

FILED

IN THE SUPREME COURT OF GUAM

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SUPREME COURT OF GUAM
By: CLERK OF COURT

GUAM RESORTS, INC.,
Plaintiff-Appellant/Cross-Appellee,

v.

G.C. CORPORATION,
Defendant-Appellee/Cross-Appellant.

GUAM RESORTS, INC.,
Plaintiff-Appellant/Cross-Appellee,

v.

G.C. CORPORATION and DONG YANG CORPORATION,
Defendants-Appellees/Cross-Appellants.

Supreme Court Case No.: CVA12-003
Consolidated with CVA12-004, CVA12-019, CVA12-020
Superior Court Case Nos.: CV0137-08, CV1491-07

AMENDED OPINION ON REHEARING

Cite as: 2013 Guam 18

Appeal from the Superior Court of Guam
Argued and submitted February 22, 2013
Hagåtña, Guam

ORIGINAL

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; KATHERINE A. MARAMAN, Associate Justice; RICHARD H. BENSON, Justice *Pro Tempore*.

CARBULLIDO, C.J.:

[1] This Amended Opinion supersedes in its entirety the prior opinion of this court, *Guam Resorts, Inc. v. G.C. Corp., et al.*, 2013 Guam 10. This litigation arises as a contract dispute between a contractor, G.C. Corporation (“GCC”), a subcontractor/guarantor, Dong Yang Corporation (“Dong Yang”), and the owner of the Okura Hotel, Guam Resorts, Inc. (“GRI”). The trial court found that both GCC and GRI breached obligations to each other, specifically, that GRI reinterpreted the terms of payment in the contract and withheld additional money. It declined to make a specific finding on the amount of work completed and thus did not calculate damages on that basis. It found GCC liable for consequential damages for attorney’s fees, as a result of forcing GRI to participate in other litigation because of GCC’s breach. The trial court also found that the guaranty agreement between Dong Yang and GRI was exonerated. The trial court further found that Dong Yang was equitably estopped from foreclosing on its mechanic’s lien because it held itself out to be a valid guarantor after the guaranty had been exonerated, continuing until it filed the lien, leading GRI to rely on its conduct to its detriment. GRI, GCC, and Dong Yang all filed appeals.

[2] For reasons explained below, we affirm in part, reverse in part, and remand for a limited purpose.

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I. FACTUAL AND PROCEDURAL BACKGROUND

[3] In 2006, GRI sought bids for a renovation project on the Okura Hotel. In September 2006, it agreed to a contract with GCC.¹ GRI agreed to pay GCC \$20,800,000.00 as the total value of the contract, or construction contract sum. The contract called for an “initial [Payment] Upon Commencement of Work” of 10% of the construction contract sum, or \$2,080,000.00. Record on Appeal (“RA”), Aff. Mark Day, Ex. B, English Constr. Agreement at 1 (Dec. 6, 2010). Subsequent payments “for [the] amount due” were to be made at the end of every month (“progress payments”); however, “20% of progress payments [were] retained” by GRI (“retainage”), to be settled within a month of completion. *Id.* The contract also stated the Japanese language version of the contract served as the original and the English translation was not legally binding.

[4] Article 26 of the contract governed payment. Article 26(2) reiterated the arrangement with respect to progress payments, where GRI would pay GCC 80% “of the amount of the Construction Contract Sum corresponding to the completed portion of the Work that has passed the inspection of Supervisor” each month. *Id.* at 9. The remaining 20% served as the retainage. Article 26(4) of the contract stated that if “prepayment has been received, the amount of the progress payment to be billed . . . shall be calculated pursuant to the following formula.” *Id.* at 9. The formula was that the amount to be billed was equal to the construction contract sum minus the amount prepaid, divided by construction contract sum, the product of which was multiplied by the amount calculated under Article 26(2). *Id.*

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¹ The parties submitted at least two somewhat different English translations of the contract. Unless otherwise noted, we cite to the version used by GRI from Mark Day’s affidavit, as this was the version submitted at trial and quoted by the court.

$$\text{Amount to be Billed} = \text{Amount Pursuant to (2)} \times \left\{ \frac{\text{Construction Contract Sum} - \text{Amount Prepaid}}{\text{Construction Contract Sum}} \right\}$$

Id. GCC's translation of Article 26(2) and (4) stated that "[w]hen having received payment in advance," such "partial payment" could be requested by the contractor. RA, GCC Answer & Countercl., Ex. A, English Constr. Agreement at 11 (Dec. 27, 2007).

[5] The Japanese version of the contract at different places used the terms "maeberai" and "daiikaime." Transcripts ("Tr."), vol. 4 at 99, 157-61 (Bench Trial, July 30, 2009); RA, Aff. Mark Day, Ex. A, Japanese Constr. Agreement at 1, 9-10 (Dec. 6, 2010). At trial, Mr. Kilhak Kunimoto ("Kunimoto"), architect for GRI, testified concerning the terms. He stated that "daiikaime" meant "first payment" and was used in place of "initial [payment]" from the English contract. Tr., vol. 4 at 106 (Bench Trial). He testified that "maeberai" appeared in place of "amount prepaid" in Article 26(4) and meant "advance payment." *Id.* at 157-59. He testified that the terms did not have the same meaning.

[6] A great deal of dispute arose surrounding the meaning of the Japanese terms as they applied to Article 26. Specifically, the parties disputed whether the 10% payment of \$2,080,000.00 was a prepayment or advance payment, as argued by GRI, or a first, mobilization, or initial payment, as advocated by GCC. If it were considered prepayment, then it would be factored in under the formula of Article 26(4), such that progress payments to GCC would be further reduced to compensate for this amount being paid upfront. As a mobilization payment, it would be money paid to GCC upfront to cover initial costs, not subject to retainage or factoring in the formula in Article 26(4), though it would count towards the construction contract sum of \$20,800,000.00, the total amount GRI would owe by the completion of construction. Under that

reading, Article 26(4) would apply to any payments made in advance by GRI to GCC to cover costs in the course of construction, as a loan, distinct from the 10% payment.

[7] GCC subcontracted some of the work to Dong Yang. As part of the agreement, GCC presented Dong Yang to GRI as a guarantor. In September 2006, Dong Yang signed a statement promising GRI to act as guarantor of the project, and that it would be jointly and severally liable for any obligations in case of default by GCC.

[8] During construction, a number of change orders were approved by GRI, adding to the nature and scope of the work. GRI approved \$797,600.00 worth of work, rendering the total value of the contract \$21,597,600.00.

[9] A number of disputes arose during construction. Of significance to the present appeal, following the sixth progress payment, GRI made changes to the amount paid, decreasing what GCC actually received. It specifically did so by considering the initial 10% payment as prepayment, applying the formula for Article 26(4) to the payments going forward, reducing the amount given to GCC in payments seven through eleven. It retroactively applied this to payments one through six as well, deducting a greater amount to compensate for what it deemed to be earlier overpayment. Kunimoto testified that this seemed onerous. He stated that the typical retainage in the industry was 5-10%. He testified that Mr. Noshita, a supervisor at GRI, had disagreed with Kunimoto's decision not to apply Article 26(4), and acted to decrease the amount that was actually paid to GCC. Then Kunimoto was relieved of duty on the project by Mr. Mori, President of GRI. There were also a number of disputes about use of outside construction material that had not undergone inspection, as promised in the contract.

[10] In September 2007, GCC ceased construction with only a portion of the project completed. GRI notified GCC that it believed this action signified GCC's repudiation of the contract.

[11] At the time of suspension, the court found that GRI had paid GCC \$6,967,547.19, which includes the initial 10% payment, but does not include any retainage.

[12] On November 20, 2007, GCC sent a 15-day notice of a mechanic's lien against the hotel in the amount of \$2,349,618.70. It recorded the lien against the hotel on December 6, 2007.

[13] Dong Yang filed a mechanic's lien against the hotel on November 29, 2007. It filed a second lien in January 2008, but the court later found the attempt to enforce it untimely, and Dong Yang did not appeal that decision.

[14] On December 12, 2007, GRI sued GCC to quiet title and extinguish the lien. GCC brought counterclaims for breach of contract, quantum merit, and sought foreclosure of the lien.

[15] Dong Yang sued GRI and GCC to foreclose on its mechanic's liens and for breach of contract. GRI filed suit against GCC for breach of contract, breach of constructive trust, fraudulent misrepresentation, constructive fraud, and slander of title, and against Dong Yang for breach of guaranty. The cases were consolidated, but then the parties agreed to bifurcate the claims by GRI against Dong Yang and Dong Yang's claim for indemnification against GCC from the other issues.

Dispute between GCC and GRI, CV CV1491-07

[16] The court held a ten-day bench trial on the main case between GCC and GRI, the pertinent facts of which were discussed above.

[17] Following trial, on March 17, 2011, the court issued an Amended Findings of Fact and Conclusions of Law. It found that when work ceased on the renovations, between 30.39% and

39.62% of the project had been completed, but it could not determine the exact percentage from the evidence submitted. Specifically, it noted that the only evidence to support GRI's 30.39% was the testimony of Mr. Tomada, who was not qualified as an expert. However, it also found that while GCC had expert testimony from Kunimoto that 39.62% had been completed, it found that that figure was based in part on work and materials that had not been incorporated into the project, particularly for claims for a fire alarm system that was not installed and for a variety of installations that GCC claimed it had done, but the court found it had not.

[18] The trial court found that the final contract required a 20% retainage from each progress payment, which GRI would retain until work was completed. The contract called for a total payment of \$20,800,000.00, of which 10%, or \$2,080,000.00, was due upon signing. The contract permitted multiple methods of payment, and GCC opted to be paid monthly based on progress payments.

[19] The court found that starting with the seventh progress payment, problems arose. GCC's filings were not in conformity with the contract, and GRI increased its retainage from 20% to 30%. It found that there was "no way for [this] Court to determine" how much of payment applications 7-11 were reduced because GRI refused to pay GCC a 50% deposit for certain items and materials. RA, Am. Finds. Fact & Concl. L. at 10 (Mar. 17, 2011). When work was suspended, GCC claimed to have received \$4,815,731.74, while GRI retained \$1,658,378.36.

[20] The court noted the dispute over the meaning and significance of "maeberai" and "daiikaime." *Id.* at 17. The court concluded that GRI's interpretation, leading to a 28% retainage, "[was] not reflective of what the parties negotiated[.]" *Id.* It found that "maeberai" and "daiikaime" were not the same, but rather that the 10% payment was an initial payment, rather than a prepayment subject to Article 26(4). *Id.* at 20. Treating the terms as equivalent and

factoring in the formula under Article 26(4) would have meant that GCC was essentially agreeing to a 30% retainage, when it had specifically rejected such an amount in earlier negotiations, and indeed 20% was well above the industry standard. The court found that GRI breached the contract by improperly adding to the retainage payments beyond the agreed-upon 20%.

[21] With respect to damages, the court made the following findings. On actual damages, the court found that there was neither an underpayment nor an overpayment. It noted that GRI claimed that it had overpaid, based on 30.39% of the work being done, and GCC claimed it was underpaid, based on 39.62% of the work being completed. Because the court found that it could not make a determination on how much work was completed, “both parties failed their burden of proof regarding this damage amount.” *Id.* at 29.

[22] On equitable restitution, the court noted that it had initially found that GCC was entitled to \$638,224.82 for the amount it needed to pay its subcontractors. It now found that because GCC did not pay its subcontractors with its own money, providing GCC with such money would serve as a windfall, which was not the purpose of restitution damages. It found that GRI’s incorrect interpretation of Article 26(4) negatively impacted GCC and its ability to complete the work. While noting that it could not make an exact determination for the cost of GRI’s breach of contract, it found that the parties were responsible to each other for four breaches of contract, but that GRI was solely responsible for the Article 26(4) breach, and therefore it was awarding GCC 20% of the unpaid balance, or \$405,331.01 out of \$2,026,655.03. This \$2,026,655.03 amount was “the balance due” from the eleven progress payments excluding any of the retainage. *Id.* at 30 n.29. This award was an “equitable amount for compensatory damages.” *Id.* at 31.

[23] The court also awarded GRI consequential damages for attorney's fees. It noted that it found GCC liable for fraudulent statements in a letter sent to GRI on July 26, 2007. The court had made this finding previously, and initially found that no further evidence would be considered on this point. It had ordered the parties to submit further evidence regarding damages for attorney's fees for *in camera* inspection, to which GCC objected. It noted that the present attorney's fees were being considered as a result of GCC's fraudulent behavior, and that the "unique situation" of the case meant that it had to wait until other cases involving subcontractors were resolved, because GRI incurred other legal costs in prosecuting or defending actions against third parties as a result of the fraudulent statements. *Id.* at 24-25. The court noted that it had not resolved this previously because the other cases were not then resolved. It awarded \$303,349.20 to GRI from GCC as a result of GCC's fraudulent breach, all for attorney's fees.

[24] The court ultimately awarded GCC \$72,477.32 in actual damages for the quantum meruit claim and \$405,331.01 in equitable compensatory damages, and awarded GRI \$303,349.20 in consequential damages.

[25] GCC moved for clarification and reconsideration, and on December 29, 2011, the court issued a Supplemental Findings of Fact and Conclusions of Law. While it did not alter any of its earlier conclusions, the court supplemented its legal and factual findings. It repeated that it did not trust Kunimoto's demeanor and that much of the work billed for was not in conformity with the contract. With respect to the retainage, it stated that GCC was not entitled to the 20% retainage because of the court's earlier determination that GCC had been neither under nor over paid and had not performed all of the work in conformity with the contract. It noted that the retainage was money withheld to provide security for the owner, and GCC did not acquire rights to that money unless and until the work was complete, per the contract.

Dispute between Dong Yang and GRI, CV0137-08

[26] Meanwhile, Dong Yang and GRI argued over their respective liabilities. On April 6, 2012, the trial court issued a Decision and Order on motions for summary judgment by Dong Yang and GRI. The issues in dispute concerned the mechanic's liens and Dong Yang's status as guarantor. First, the court found that the Guaranty Contract itself was valid. It found that GRI properly verified its Notice of Cessation as applied to both the First Lien and Second Lien. It found that Dong Yang filed a timely claim of lien as to the First Lien, but was untimely as to the second, which was therefore unenforceable.

[27] As to the First Lien, the court found that the guaranty agreement was exonerated by the change orders of the work in the original prime contract between GCC and GRI, and therefore Dong Yang was not responsible as guarantor for any part of the contract.

[28] In turn, the court agreed with GRI that Dong Yang was equitably estopped from enforcing the lien against GRI. It found that throughout the project, up until termination, Dong Yang's actions led GRI to believe that Dong Yang intended the Guaranty Agreement to be enforceable and acted upon. The court stated that GRI was unaware that Dong Yang was a subcontractor as well as a guarantor, that it would file the lien rather than protect GRI from such liens, and that it would fail to honor the guaranty. Finally, it found that GRI failed to secure another guarantor in reliance upon Dong Yang acting as a guarantor. Therefore, the court found that all the elements of estoppel were met in this case, and that as a result, Dong Yang was equitably estopped from enforcing the lien. It stated that it came to this conclusion due to "the circumstances of the . . . transactions and the overall conduct of the parties," even though it had found the guaranty unenforceable. RA, Dec. & Order (Mot. Summ. J.) at 30 (Apr. 6, 2012).

[29] The court granted in part Dong Yang's motion for summary judgment, in finding the guaranty unenforceable, but granted in part GRI's motion for summary judgment, finding that Dong Yang was equitably estopped from enforcing the First Lien and that the Second Lien was untimely. Thus, neither party was entitled to damages.

[30] The parties filed appeals challenging orders from both cases. First, the parties sought to appeal the December 29, 2011 order, docketed on December 30, 2011, in CV0137-08. Second, the parties sought to appeal the judgment entered on April 6, 2012, and docketed on April 9, 2012, in CV1491-07.

[31] We issued a series of orders consolidating all four appeals into CVA12-003.

II. JURISDICTION

[32] We have jurisdiction over this appeal pursuant to the following statutes: 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-9 (2013)); 7 GCA §§ 3107(b), 3108(a) (2005); and 7 GCA § 25102(a) (2005).

III. STANDARD OF REVIEW

[33] Findings of fact made following a bench trial are reviewed for clear error. *Yoshida v. Guam Transp. & Warehouse, Inc.*, 2013 Guam 5 ¶ 20. This court looks "at whether the trial court's finding of fact is supported by substantial evidence, and the trial court's decision will only be reversed if this court has a definite and firm conviction that a mistake has been committed." *In re Guardianships of Moylan*, 2011 Guam 16 ¶ 12 (internal quotation marks omitted). Legal conclusions are reviewed *de novo*. *Yoshida*, 2013 Guam 5 ¶ 20.

[34] Legal issues of contract interpretation are reviewed *de novo*. *Pangelinan v. Camacho*, 2008 Guam 4 ¶ 6.

[35] The measure of damages is a mixed question of law and fact warranting *de novo* review.

See Fargo Pac., Inc. v. Korando Corp., 2006 Guam 22 ¶ 20.

[36] A trial court's decision to grant a motion for summary judgment is reviewed *de novo*.

Guam Top Builders, Inc. v. Tanota Partners, 2006 Guam 3 ¶ 8 ("*Guam Top Builders I*").

Summary judgment is only proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Guam R. Civ. P. 56(c). "In rendering a decision on a motion for summary judgment, the court must draw inferences and view the evidence in a light most favorable to the non-moving party."

Guam Top Builders I, 2006 Guam 3 ¶ 8.

[37] Whether a court correctly determined equitable estoppel applies is reviewed for abuse of

discretion. *Guam Election Comm'n v. Responsible Choices for all Adults Coal.*, 2007 Guam 20

¶ 76; *see also Mendiola v. Bell*, 2009 Guam 15 ¶ 12 (a court's imposition of equitable remedies generally is reviewed for abuse of discretion). A court abuses its discretion "when its decision is

based on clearly erroneous factual findings or an incorrect legal standard." *Carlson v. Perez*, 2007 Guam 6 ¶ 15.

IV. ANALYSIS

A. Whether Article 26(4) Should Apply to the Progress Payments

[38] While most of the findings on the breach of contract itself are not disputed on appeal, the parties disagree on the court's reading of Article 26(4) in finding that GRI breached the contract by reinterpreting it during construction, withholding additional retainage, and applying Article 26(4) to the calculation of payments. Under any reading of the contract, had the contract been satisfactorily completed without further change orders, GRI would have owed GCC

\$21,597,000.00: the construction contract sum plus the change orders. GRI argues that if Article 26(4) were not applied to the progress payments, then GCC would receive a windfall, in that it would receive the full construction contract sum in progress payments plus the \$2,080,000.00. GRI Response Br. at 6-7 (Oct. 30, 2012). Therefore, it argues that this reading of the contract cannot be correct, but instead that Article 26(4) must apply to such payments, and it was right to withhold the additional retainage as a result. *Id.* at 7-8.

[39] In interpreting conflicting or uncertain portions of a contract, “an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect[.]” Restatement (Second) of Contracts § 203(a) (1981). Courts prefer an interpretation that harmonizes different sections, rather than leaving them in conflict, if plausible. *See, e.g., Gutzi Assocs. v. Switzer*, 264 Cal. Rptr. 538, 540-41 (Ct. App. 1989). “[R]epeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.” Restatement (Second) of Contracts § 202(4) (1981).

[40] With respect to technical terms, they are to be “interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.” 18 GCA § 87111 (2005). Mobilization payments have been defined as “large advances to a contractor that enable him to purchase necessary machinery and tools.” Hassan Alaghband, *Abolition of the Completed Contract Method Under Fire: A Study in Legislative Compromise*, 32 Am. U. L. Rev. 1009, 1021 n.73 (1982); *see also* D. Robert Beaumont, *Assuring Performance in International Construction Contracts*, *Construction Law.*, July 1999, at 5 (“[C]ontractors request

an initial down payment or ‘mobilization payment’ to maintain positive cash flow when they incur start-up costs.”).

[41] We agree with the trial court’s interpretation of the contract and finding that GRI committed breach by reinterpreting it and applying Article 26(4) to the payments. Kunimoto presented testimony that “daiikaime” appeared in place of “initial [payment]” in the Japanese contract, and that “maeberai” appeared in place of “amount prepaid” in Article 26(4). Tr., vol. 4 at 106, 157-59 (Bench Trial). He also testified that the different terms had different meanings, consistent with GCC’s reading of the contract: “daiikaime” was a first payment that was not subject to retainage, while “maeberai” payments were subsequent advance payments. *Id.* As stated in the English contract, the Japanese language version is controlling. Further, GRI’s first six payments to GCC were made in accordance with this interpretation: GRI reduced the payments by the agreed-upon 20% retainage and did not apply the formula in Article 26(4). This constitutes “repeated occasion[] for performance . . . with knowledge of the nature of the performance and opportunity for objection” and is therefore “given great weight in the interpretation of the agreement.” Restatement (Second) of Contracts § 202(4) (1981). In addition, this reading is buttressed by the fact that the contract delineates the 10% initial payment under “payment of the construction contract sum” segment of the contract, while Article 26(4) begins by noting “[i]n the event that prepayment has been received” or “when having received payment in advance.” RA, Aff. Mark Day, Ex. B, English Const. Agreement at 1, 10. This means that the former is intended to occur, while the latter is merely conceived of as a possibility, indicating that the terms refer to different types of payments.

[42] This reading of the contract neither results in a windfall to GCC nor renders certain terms superfluous. The contract specifies that the final payment, which includes the 20% retainage, is

to be “settled” within a month of completion. *Id.* at 1. At that point, GRI would pay GCC from the retainage the balance due only, taking into account all prior progress payments and the 10% payment at the beginning. It would not simply pay GCC the entirety of the retainage if doing so would exceed the total construction sum plus change orders, and nothing in the contract suggests that would be required. Article 26(4) is not rendered superfluous because it is in place “in the event” of such prepayment, such as if GRI needed to advance GCC a substantial amount of money for supplies for a particular phase of the project. *Id.* at 10.

[43] Accordingly, the trial court did not err in determining that GRI breached the contract by reinterpreting the agreement and withholding additional retainage.

B. Damages

[44] The parties also dispute the damages imposed by the trial court, in particular the “equitable amount for compensatory damages,” also called “equitable restitution.” RA, Am. Finds. Fact & Concl. L. at 29-31. The court awarded \$405,331.01 to GCC because such amount was 20% of the outstanding balance due, corresponding to the fact that the parties each committed four mutual breaches and GRI had committed one breach unilaterally. *Id.* at 30 & nn.28-29. GCC contends that it is owed additional money for completing up to 39.62% of the project, including the money withheld as retainage. GCC Opening Br. at 48 (Oct. 4, 2012). GRI argues that because the court could not decide upon how much work was completed, it could not determine if either party was damaged at all, and awarding damages by applying an “arbitrary multiplier” was improper. GRI Response Br. at 8-10.

[45] At the outset, we note that Dong Yang has also attempted to appeal the lower court’s findings on damages regarding GCC and GRI’s contract. However, it was not a party to that case and has no direct entitlement to those damages. Accordingly, it lacks standing to raise such

argument. See *Benavente v. Taitano*, 2006 Guam 15 ¶ 15 (a party must suffer an injury which is concrete, particularized, and actual or imminent which can be addressed by a favorable decision of the court); *Pagan v. Calderon*, 448 F.3d 16, 27 (1st Cir. 2006) (courts generally do not allow a party to rely on an injury to a third party in order to gain access to court).

[46] Nonetheless, the trial court's finding on this aspect of damages is properly before us generally because both GCC and GRI seek to challenge it. GRI Opening Br. at 18-25 (July 2, 2012); GCC Opening Br. at 36-50. "Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Park v. Mobil Oil Guam, Inc.*, 2004 Guam 20 ¶ 13 (citation and internal quotation marks omitted); see also 20 GCA § 2201 (2005). Such an award is authorized generally by 20 GCA § 2201, which provides that, in breach of contract cases, "the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." 20 GCA § 2201. Significantly, "[n]o damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." 20 GCA § 2202 (2005). These laws are derived from California Civil Code sections 3300 and 3301. See 20 GCA §§ 2201-2202.

[47] Restitution is a different type of remedy. "The primary purpose of restitution is to prevent unjust enrichment, and a party unjustly enriched is required to disgorge himself of the benefit of which it would be unjust for him to keep by returning it in kind or paying money." *Guam Bar Ethics Comm. v. Maquera*, 2001 Guam 20 ¶ 25. We contrasted restitution from an ordinary claim of damages, "where the goal is to compensate the injured party." *Id.* Likewise, in a contracts case, a party in breach "is entitled to restitution for any benefit that he has conferred by way of part performance . . ." *Guam Top Builders, Inc. v. Tanota Partners*, 2012

Guam 12 ¶ 61 (“*Guam Top Builders IP*”) (citing Restatement (Second) of Contracts § 374 (1981)).

[48] Under either theory, the award here was made in error. The trial court awarded GCC \$405,331.01 because it constituted 20% of \$2,026,655.03, which was the amount unpaid by GRI and still sought by GCC. The court arrived at 20% because, of five breaches that occurred, four were mutual and one was attributable to GRI. RA, Am. Finds. Fact & Concl. L. at 30 n.28. This amount does not correspond with either the amount of benefit unjustly gained by GRI or the losses suffered by GCC in rendering work without being compensated.

[49] California courts have held that “the fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery.” *Dillingham-Ray Wilson v. City of Los Angeles*, 106 Cal. Rptr. 3d 691, 700 (Ct. App. 2010) (citing *Cal. Lettuce Growers v. Union Sugar Co.*, 289 P.2d 785 (Cal. 1955)). Another court clarified that “[w]hen it is clear that a party has been damaged, uncertainty regarding the precise amount of damages is not a reason to deny recovery.” *Dominium Mgmt. Servs., Inc. v. Nationwide Hous. Grp.*, 195 F.3d 358, 366 (8th Cir. 1999) (involving the application of California law and specifically Cal. Code § 3301); *GHK Assocs. v. Mayer Grp., Inc.*, 274 Cal. Rptr. 168, 179 (Ct. App. 1990) (“Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty.”). The court in *GHK* further stated that the “law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation.” *GHK Assocs.*, 274 Cal. Rptr. at 179.

[50] Taking this into account, we vacate the award of damages in this respect and remand with the following instructions to calculate the damages under a contract damages theory. We are

mindful of the trial court's concern that it could not come up with an exact figure as a result of conflicting and uncertain testimony and evidence. However, it must produce a percentage which best approximates the amount of work completed, and base its award on that number. To that end, it should rely on findings of fact already made, and need not otherwise rehear evidence or alter its findings of fact. It found that, other than Mr. Tomada's lay testimony, GRI presented no expert and no supporting evidence to establish its 30.39% figure, while GCC presented some evidence to back its 39.62% assertion, but some of that work was not done in compliance with the contract's requirements. RA, Am. Finds. Fact & Concl. L. at 5. It later stated that it did not believe Kunimoto's testimony or indeed any of the progress payment invoices, as all contained factual inaccuracies. RA, Supp. Finds. Fact & Concl. L. at 2 (Dec. 29, 2011). While we are aware of the difficulty of the task, the court must decide what portion of the work was completed, based on those findings, and assign an overall percentage. For instance, where it found inaccuracies in testimony or an invoice, it could choose to excise the inaccurate portion of the work or otherwise alter the amount in the calculation to best reflect its reading of the facts, depending on the situation. The court need not be absolutely certain the percentage reflects the precise amount of work completed, but it must produce a percentage based on the best available consideration of the evidence submitted. It may take new evidence if it believes doing so would be necessary to the calculations, or it may simply comb through the extant documentary evidence and, relying on findings already made, account for the work that was not completed in coming to a conclusion. It may also supplement such work with additional findings if necessary.

[51] Once it has done so, the court can then figure out the total amount due based on the construction contract sum. The damages in this area will thus be the amount corresponding to the work completed minus the amount already paid to GCC. The actual fate of the retainage is

therefore irrelevant, since the end result is simply that GCC receive the amount commensurate with the work completed, whether from the retainage or otherwise.

C. Attorney's Fees

[52] GCC appeals the decision to grant GRI attorney's fees as consequential damages, resulting from GRI having to defend itself in other litigation as a result of GCC's breach of contract. It argues that the court improperly considered evidence after the close of the case and did so *ex parte*, without giving GCC a chance to examine it or respond. GCC Opening Br. at 50-61.

[53] While attorney's fees are generally not allowed as compensatory damages in fraud cases, the plaintiff may obtain them as an element of damages. *Fleming v. Quigley*, 2003 Guam 4 ¶ 28. This is so where the plaintiff, "as a proximate result of defendant's fraud, is required to prosecute or defend an action against a third party for the protection of his interest." *Id.*

[54] The Guam Rules of Civil Procedure ("GRCP") allow for attorney's fees in certain situations. *See* Guam R. Civ. P. 54(d). Rule 54(d) notes that while requests for fees shall be made and proved by motion, this is not true if the claim involves fees as an element of damages to be proved at trial. Guam R. Civ. P. 54(d)(2)(A). This is essentially the same as the analogous federal rule. *Compare* Guam R. Civ. P. 54(d)(2)(A), *with* Fed. R. Civ. P. 54(d)(2)(A). Federal courts have noted that to obtain such fees, a party "must raise its claim in time for submission to the trier of fact, which means before the trial rather than after." *Rissman v. Rissman*, 229 F.3d 586, 588 (7th Cir. 2000). Courts may reserve making a determination on fees until after trial, provided a party requests as much. *Lamp, Inc. v. Int'l Fid. Ins. Co.*, 493 N.E.2d 146, 150 (Ill. App. Ct. 1986). It is unclear, however, whether this applies to the submission of evidence for such claims, which that court did not address.

[55] Under the circumstances, because the amount of attorney's fees was not calculable until subsequent litigation had been completed, it was appropriate for the court to wait until the conclusion of other litigation before taking evidence and making findings in this area. GCC raised the issue in its Answer and Counterclaims, and the trial court merely reserved, if impliedly, ruling on it until it became ripe. *See RA, GCC Answer & Countercl. at 21-22.* There is no indication GRI was prejudiced by this delay. We affirm the decision in that respect.

[56] California courts have held that where "attorney's fees are recoverable as damages, the determination of the recoverable fees must be made by the trier of fact unless the parties stipulate otherwise." *Brandt v. Superior Court*, 693 P.2d 796, 800 (1985). Relying on this statement, another California court held, in an unpublished case, that review of billing records *in camera* to determine fees was inappropriate. *Concept Enters., Inc. v. Hartford Ins. Co. of the Midwest*, No. CV007267NM(JWJX), 2001 WL 34050685, at *8 n.6 (C.D. Cal. May 22, 2001).

[57] Further, even where *in camera* review of privileged materials may be necessary, other safeguards exist to ensure fairness to the opposing party. Such review is disfavored and in "order to warrant such review with respect to the validity of the assertion of a privilege or protection, there must be a sufficient evidentiary showing to create a legitimate issue as to the application of the privilege or protection asserted." *Nationwide Payment Solutions, LLC v. Plunkett*, 831 F. Supp. 2d 337, 338 (D. Me. 2011). Specifically, where documents are privileged, the adverse party should have an opportunity to review redacted versions. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 505 (9th Cir. 1986) ("The court may withhold . . . any information it finds [privileged]."). Fee information itself is generally not privileged. *Fed. Sav. & Loan Ins. Corp. v. Ferm*, 909 F.2d 372, 374 (9th Cir. 1990).

[58] There is no indication in the record why GCC should not have been afforded an opportunity to review the records, or a redacted portion of the same, and file a response. As noted, typically *in camera* review is disfavored, many of the records concerning fees would likely not have been privileged to begin with, and even if some were, redaction or other measures might be possible to protect both the interests of GRI and allow GCC a fair opportunity to respond.

[59] Accordingly, we vacate and remand for a limited purpose in this respect. The trial court may fashion a remedy as needed to allow GCC the opportunity to review the records and respond, including redactions, filing under seal, and holding a hearing if necessary. GCC must be given the opportunity to file a response to the proposed cost and documentation supporting it. The trial court retains the discretion as to whether a factual hearing or other proceedings are necessary to resolve the issue.

D. Estoppel

[60] Dong Yang raises a number of arguments on appeal against the decision rendered in litigation between it and GRI. First and foremost, it argues that while the trial court properly found that its guaranty agreement with GRI was exonerated, it erred by finding that, despite this, Dong Yang was equitably estopped from enforcing its mechanic's lien, imposed when GRI did not pay it for work done in its role as a subcontractor. Dong Yang Opening Br. at 15-21 (Oct. 2, 2012). Dong Yang argues that there is nothing which prevents a party from acting as both a guarantor and a subcontractor, and therefore as a guarantor and a lienholder. *Id.* at 16-17.

[61] The doctrine of equitable estoppel applies if all elements of a four-part test are met:

- (1) the party to be estopped must be apprised of the facts;

(2) he must intend that his conduct will be acted upon, or act in such a manner that the party asserting the estoppel could reasonably believe that he intended his conduct to be acted upon;

(3) the party asserting the estoppel must be ignorant of the true state of the facts; and

(4) he must rely upon the conduct to his injury.

Limtiaco v. Guam Fire Dep't, 2007 Guam 10 ¶ 58; see also *Islander Yachts, Inc. v. One Freeport 36' Vessel*, 219 Cal. Rptr. 654, 658 (Ct. App. 1985) (explaining doctrine of equitable estoppel).

[62] Enforcement of mechanic's liens may be subject to estoppel. See, e.g., *Peterson Mech., Inc. v. Nereson*, 466 N.W.2d 568, 571 (N.D. 1991). The California court in *Islander Yachts* applied estoppel to enforcement of a lien when the lien holder represented to the purchaser that it retained no interest in the boat being purchased, when in fact it held a lien on the boat. 219 Cal. Rptr. at 658. Another California court held that "[e]stoppel may be invoked against a liening materialman when he gives the contractor a waiver of lien, a false receipt of payment, or a promise to look only to the contractor for his money, to induce payment from the owner." *R. D. Reeder Lathing Co. v. Allen*, 425 P.2d 785, 788 (Cal. 1967).

[63] Courts have held that a party may be both a surety for a contract and enforce a lien without being estopped from the latter. E.g., *Prescott Nat'l Bank v. Head*, 90 P. 328, 330 (Ariz. 1907). In that case, the plaintiff acted as a surety on a bond for the lender in a construction project, but also sold material to the contractor. *Id.* at 329. The court held that there was nothing inherently inequitable about such an arrangement, noting that at worst the dual obligations could be set off against one another, such that both could be honored. *Id.* at 330.

[64] In this case, the trial court did not base its decision on the fact that Dong Yang acted as a guarantor and subcontractor, but rather because Dong Yang contracted to be a guarantor and had

led GRI to believe it would honor the guaranty up until the point it filed a lien, it should be estopped from enforcing it. RA, Dec. & Order (Mot. Summ. J.) at 29.

[65] Applying the facts of the case to the test for equitable estoppel, we hold that the trial court's findings were not an abuse of discretion. First, it found that the party to be estopped, Dong Yang, admitted it signed a guaranty and knew it created a potential liability if difficulties arose. *Id.* Second, the court found that Dong Yang took no steps to notify GRI that it believed the guaranty was exonerated until it filed the lien, leading GRI to believe the guaranty remained valid and that Dong Yang intended to follow through. *Id.* at 29-30. This is consistent with the evidence, which includes the signed guaranty agreement and lack of any action on Dong Yang's part to repudiate the agreement prior to filing the lien.

[66] Second, it was not an abuse of discretion to find that Dong Yang expected GRI to believe it would act on its guaranty. Dong Yang did not repudiate the guaranty until it filed a lien when the contract was terminated, and took no earlier steps to indicate that it would not follow through. This is true even with the guaranty being exonerated, because Dong Yang had knowledge that it *appeared* to GRI as if it were acting as guarantor.

[67] The third element requires that "the party asserting the estoppel must be ignorant of the true state of the facts[.]" *Limtiaco*, 2007 Guam 10 ¶ 58. In the present case, this means that GRI must have been ignorant that Dong Yang was not required to honor the guaranty and that it had no intention of doing so. There is no indication that it knew that Dong Yang was not going to follow through on the guaranty, in part as evidenced by its failure to secure another guarantor. It also presented direct testimony to this effect. RA, Aff. Mark Day ¶ 11-15.

[68] It is a closer question as to whether GRI knew, or can be imputed to have known, that Dong Yang had no obligation to honor the guaranty because the guaranty had been exonerated.

This is because, according to the trial court's findings, it was GRI's own actions in altering the agreement that led to it being exonerated. RA, Dec. & Order (Mot. Summ. J.) at 12-14.

[69] In *Palomo v. Manglona*, 2012 Guam 18 ¶ 43 n.14, we discussed equitable estoppel in a child support case. The father of the child sought to equitably estop the mother from seeking child support payments from him, on the basis that the mother put the name of another man, her ex-boyfriend, on the child's birth certificate. *Id.* We held that, assuming equitable estoppel could apply in such a case generally, the father did not meet the third prong of the test. *Id.* We held that the defendant was not ignorant of the facts concerning the true paternity of the child, when he had relations with the mother prior to and during the time she became pregnant and had been told by the mother that he might be the father, even though he did not actually know the results of a paternity test confirming this. *Id.*

[70] In this case, the trial court found that GRI did not know that the guaranty had been exonerated within the meaning of the estoppel requirements. It is possible that a circumstance may arise where a party's actual ignorance is so reckless that knowledge must be imputed to it, but absent such a set of facts, which are not present here, actual knowledge is required. Here, GRI presented evidence, and the court agreed, that it did not know that it had exonerated the guaranty, and there is no basis for overturning that finding. RA, Aff. Mark Day ¶ 11-15; RA, Dec. & Order (Mot. Summ. J.) at 29-30.

[71] Fourth, the trial court's finding that GRI relied upon Dong Yang's conduct to its detriment is supported by the record, in that it did not seek a new guarantor at any point in time, believing Dong Yang to be standing in that role. *See* RA, Aff. Mark Day ¶ 14.

[72] Accordingly, we affirm the trial court's findings that Dong Yang is estopped from enforcing its lien. The other issues raised by Dong Yang concern issues that are relevant only if

we reverse the trial court's decision on estoppel. Because we decline to do so, Dong Yang is not entitled to damages in this respect, and we have no occasion to reach the trial court's alternative findings on excluding a particular account from the calculations and denying prejudgment interest in assessing damages.

V. CONCLUSION

[73] The trial court's decision in finding that GRI breached the contract by reinterpreting Article 26(4) to apply to progress payments is affirmed. On the trial court's findings on damages for equitable restitution, we reverse and remand. The trial court must make whatever additional findings and calculations are necessary to produce, to the best of its ability, a percentage of work completed, and then assess damages based on that figure. It need not conduct additional hearings or proceedings if it feels it has a sufficient factual record or additional proceedings would not be helpful. It may review invoices and testimony which it previously found were unreliable and incorporated noncompliant work, and assign a percentage based on the court's best estimate of how much compliant work was completed. Once it arrives at a percentage, it should apply that to the total value of the contract, determine how much is owed, and assess damages based on how that compares to the present balance of payments.

[74] We affirm in part and reverse in part the trial court's decision on attorney's fees as consequential damages. We affirm the decision to consider evidence for attorney's fees after the conclusion of the trial, but we remand for the limited purpose of providing GCC with the chance to review the records, either as submitted or with suitable precautionary measures to avoid divulging privileged information, to file any objections, and for the court to consider the same before ruling.

[75] We affirm the trial court's decision finding that Dong Yang was estopped from enforcing its mechanic's lien. We hold that this is so not because Dong Yang stood as both a guarantor and a subcontractor/lienholder, but rather because it held out to GRI that it still intended to honor the guaranty, which had been exonerated, when in fact it did not intend to do so. We hold that GRI was ignorant of the fact that Dong Yang's guaranty had been exonerated and that Dong Yang had no intention of honoring it. We therefore do not reach any of the other issues Dong Yang raises with respect to the court's alternative findings.

[76] **AFFIRMED** in part, **REVERSED** in part, and **REMANDED** for further proceedings not inconsistent with this opinion.

Original Signed - **Katherine A. Maraman**
By
KATHERINE A. MARAMAN
Associate Justice

Original Signed - **Richard H. Benson**
By
RICHARD H. BENSON
Justice *Pro Tempore*

Original Signed - **F. Philip Carbullido**
By
F. PHILIP CARBULLIDO
Chief Justice