundations" underlying these alternate theories of recovery, the court held that "compensation for a party's performance should be paid by the person whose request induced the performance." *Id*. at 1351-52.

**[46]** We agree with the reasoning articulated under the preceding California authority and adopt it in this jurisdiction. We are persuaded by the recognition in comment b of section 1 of the Restatement of Restitution, that a "person confers a benefit on another if he . . . performs services beneficial to or at the request of the other . . . ." RESTATEMENT OF RESTITUTION § 1 cmt. b (1937). Under the Restatement, "performance of services at another's behest may itself constitute 'benefit' such that an obligation to make restitution may arise." *Id*.

**[47]** The Restatement rule is not inconsistent with the theory of "benefit" underlying the law of restitution. Where a person requests an architect to prepare plans, the person requesting "derived the benefit he had in mind, and the fact that he later decided not to use the plans he had ordered in no way indicates an absence of benefit, within the meaning of the *quantum meruit* rule." *Bodmer,* 233 P.2d at 159.

**[48]** Furthermore, the Restatement rule furthers the equitable underpinnings of the theory of quasi-contract. When two parties act in furtherance of the performance of services but fail to execute a contract to express their intent, and are both at fault for this failure, the loss suffered should be borne by the person who requested performance from the other. It would be unjust to force the loss to be borne by the person whose performance was undertaken upon reasonable reliance on a request to perform. Recovery, therefore, is allowed based on "a moral obligation to restore to his original position a party who has acted to his detriment in reliance on a representation, technically unenforceable, by another that he will give value for a detriment suffered." *Coleman Eng'g*, 420

P.2d at 729. The rule "place[s] the loss where it belongs – on the party whose request induced performance in justifiable reliance on the belief that the requested performance would be paid for." *Id*.

**[49]** We therefore hold that a person performing at the request of another "should be paid by the person whose request induced the performance." *Earhart,* 600 P.2d at 1352. In receiving requested performance, the law implies that the defendant received a "benefit" regardless of whether an actual benefit was received, and recovery under a quasi-contract theory should be permitted in such circumstances.

**[50]** The trial court found that Leo Palace benefitted from TRA's services because TRA "scheduled its work to meet the short demand of a scheduled completion date and continuously performed to meet the deadline scheduled until terminated by [Leo Palace]." Appellant's ER, p. 55 (Decision and Order, Sept. 9, 2003). The trial court ascertained that because TRA performed in accordance with a schedule, TRA was working at the request of Leo Palace. Furthermore, the trial court determined that the evidence indicated the parties had previously engaged in a similar course of action with regard to Package 1, whereby TRA initially started work without a fee agreement, with the parties later agreeing on a fee agreement towards the completion of the deadline date for Package 1.

**[51]** The record supports the trial court's findings. Throughout early to mid 2001, TRA performed services for Leo Palace for Package 1. In June of 2001, Leo Palace and TRA agreed on a fee for the work on Package 1; thus, the two companies were actively engaged in a working relationship before ever reaching a fee agreement. Leo Palace's letter dated July 24, 2001, specifically stated that Leo Palace hired KKS for Packages 2 and 3, and requested that TRA work together with KKS as its local partner. Furthermore, Mr. Ruth testified that, pursuant to information from KKS, the October 31, 2001 deadline for completion of the documents for Packages 2 and 3 was imposed by Leo Palace on KKS. These facts support a finding that TRA performed the work for Packages 2 and 3 at the request of Leo Palace.

**[52]** Although Mr. Ishii testified that Leo Palace never instructed TRA to perform the architectural work and Leo Palace was awaiting a fee proposal prior to giving approval to start work, the existence of this evidence does not warrant overturning the trial court's contrary finding unless it can be said that the lower court definitely committed a mistake. The trial court's determinations on conflicting

or ambiguous evidence should be accorded weight. *Yang v. Hong*, 1998 Guam 9, ¶ 7. Under *Yang,* we find that the trial court did not clearly err in its factual finding that TRA performed at the request of Leo Palace.

**[53]** Because the record supports the trial court's finding that Leo Palace requested architectural services from TRA, we hold that the trial court correctly concluded that Leo Palace received a benefit from TRA's services.

**b. Whether it would be unjust for Leo Palace to retain the benefit without compensating the plaintiff.**

**[54]** We must next decide whether the final element of recovery under a quasi-contract claim was satisfied. Specifically, we must review whether the transaction took place in circumstances under which it would be unjust for Leo Palace to retain the benefit of TRA's services without compensating TRA.

**[55]** "[A] recovery on a quantum meruit basis may not be obtained where the services (even if beneficial) are rendered with no anticipation that compensation is to be received. . . . . There can be no recovery for services rendered voluntarily and with no expectation *at the time of the rendition* that they will be compensated. Under such circumstances no obligation is incurred." *Broughton v. Johnson*, 545 S.E.2d 370, 372 (Ga. Ct. App. 2001); *see also Sparks v. Gustafson*, 750 P.2d 338, 342 (Alaska 1988) ("Courts will allow the defendant to retain a benefit without compensating plaintiff in several situations, one of which is . . . where the benefit was given gratuitously without expectation of payment.").

**[56]** The trial court allowed recovery for architectural services performed up until October 23, 2001, the date Mr. Ishii faxed a letter to Mr. Ruth, stating that Leo Palace received the revised estimated design fee for Packages 2 and 3, but that TRA's fee was too high and Leo Palace would not be hiring TRA to prepare the permit documents. After a thorough review of the record, we find that it was not reasonable for TRA to expect payment for services rendered after October 15, 2001, and the trial court erred in allowing recovery for services performed through October 23, 2001.

**[57]** An examination of the undisputed facts is relevant here. First, there was evidence in the record which supported a finding that TRA expected to be compensated for its work prior to October 15, 2001. Specifically, Mr. Ruth testified that in the late 80's and early 90's, TRA performed work

for Leo Palace without a fee agreement in place. In fact, TRA commenced work for Package 1 without a fee agreement. A local architect and expert witness, Jack Jones, testified that it was common industry practice for architects to perform services prior to agreeing to a fee. Based on the circumstances between the parties and the industry practices, it could rationally be concluded that TRA expected payment during the period before the parties reached a fee agreement.

**[58]** However, TRA was informed on October 10, 2001, by a representative of KKS, that Leo Palace had concerns with TRA's fee proposal. The message from the KKS representative was not detailed but put TRA on notice regarding Leo Palace's assessment of the fee for the services. On October 15, 2001, Mr. Ruth, Mr. Ishii and Mr. Hyodo met, and Mr. Ishii informed Mr. Ruth that Leo Palace's budget for the Package 2 and 3 work was between $300,000.00 and $400,000.00, and TRA's estimate exceeded the amount Leo Palace was willing to pay for the work. While the parties discussed the fee between October 15, 2001, and October 23, 2001, it is undisputed that even during discussions on October 18, 2001, when TRA faxed Leo Palace a proposed new fee of $659,000.00, Leo Palace maintained it could not pay more that $300,000.00 to $400,000.00. Although Mr. Ishii only put in writing on October 23, 2001, that TRA's fee of $592,000.00, as indicated in the letter from Mr. Ruth on October 22, 2001, was too high, and that Leo Palace was not going to hire TRA for the work, Mr. Ishii's letter evidenced what was made clear on October 15, 2001; specifically, that Leo Palace could not pay more than between $300,000.00 to $400,000.00 for the work. Mr. Ruth testified at trial that as of October 15, 2001, he was aware he could not complete the work for between $300,000.00 and $400,000.00.

**[59]** Based on the undisputed facts, we cannot conclude that TRA had a reasonable expectation of payment, without a fee arrangement in place, for work completed after October 15, 2001, the date Leo Palace informed TRA that the budget for the permit documents was between $300,000.00 and $400,000.00. Because it was not reasonable for TRA to expect compensation for services performed after October 15, 2001, TRA cannot recover for services rendered after that date. *See Broughton*, 545 S.E.2d at 372. The trial court's contrary finding was against the clear weight of the evidence and was clearly erroneous as a matter of law. In light of the evidence, we hold that the trial court erred in allowing *quantum meruit* recovery for the reasonable value of services rendered after October 15, 2001.

### 3. Other Challenges to the *Quantum Meruit* Award

**[60]** Leo Palace raises other challenges to the trial court's award of *quantum meruit* recovery which we discuss in turn.

#### a. Quantum meruit recovery is precluded when an architect cannot meet an owner's budget

**[61]** Leo Palace claims that this case is governed by special rules pertaining to quantum meruit recovery involving architectural services. Leo Palace argues that where the architect is given a budget, and the plans exceed the budget, then the architect is not allowed to recover for services rendered because in such case the owner has not received the benefit of its bargain.

**[62]** Several legal principles apply to the recovery of services for architectural work. Where architects understand that the owner is working within a construction budget, and construction based on the plans far exceeds the budget, then the architect cannot recover for the value of his services. *Kleinschmidt*, 368 So. 2d at 1155.

**[63]** This rule does not, however, apply in this case. TRA and Leo Palace did not discuss a construction budget. At trial, Mr. Ruth explained that the construction cost estimate was not included in the scope of TRA's work on the project. Only the budget for the architecture fees was discussed, and not the overall construction budget.[12] Rather than applying the above-mentioned rule, the converse rule applies in this case. Specifically, if there is no understanding as to a maximum construction budget, then the architect can generally recover for the value of his services. *Id.*; *cf. Matthews v. Neal Greene & Clark*, 338 S.E.2d 496, 498 (Ga. Ct. App. 1985) ("Where an architect is employed by the owner of land to prepare plans and specifications for the construction of a building, and does so, and the owner decides not to have the building erected, because of the estimated cost, but nevertheless retains the plans and specifications, in the absence of any guaranty as to the cost of the building, or agreement as to his compensation for preparing the plans and specifications, the architect would be entitled to recover the reasonable value of his services in preparing and furnishing the plans and specifications.") (quoting *Douglas v. Rogers*, 73 S.E. 700 (Ga. Ct. App. 1912)).

[12] There was evidence that Leo Palace discussed the construction budget with KKS. However, the evidence does not reveal that the construction budget was discussed with TRA.

**b. Leo Palace was not unjustly enriched because it paid another architect $300,000 to prepare the necessary plans.**

**[64]** Leo Palace also argues that it would be unjust for them to compensate TRA because Leo Palace paid MCL to prepare the plans for Packages 2 and 3. Leo Palace contends that it would be unfair to force them to pay twice. This argument also fails. As explained earlier, "[t]he injustice of the enrichment or detriment in quasi-contract equates with the defeat of someone's reasonable expectations." *Salamon v. Terra*, 477 N.E.2d 1029, 1031 (Mass. 1985) (quoting 1A Corbin on Contracts § 19 (1963)). If the plaintiff reasonably expected to be paid, it would be unjust for the defendant to accept the service without compensating the plaintiff. The record supports the conclusion that TRA reasonably expected to be paid for a portion of the services rendered and it would be unjust for Leo Palace to withhold such payment regardless of whether Leo Palace eventually hired another architecture firm to prepare the permit documents.

**c. Quantum Meruit is not an Appropriate Remedy for "Fruitless Negotiations, Frustration or Disappointed Expectations," or Permitted Without an Expectation of Payment by Both Parties.**

**[65]** Finally, Leo Palace contends that the *quantum meruit* award was erroneous because recovery under the theory is not allowed for "fruitless negotiation[s], frustration, or disappointed expectations," nor is recovery allowed in the absence of an expectation of payment by both parties. Appellant's Brief, pp. 34, 37 (Apr. 16, 2004). We are not persuaded by either argument. The parties dealt, both in the early 1990's and with Phase 1 of the 2001 project, without a fee agreement in place. Furthermore, Leo Palace requested that TRA work with KKS with regard to the remaining phases in its letter of July 24, 2001. This course of conduct, coupled with Leo Palace's indication to proceed with the project, does not support Leo Palace's claim that the parties were merely negotiating. The evidence of the parties' prior dealings and Leo Palace's instructions during the initial work period for Packages 2 and 3 satisfies the test for recovery under a *quantum meruit* theory, specifically, that TRA reasonably expected payment for work done prior to October 15, 2001, and that it would not be unjust to impose a contract under the law requiring Leo Palace to pay TRA for such work.

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**B. Duty to Mitigate Damages**

**[66]** Leo Palace maintains that the trial court erred in not finding that TRA failed to mitigate its damages. Leo Palace argues that during the time period between July 24, 2001, and October 23, 2001, "[t]here were numerous milestones . . . that would have caused any prudent architect with any concern for mitigating its damages to seek clarification from the owner, the party who would be actually paying TRA's fees." Appellant's Brief, p. 43 (Apr. 16. 2004). Of most significance was Leo Palace's reference to an October 10, 2001 telephone call from KKS to TRA which directly communicated to TRA that TRA's fee proposal had not been accepted by Leo Palace, and Leo Palace's indication on October 15, 2001, that Leo Palace could not pay more that $300,000.00 to $400,000.00. Mr. Ruth further testified that he knew on October 15, 2001, that TRA could not do the work for this amount. Leo Palace states that any work performed after this time clearly could have been mitigated, and that the trial court should have denied recovery based on this evidence.

**[67]** TRA postulates that the rule of mitigation of damages does not apply in this case. TRA nonetheless acknowledges that "in order to recover in *quantum meruit* its expectation that it would be paid . . . must have been reasonable." Appellee's Brief, p. 41 (June 1, 2004). TRA contends that the trial court's decision on this issue was supported by the evidence in the record.

**[68]** This court has not had occasion to determine whether the doctrine of mitigation applies in quasi-contract cases. We note that under the Restatement of Contracts, mitigation is required where restitution is sought in a breach of contract case. Section 352 of the First Restatement of Contracts provides:

> Restitution will not be awarded with respect to a part performance rendered with knowledge that the other party has repudiated the contract, if the total amount awarded would be increased thereby.

RESTATEMENT (FIRST) OF CONT. § 352 (1932). While the above-stated rule relates to a breach of contract situation, the rationale in support of the rule need not be limited to breach of contract cases. The comment to § 352 explains that this rule is analogous to the rule regarding "avoidable harm," and clarifies that "[a]fter repudiation of a contract, the injured party cannot increase his recovery, in either damages or restitution, by continuing to perform when he knows that the other party no longer desires his performance." RESTATEMENT (FIRST) OF CONT., § 352 cmt. a (1932). The illustration in the Restatement sheds light on the practicality of the mitigation theory where restitution is

claimed. There, it is stated:

> A contracts to erect a building for B on specified terms. B repudiates the contract and orders A to stop work. A cannot get judgment for the value of work done after the repudiation and in disregard of B's order.

RESTATEMENT (FIRST) OF CONT. § 352 illus. 1 (1932).

**[69]** Applying the same logic here, if Leo Palace requested that TRA perform services, TRA should not be able to get judgment for the value of work done after TRA was aware of Leo Palace's intent to have TRA cease working.

**[70]** The lower court stated: "In assessing the . . . amounts as [p]laintiff's *quantum meruit* damages, the Court finds that mitigation is inappropriate in this matter." Appellant's ER, p. 59 (Decision and Order, Sept. 9, 2003). It is unclear from this statement whether the trial court found that mitigation did not apply under a quasi-contract theory, or, rather, that the facts did not warrant application of the doctrine of mitigation.

**[71]** We find it unnecessary to decide whether the doctrine of mitigation applies in a quasi-contract case because recovery under quasi-contract is limited to the amount that the defendant was unjustly enriched. Recovery under unjust enrichment requires examination into whether the plaintiff acted reasonably in incurring his losses. As stated earlier, the rule is that "[e]ven where a person has conferred a benefit upon another, . . . he is entitled to compensation only if it would be just and equitable to require compensation under the circumstances." *Sparks*, 750 P.2d at 342. Even assuming a benefit was conferred by the plaintiff's performance, it is difficult to conclude that the defendant was enriched unjustly if the defendant's actions reflect a desire that the plaintiff cease performance. In such case, it could not be said that the plaintiff reasonably expected compensation for his services. *See Salamon*, 477 N.E.2d at 1031. Moreover, if the theory behind the "benefit" to the defendant is premised upon the fact that the defendant "requested" performance, then the benefit is lost where the plaintiff's performance of services was undertaken after the defendant acts in a manner which indicates he has rescinded the request for services.

**[72]** The rule of mitigation in breach of contract cases seeking restitution prohibits recovery where the plaintiff "continu[es] to perform when he knows that the other party no longer desires his performance." RESTATEMENT (FIRST) OF CONT. § 352 cmt. a (1932). Because quasi-contract focuses on the unjust enrichment of the defendant, the requirements underlying a finding that the

defendant was enriched "unjustly" overcomes the utility of imposing a mitigation requirement in quasi-contract cases.

**[73]** As we have explained earlier, it was reasonable for TRA to expect compensation for work performed up until October 15, 2001, but not after. Whether under a mitigation theory, or under the theory for recovery under a quasi-contract claim, TRA cannot recover after October 15, 2001. After that date, it could either be concluded that, consistent with mitigation principles, TRA continued to perform when they knew that Leo Palace "no longer desire[d their] performance," *id*., or, under the quasi-contract elements, that TRA had no reasonable expectation of compensation thereby rendering it unjust to require Leo Palace to compensate TRA for the work. Because the result would be the same in light of our holding that TRA cannot be awarded for work done after October 15, 2001, we decline to reverse the trial court's award under a theory of mitigation.

**C. Prejudgment Interest**

**[74]** Finally, Leo Palace challenges the lower court's judgment awarding prejudgment interest to TRA. Leo Palace contends that prejudgment interest is not allowed under Title 20 GCA § 2110, which allows the recovery of interest only on damages which are "certain, or capable of being made certain by calculation." Title 20 GCA § 2110 (1998).[13] Leo Palace argues that prejudgment interest is not allowed in this case because an award based on *quantum meruit* is unliquidated, and not "certain, or capable of being made certain by calculation." *Id*. We find that Leo Palace waived a challenge to the court's award of interest, and therefore decline to address this issue.

**[75]** Under Rule 46 of the Rules of Civil Procedure, a party must, "at the time the ruling or order of the court is made or sought, make[ ] known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor." Guam R.

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[13] That section provides:

> Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him, upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.

Title 20 GCA § 2110 (1998).

Civ. P. 46. Leo Palace asserts that TRA argued for the first time in its post-trial brief that the lower court should award TRA prejudgment interest at the statutory rate of 6%, and that Leo Palace never had an opportunity to challenge TRA's entitlement to statutory prejudgment interest before the trial court awarded statutory interest in its Decision and Order.

**[76]** Leo Palace, however, had the opportunity to challenge or request reconsideration of the lower court's decision to award prejudgment interest under Rule 59(e) of the Rules of Civil Procedure. *See* Guam R. Civ. P. 59(e) ("A motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment."); *Guam Bar Ethics Comm. v. Maquera*, 2001 Guam 20, ¶ 9 ("A Rule 59(e) motion may be granted (1) if the movant demonstrates that it is necessary to prevent manifest errors of law or fact upon which the judgment is based; (2) to allow the moving party to present newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; or (4) if there is an intervening change in controlling law."). The objective of post-judgment motions "is to call to the trial court's attention an alleged mistake in the judgment and effect a ruling thereon, which 'might entirely obviate the need of an appeal.'" *Franki Found. Co. v. Alger-Rau & Assocs., Inc.*, 513 F.2d 581, 586 (3d Cir. 1975) (quoting *Welch & Corr Constr. Corp. v. Wheeler*, 470 F.2d 140, 141 (1st Cir. 1972)).

**[77]** Leo Palace did not object to the court's award of prejudgment interest at any point after the lower court issued its Decision and Order, or after the judgment was issued. Such inaction, under general circumstances, amounts to a waiver of this issue. *See Pomerleau v. West Springfield Pub. Schs.*, 362 F.3d 143, 146-47 (1st Cir. 2004) ("A party who fails to object to a motion to dismiss must raise any claims of error by filing the appropriate post-judgment motion, or forfeit his or her right to raise those claims before this court. To hold otherwise would undermine the ability of the district courts to serve as an effective and efficient forum for the resolution of disputes."); *Jovanovich v. United States*, 813 F.2d 1035, 1037 (9th Cir. 1987) (declining to address an argument raised on appeal where the defendant "never argued either issue to the court during trial," never "*request[ed] a finding with respect to either issue after trial*"; and "offered no objection to the findings of fact and conclusions of law *after the court entered them*.") (emphasis added).

**[78]** Furthermore, as a matter of general practice, "this court will not address an argument raised for the first time on appeal." *Univ. of Guam v. Guam Civil Serv. Comm'n*, 2002 Guam 4, ¶ 20 (declining to address an argument raised by the appellant for the first time on appeal); *B.M. Co. v. Avery*, 2001 Guam 27, ¶ 33 (rejecting the argument that the trial court used an improper measure of damages for claims regarding construction defects because the issue was raised for the first time on appeal); *Guam Bar Ethics Comm.*, 2001 Guam 20 at ¶ 39 (declining to address the appellant's argument that the trial court erroneously granted a motion to amend under GRCP 59(e) where the movant failed to comply with Rule 5A(2) of the Superior Court Rules because the issue was raised for the first time on appeal). This rule applies where a party fails to raise an argument in a post-judgment motion. *See Bueno v. City of Donna*, 714 F.2d 484, 493-94 (5 th Cir. 1983) ("It is well-established that there can be no appellate review of allegedly excessive or inadequate damages if the trial court was not given the opportunity to exercise its discretion on a motion for a new trial.").

**[79]** Other courts have declined to address challenges to an award of prejudgment interest which were raised for the first time on appeal. *See Ruck Corp. v. Woudenberg*, 611 P.2d 106, 109-10 (Ariz. Ct. App. 1980) ("The Woudenbergs raise for the first time on appeal the propriety of the trial court's award of prejudgment interest. Having failed to object in the trial court, they are now precluded from raising this issue."); *Evans v. Provident Life & Accident Ins. Co.*, 815 P.2d 550, 560 (Kan. 1991) ("As to the prejudgment interest aspect of this issue, the Court of Appeals correctly held that this was a matter not raised before the trial court and hence cannot be raised for the first time on appeal . . ."). We similarly decline to address the issue in this appeal.

**[80]** In *Dumaliang v. Silan*, this court clarified that the rule precluding appellate review of newly raised issues

> is discretionary, and an appellate court may recognize such exceptions as: (1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law.

*Dumaliang*, 2000 Guam 24 at ¶ 12 n.1. Though not elucidated in *Duamlaing*, the exceptions enumerated are in the disjunctive. Thus, "[i]f one of the exceptions is applicable, we have discretion to address the issue." *Bolker v. Comm'r of Internal Revenue*, 760 F.2d 1039, 1042 (9th Cir. 1985).

**[81]** The court could potentially exercise discretion under the third exception wherein review may be granted if "the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed . . . ." *Bolker*, 760 F.2d at 1039. Whether prejudgment interest was properly awarded pursuant to a *quantum meruit* claim arguably meets this standard. *See Folgers Architects Ltd. v. Kerns*, 633 N.W.2d 114, 128 (Neb. 2001) ("[R]egarding the prejudgment interest awarded . . . and whether . . . damages were liquidated, our scope of review is de novo.") (quoting *Blue Valley Co-op. v. Nat'l Farmers Org.,* 257 Neb. 751, 757, 600 N.W.2d 786, 792 (1999)). There are, however, different policies that interact in this case. The first is the policy underlying the rule requiring arguments to be raised at the trial court in the first instance. The policy here is to allow the trial judge the opportunity to address potential errors in rulings which could possibly negate the necessity of an appeal, and further ensure that the issues are adequately briefed at the lower court and a record developed for appeal. *See Monaghan v. Hill*, 140 F.2d 31, 33-34 (9th Cir. 1944) (recognizing that the purpose of Rule 46 requiring a party to "inform[ ] the court of supposed error is to give it an opportunity to reconsider its ruling and to make any changes deemed advisable").

**[82]** The other applicable policy is that which underlies the rule allowing for discretionary review of questions raised for the first time on appeal. The availability of discretionary review is "established for the purpose of orderly administration and the attainment of justice." *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1086 (Ariz. 1987). Our exercise of discretion to review an issue raised for the first time on appeal is reserved for extraordinary circumstances where review is necessary to address a miscarriage of justice or clarify significant issues of law. *See United States v. Munoz*, 746 F.2d 1389, 1390 (9th Cir. 1984) ("The general rule of this circuit is that the district court will not be reversed on a contention not presented to it, absent exceptional circumstances, significant questions of general impact, or where injustice might otherwise result."). With regard to the latter, a review of legal questions should be undertaken only when the policy favoring discretionary review outweighs the rule favoring raising the issues below in the first instance. While the issue presented of whether prejudgment interest may be included as part of *quantum meruit* recovery is interesting, there was no extraordinary reason evident for Leo Palace's failure to raise

the issue in the trial court. *See Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 655 (9th Cir. 1984) ("The general rule is that an issue will not be considered for the first time on appeal. Before the appellate court will address such an argument, the plaintiff must show exceptional circumstances why the issue was not raised below.") (citation omitted). Under these circumstances, we do not find that the lower court's award of prejudgment interest warrants our exercise of discretion to deviate from the general rule against addressing issues raised for the first time on appeal.

**IV.**

**[83]** Based on the foregoing, we hold that the trial court correctly allowed for *quantum meruit* recovery under a quasi-contract theory for work performed by TRA prior to October 15, 2001, but that the court erred in allowing recovery for work performed after that date. The trial court's judgment is **AFFIRMED** in part and **REVERSED** in part, and the matter is **REMANDED** for a recalculation of the *quantum meruit* award and entry of judgment in accordance with this opinion. We also find that Leo Palace waived its present challenge to the trial court's award of prejudgment interest. We therefore **AFFIRM** this aspect of the trial court's judgment.