2019 IL App (4th) 160567-U

NO. 4-16-0567

FILED
March 6, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

STARK EXCAVATING, INC., Plaintiff-Appellant and Cross-Appellee, v. CARRI SCHARF MATERIALS COMPANY, an Illinois Corporation, Defendant-Appellee and Cross-Appellant, v. DAVID STARK, Individually, and STARK EXCAVATING, INC., Counter-Defendants/Plaintiffs- Appellants/Cross-Appellees.	)	Appeal from the Circuit Court of McLean County No. 06L118 Honorable Paul G. Lawrence, Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed in part and reversed in part plaintiff's appeal and remanded with directions, finding the trial court erred in granting summary judgment and awarding damages in favor of defendant. The appellate court also affirmed defendant's cross-appeal.

¶ 2 In August 2006, plaintiff, Stark Excavating, Inc., filed a complaint against defendant, Carri Scharf Materials Company (Scharf), for conversion and trespass. In March 2011, Scharf filed a second-amended countercomplaint against Stark Excavating, Inc., and David Stark, individually (hereinafter referred to collectively as Stark unless specifically noted), setting forth claims of unlawful conversion, conspiracy to defraud, and tortious interference with a contractual relation. The trial court granted summary judgment in favor of Stark. In August

2013, Scharf filed a second amendment to the second-amended countercomplaint against Stark, alleging trespass and unjust enrichment. Both parties filed motions for summary judgment. In December 2014, the court entered partial summary judgment in favor of Scharf. Following a bench trial on damages, the court awarded Scharf $980,076.28.

¶ 3 In its appeal, Stark argues the trial court erred in (1) granting summary judgment in favor of Scharf on its unjust enrichment and trespass claims and (2) not granting summary judgment in Stark's favor on its claims of conversion and trespass. Stark also argues in the alternative that the court's award to Scharf should be reduced. We affirm in part, reverse in part, and remand with directions. In its cross-appeal, Scharf argues the court erred in (1) granting summary judgment in favor of Stark, (2) denying its motion to amend the pleadings, and (3) failing to award punitive damages in its favor. We affirm the cross-appeal.

¶ 4 I. BACKGROUND

¶ 5 A. The Parties

¶ 6 This case concerns a dispute involving two lease agreements to excavate sand and gravel underlying the same 160-acre tract of land (leased premises) in McLean County. David Stark was the president and an agent of Stark Excavating, Inc. Scharf and Stark Excavating, Inc. are in the business of supplying sand and gravel material and often submit competing bids to supply the material for the same projects, including projects by the McLean County Highway Department and the Illinois Department of Transportation.

¶ 7 B. The Leases

¶ 8 1. *The Stark Sand and Gravel Lease*

¶ 9 On December 17, 1996, Stark (as lessee) entered into a lease with Marion Cloud and Commerce Bank (as trustees) under the will of Delmar Darrah; the Cloud Family

Partnership; and Skade Family Limited Partnership (collectively the property owners) for "all the sand and gravel in and underlying [the leased premises] together with the right, at all times, to enter on said land and to remove therefrom sand and gravel as Lessee may see fit, subject to covenants as set forth in this agreement." Stark agreed to pay the property owners, "as royalty for the removal of sand, gravel and other materials from the leased premises, a royalty rate per ton for each ton of sand, gravel or overburden removed from the leased premises for sale or delivery to others or for the use by Lessee." The Stark lease was to commence January 1, 1997, and terminate on December 31, 2003.

¶ 10 Section 8 of the Stark lease contained a provision labeled "Removal of Property," which stated as follows:

> "Lessee shall have the right, but shall not be obligated, during the period of one year from and after the termination of this lease to dismantle and to remove its plant, machinery, equipment and other improvements and to sell and remove all sand and gravel stockpiled on the subject premises on which royalties have previously been paid. Any equipment or material not removed during said one-year period, or, in the event of failure to pay the plant site rental, during the term of the lease shall belong to Lessor."

¶ 11 Prior to the expiration of the lease, Stark had excavated and placed on top of the ground numerous materials, including different types and sizes of sand and gravel, which had been removed from the ground with a dredge and washed, sorted, and placed into stockpiles.

¶ 12 Stark also owned an 11-acre parcel of land adjacent to the leased premises. Prior

to the expiration of the lease, Stark mined materials from the leased premises and had stockpiled materials on the leased premises and the Stark property.

¶ 13 In August 2003, the property owners began negotiations with Stark to renew the lease, but an agreement was not reached. The property owners ultimately agreed to enter into a new lease with Scharf in December 2003. Stockpiled materials remained on the leased premises.

¶ 14 2. *The Scharf Sand and Gravel Lease*

¶ 15 On December 17, 2003, Scharf (as lessee) entered into a lease with the Cloud Family Partnership, the Skade Family Limited Partnership, the Kroger Family Trust, and Kelly Kroger-Sibert (collectively the property owners) for "the sand and gravel in and underlying [the leased premises] together with the right at all times to enter on said land to remove therefrom sand and gravel as the said Lessee may see fit, subject to covenants as set forth in this agreement." The Scharf lease was to commence January 1, 2004, and terminate on December 31, 2015. Scharf agreed to pay the property owners, "as royalty for the removal of sand and gravel from the leased premises, a royalty rate per ton for each ton of sand or gravel removed from the leased premises for sale or delivery to others or for use by Lessee."

¶ 16 Section 4 of the Scharf lease contained a provision labeled "Operations," which stated, in part, as follows:

> "Lessee shall commence its operation in the existing gravel pit area, including the land on which the previous operator's equipment or stockpiles are located or have been located, and shall excavate to the maximum depth required for extraction of all merchantable materials located therein. In the event there are machinery or stockpiles belonging to the former tenant, Lessee

shall not be required to excavate that area until such machinery or stockpiles have been removed."

¶ 17 Section 10 of the Scharf lease contained a provision labeled "Ownership," which stated, in part, as follows:

"Lessee has been informed that the current leaseholder of the leased premises is Stark Excavation. Lessee has also been informed that Stark Excavation will be allowed twelve months to remove its equipment and materials belonging to Stark from the premises after January 1, 2004. Except for Stark Excavation, Lessor shall deliver sole and exclusive possession of the leased premises to Lessee on January 1, 2004."

¶ 18 C. The Thornton Letter

¶ 19 On December 26, 2003, Marty Thornton, a senior vice president of Heartland Bank, sent a letter to David Stark confirming the property owners' decision not to extend the Stark lease. In winding up the Stark lease, Thornton noted four unresolved issues concerning (1) the materials from the leased premises without royalties yet paid to the property owners, (2) the overburden payment and accounting, (3) the handling of the topsoil as specified in the lease, and (4) the restoration of the leased premises.

¶ 20 D. The Bach Letters

¶ 21 On January 9, 2004, William Bach, the property owners' attorney, sent a letter regarding the wind up of the lease to David Stark. Bach noted "[a]t the end of the lease term, there was a substantial amount of material removed from the leased premises for which payment has not been made." The material had been stockpiled on the 11-acre tract and still more

material had been stockpiled on the leased premises. Bach noted "[r]oyalties on none of the removed materials" had been paid. Further, the Stark lease provided that only materials for which royalties had been paid could be removed from the property after the end of the lease term. Thus, "the material stockpiled on the [leased premises] may not be removed since it now belongs to the Lessor." Bach also objected to Stark's continued processing of materials on the leased premises and stated the Stark lease only permitted Stark to remove its machinery within 12 months.

¶ 22 On January 16, 2004, Bach sent a letter to Robert Lenz, Stark's attorney. Bach stated he had been advised that Stark had taken materials from the leased premises after Stark employees were advised by Thornton that the property belonged to the property owners. The letter confirmed a gate was to be installed on the road between the leased premises and the 11-acre tract and asked Stark to cease and desist all further removal of materials from the leased premises.

¶ 23 E. Stark's Removal of Stockpiled Materials

¶ 24 As of January 1, 2004, Stark did not believe Scharf had any ownership rights in the stockpiled materials and that Stark had, "at a minimum, an inchoate and conditional ownership right in the Stockpiles." Consistent with that belief, Stark began removing a portion of the stockpiles in January 2004 and entered the leased premises for that limited purpose. Stark stated it did not interfere with Scharf's operations while attempting to perform the removal. It was Stark's intention to remove and sell the stockpiled materials and pay royalties to the property owners.

¶ 25 At the request of the property owners, Farnsworth Group measured the quantities of stockpiled materials on the leased premises and determined it to be 150,096 tons. The parties

stipulated to this figure, although Stark contends there were approximately 100,000 tons on the leased premises and 50,000 tons on the 11-acre tract. The parties stipulated Stark removed all of the stockpiled materials by December 31, 2004.

¶ 26 F. The Dispute and Settlement Agreement

¶ 27 After Stark began removing the stockpiled materials, Scharf protested, believing Stark's removal was not "legally appropriate." Stark then discontinued its efforts to remove the stockpiled materials, but the property owners constructed a fence or gate to prevent Stark's access. Following months of negotiations, the property owners and Stark entered into a settlement agreement that was executed on April 29, 2004, although it was dated December 31, 2003. David Stark indicated the settlement agreement was dated December 31, 2003, so as to make clear that the effective date of Stark's interest in the stockpiled materials included the stockpiles removed by Stark in January 2004.

¶ 28 Pursuant to the settlement agreement, Stark agreed to pay the property owners $106,898.05, which included $35,622.93 for materials removed from the leased premises prior to December 31, 2003, and $71,275.12 for materials removed after December 31, 2003, or currently stockpiled on the leased premises. The agreement stated the stockpiled materials were Stark's property and could be removed by Stark not later than December 31, 2004. Any stockpiled materials remaining on the leased premises after December 31, 2004, were to become the property of the property owners. Any equipment remaining on the leased premises after December 31, 2004, could be removed by the property owners at Stark's expense. Stark also agreed to sell its 11-acre tract to the property owners for $50,000 on or before April 15, 2011.

¶ 29 G. Scharf's Objections to Stark's Removal of the Stockpiled Materials

¶ 30 On April 20, 2004, Clayton Moushon, Scharf's attorney, sent a letter to Bach.

Scharf claimed it had learned the property owners intended to sell the stockpiled materials to Stark, which Scharf contended would be a breach of the lease agreement. The letter further stated:

> "If Stark actually purchased the material prior to January 1, 2004, then, in accordance with the Lease Agreement, Stark would have twelve months to remove the material from the Leased Premises. If Heartland Bank is asserting that the material currently located on the Leased Premises was sold to Stark prior to January 1, 2004, please provide written verification of such sale to this office. Absent receipt of such written verification, [Scharf] will proceed under the written terms of the Lease Agreement."

¶ 31 On May 10, 2004, Moushon sent a notice of breach to Bach and stated, in part, as follows:

> "It is clear from Paragraph 8 of the Lease that Stark Excavating, Inc. had one year to 'remove all sand and gravel stockpiled on the subject premises on which royalties have previously been paid.' This is the same language contained in Paragraph 8 of the Scharf Lease. Paragraph 1 of the Settlement Agreement purportedly executed on April 29, 2004, is clear and unambiguous evidence that Stark Excavating, Inc., did not pay any royalties on the stock piled [*sic*] materials prior to the expiration of their Lease on December 31, 2003. As such, Stark Excavating, Inc. had absolutely no contractual claim to the stockpiles after December

31, 2003.

* * *

> The unambiguous language of the Lease Agreement granted the sole and exclusive possession of this property to [Scharf], subject only to the right of Stark Excavating, Inc., to remove any material 'owned' by Stark. Stark did not own the stockpiles. As such, only [Scharf] has the right to enter and remove any material from the premises after January 1, 2004."

Scharf contended Stark purchased approximately 100,000 tons of material pursuant to the settlement agreement and the fair market value of the material was $15 per ton for a total value of $1.5 million. After payment of the royalty and minimal additional expenses, Scharf stated the value was still in excess of $12 per ton.

¶ 32 On the same date, Moushon sent a cease-and-desist letter to Stark's attorney, claiming Stark had no claim to any material on the leased premises, notwithstanding the April 29, 2004, settlement agreement. Scharf contended the settlement agreement offered "clear and unambiguous evidence" that Stark did not pay royalties on the stockpiled materials prior to the expiration of the Stark lease on December 31, 2003. Thus, Stark "had absolutely no contractual claim to the stockpiles after December 31, 2003."

¶ 33 H. Scharf's Use of the Stockpiled Materials

¶ 34 Between January and April 2004, Scharf prepared the surface of the leased premises for its new processing plant. For part of the base of the road and plant, Scharf used gravel from the stockpiled materials. On April 15 or 16, 2004, Thornton, as the bank's agent, advised Scharf to cease moving any of the stockpiled materials on the leased premises, and

Scharf complied. Although the parties disputed the total of amount of material removed from the stockpiled materials, Scharf admitted it removed 3000 tons of gravel.

¶ 35 I. The Litigation

¶ 36 1. *Stark's Complaint*

¶ 37 In August 2006, Stark filed a complaint against Scharf for conversion and trespass. In its count I alleging conversion, Stark claimed Scharf converted 7648 tons of gravel with a total value of $78,910 from the stockpiled materials between January 20, 2004, and November 7, 2004.

¶ 38 In its count II alleging trespass, Stark claimed Scharf entered upon the leased premises on or about January 19, 2004, and asserted ownership and control over the stockpiled materials. However, Stark claimed the Stark lease and the settlement agreement granted it ownership rights in the stockpiled materials. On May 4, 2004, one of Scharf's employees closed a gate on the haul road, which prevented Stark from removing its stockpiled materials and equipment. Thereafter, Stark demanded that Scharf grant it access to remove Stark's stockpiled materials and equipment, but Scharf refused. Stark claimed this trespass damaged it in excess of $10,000 because Stark was unable to perform delivery of materials under contracts with public entities and private customers.

¶ 39 2. *Scharf's Countercomplaint*

¶ 40 In January 2007, Scharf filed a verified countercomplaint against Stark and the property owners. Scharf set forth claims of breach of contract (count I), a declaratory judgment (count II), unlawful conversion (count III), conspiracy to defraud (count IV), and tortious interference with a contractual relation (count V).

¶ 41 3. *Stark's Motion for Summary Judgment*

¶ 42 In December 2010, Stark moved for summary judgment on counts III, IV, and V of Scharf's countercomplaint. Stark contended there was no genuine issue of material fact that the Scharf's lease did not convey the sand and gravel stockpiled on the leased premises to Scharf. Instead, the Scharf lease granted Scharf "a right to only sand and gravel in and underlying the leased premises—*not* the materials stockpiled on top." Thus, the property owners "had title to the stockpiled materials and were free to dispose of them at will."

¶ 43 In its response to Stark's motion for summary judgment, Scharf claimed the property owners did not retain the right to the stockpiled materials. According to Scharf, an affidavit from Mark Tremper, Scharf's negotiator, established the parties discussed the stockpiled materials and the language in the Scharf lease was intended to limit Stark's rights to the stockpiled materials.

¶ 44 Stark filed an emergency motion to strike Tremper's affidavit, claiming it violated the parol evidence rule because it attempted to describe negotiations that would vary and contradict the clear written provisions of the Scharf lease. Stark also argued Tremper's affidavit contained inadmissible hearsay and irrelevant evidence.

¶ 45 4. *Scharf's Second-Amended Countercomplaint*

¶ 46 In March 2011, Scharf filed an eight-count, second-amended countercomplaint seeking lost profits and punitive damages. Count I alleged the property owners breached the Scharf lease. Scharf claimed the terms of the settlement agreement allowed the property owners to sell 100,000 tons of stockpiled materials when the property owners had no authority to sell any material from the leased premises after January 1, 2004.

¶ 47 Count II alleged the property owners breached the Scharf lease and the express warranty of exclusive possession. Count III set forth a claim of unlawful conversion against

Stark. Count IV alleged Stark engaged in a conspiracy to defraud with the property owners by backdating the settlement agreement to defraud Scharf out of the material it was entitled to under its lease.

¶ 48 Count V alleged Stark engaged in tortious interference with a contractual relation, claiming Stark intentionally executed the settlement agreement to deprive Scharf of the stockpiled materials it was entitled to under the Scharf lease and to inflict financial hardship on Scharf by interfering with the contractual relationship between Scharf and the property owners.

¶ 49 Count VI alleged the property owners breached the Scharf lease and the implied warranty of exclusive possession. Count VII alleged the property owners breached the Scharf lease and the implied warranty of undisturbed enjoyment. Count VIII alleged the property owners breached the Scharf lease and the express warranty of quiet enjoyment.

¶ 50 5. *The Trial Court's Summary Judgment Ruling*

¶ 51 In April 2011, the trial court (Judge Scott Drazewski) issued a written order. The court indicated it reviewed Tremper's affidavit and ordered it stricken for failing to strictly comply with the requirements of Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). The court found the affidavit contained "inadmissible hearsay," was "not demonstrably based upon the affiant's personal knowledge and is violative of the parol evidence rule."

¶ 52 The trial court found Scharf's rights under its lease were "clear and unambiguous," *i.e.*, it was entitled to "the sand and gravel in and underlying the described real estate." The court stated the "stockpiles at issue were on top of, and not 'in and underlying,' the real estate referenced in the Scharf lease." The court concluded there was no genuine issue of material fact that Scharf had no recognizable legal interest in the stockpiled materials and entered summary judgment in favor of Stark as to all counts in Scharf's second-amended

countercomplaint.

¶ 53 6. *Scharf's Second Amendment to its Second-Amended Countercomplaint*

¶ 54 In August 2013, Scharf filed a second amendment to the second-amended countercomplaint and added counts IX through XIII. Counts IX and XI sought recovery from David Stark, individually, for trespass (count IX) and unjust enrichment (count XI). Counts X and XII sought recovery from Stark Excavating, Inc., for trespass (count X) and unjust enrichment (count XII). Count XIII sought recovery from the property owners for unjust enrichment.

¶ 55 In the trespass counts, Scharf alleged Stark and the property owners entered into a settlement agreement that granted Stark the right to enter the leased premises and remove the stockpiled materials. However, Scharf claimed this interfered with Scharf's right to undisturbed enjoyment and use of the leased premises, violated the Scharf lease, and constituted a trespass.

¶ 56 In the unjust enrichment counts, Scharf alleged Stark sold the stockpiled materials it wrongfully removed at a substantial profit, thereby substantially enriching itself to the detriment and impoverishment of Scharf. Scharf claimed it had no other remedy at law. Moreover, Scharf argued damages alone would be insufficient and asked that punitive damages be awarded.

¶ 57 7. *Scharf's Settlement With the Property Owners*

¶ 58 In June 2014, Scharf settled with the property owners and agreed to dismiss with prejudice all causes of action against them.

¶ 59 8. *Stark's Motion for Summary Judgment*

¶ 60 In July 2014, Stark filed a motion for summary judgment on counts IX through XII. Stark argued there were no genuine issues of material fact that it committed a trespass

against Scharf because Stark had been granted the express right to remove the stockpiled materials that it owned according to both leases. Further, Stark argued there were no genuine issues of material fact that it had been unjustly enriched to Scharf's detriment as a lessee of the land upon which Stark had been granted rights to remove the stockpiled materials that it owned.

¶ 61 Stark also argued it was entitled to summary judgment on count I of its verified complaint because there were no genuine issues of material fact that Scharf, having admitted to removing material from the stockpiles owned by Stark, was guilty of conversion. Stark argued it was entitled to summary judgment on count II of its verified complaint because there were no genuine issues of material fact that Scharf was guilty of trespass.

¶ 62 9. *Scharf's Motion for Summary Judgment*

¶ 63 That same month, Scharf filed a cross-motion for summary judgment on counts IX through XII of its second amendment to the second-amended countercomplaint. Scharf argued the property owners and Stark intentionally backdated the settlement agreement to circumvent Scharf's rights. Scharf also argued Stark and the property owners were unjustly enriched, claiming Stark paid $72,275.12 for the stockpiled materials and resold it for $1,407,191.00, a net profit of $1,334,915.88. Scharf claimed Stark used the stockpiled materials to bid on and was awarded various projects.

¶ 64 10. *The Trial Court's Summary Judgment Ruling*

¶ 65 In December 2014, the trial court (Judge Paul Lawrence) issued its order on the motions for summary judgment. In regard to Stark's motion to summary judgment, the court found Stark was unable to prove the elements necessary to sustain a cause of action for conversion. The court found Stark "did not own and cannot assert an ownership interest in the stockpiled materials at any time during the period of the alleged conversion, between January 1,

2004 and April 29, 2004." The court continued as follows:

> "Therefore, Stark was not the owner of the property at the time of the conversion and at the time of the conversion Stark did not have an absolute and unconditional right of immediate possession of the stockpiled materials. The Stark Settlement Agreement was backdated to December 31, 2003, when in fact it was not signed until April 29, 2004. The Court rejects Stark's 'relation back' argument. Stark accepted the stockpiled materials as they existed on April 29, 2004 and Scharf did not remove or use any of the stockpiled materials after April 17, 2004. Scharf did not remove any of the stockpiled materials after Stark acquired an ownership interest in the stockpiled materials. Therefore, there is no material issue of fact and Scharf is entitled to judgment on Count I of the Verified Complaint as a matter of law."

¶ 66 The trial court also found Stark was unable to prove the elements necessary to sustain a cause of action for trespass.

> "Scharf, not Stark[,] had exclusive possession of the leased premises on January 1, 2004. The fence and gate were erected and controlled by the joint lessors, not Scharf. Stark was not denied access to the leased premises after May 4, 2004. Stark's allegations of trespass are based on the Stark Settlement Agreement, which was backdated to December 31, 2003 in a deliberate attempt to grant Stark access to the leased premises

which Stark would otherwise not have had. If not for the backdating of the Stark Settlement Agreement, Stark would not have any right to access the leased premises after December 31, 2003. For these reasons, Scharf is entitled to summary judgment on Count II of the Verified Amended Complaint as a matter of law."

¶ 67 In regard to Scharf's motion for summary judgment, the trial court found Scharf was entitled to summary judgment on counts IX and X alleging trespass and stated as follows:

"The Court finds that Stark was informed by Scharf not to enter upon the premises for the purposes of removing the stockpiled materials, but Stark did so anyway, and that such conduct was an unlawful trespass. Stark and the joint lessors backdated the Settlement Agreement in order to grant Stark access to the leased premises. At the time of the execution of the Stark Settlement Agreement, Stark had already trespassed upon the leased premises and was removing stockpiled materials that he did not own."

¶ 68 As to Scharf's claims of unjust enrichment, the trial court found Stark did not own the stockpiled materials on January 1, 2004, and the provisions of the Stark lease did not apply.

"Scharf's right under the Scharf lease vested on January 1, 2004 and Stark's right under the Stark lease terminated on December 31, 2003. Stark's Settlement Agreement was wrongfully backdated to allow Stark access to the leased premises. Stark's conduct was 'wrongful.' But for the wrongful conduct, including the wrongful

> trespass upon the leased premises, Stark would not have been able to remove the stockpiled materials from the leased premises. Stark would not have been able to sell the stockpiled materials and retain the profits therefrom. The retention of the profits is the unjust enrichment that Stark should not be entitled to retain. For the reasons set forth above, summary judgment is entered in favor of Scharf as a matter of law on Counts XI and XII of the Amended Counter Complaint."

¶ 69 11. *The Trial on Damages*

¶ 70 In September 2015, the parties entered into an agreed order on additional discovery. The parties stipulated that at the trial on damages the burden of proof would be on Stark to establish Stark's cost of production of the stockpiled materials and that Stark would be limited to the comparative income statement and the documents produced by Stark in response to Scharf's third request to produce to establish such costs.

¶ 71 12. *The Trial Court's Ruling on Damages*

¶ 72 In June 2016, the trial court (Judge Lawrence) issued a written order on the issue of damages. The court found Stark had been unjustly enriched from the sale of the stockpiled materials in the amount of $980,076.28 because (1) Stark failed to produce any evidence of the cost to produce the stockpiled materials, (2) Stark commingled the stockpiled materials on the leased premises with the aggregate materials located on the Stark property, (3) the 2004 and 2005 comparative income statements do not include the cost of producing the stockpiled materials, (4) the cost incurred by Stark in closing the mining operations could not be included in determining whether there was a profit, and (5) Stark could not deduct the cost of taking the

stockpiled materials.

¶ 73 The trial court based its calculation of the profits from Scharf's exhibit less the 3000 tons of material that Scharf admitted removing, a difference of $26,010.54. In denying Scharf's request for punitive damages, the court found it was unable to find Stark's conduct was "the result of intentional malice, trickery or deceit." This appeal and cross-appeal followed.

¶ 74 Prior to beginning our analysis, we note the record in this case consists of over 3500 pages and 20 volumes. The parties have also filed lengthy briefs setting forth their arguments. In those briefs, the parties have stated facts with reference to the pages of the record. We would encourage the parties, especially in cases involving such a voluminous record, to also include the corresponding volume numbers where those pages can be found, thereby assisting the court to access the cited materials more expeditiously.

¶ 75 II. ANALYSIS

¶ 76 A. Stark's Appeal

¶ 77 1. *Scharf's Claims of Unjust Enrichment and Trespass*

¶ 78 Stark argues the trial court erred in granting summary judgment in favor of Scharf on its unjust enrichment and trespass claims. We agree.

¶ 79 "Summary judgment is appropriate where 'the pleadings, depositions, 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.' " *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201, 902 N.E.2d 645, 648 (2008) (quoting 735 ILCS 5/2-1005(c) (West 2000)). Where, as here, cross-motions for summary judgment were filed, the parties "agree only a question of law is involved, and the court should decide the issue based on the record." *Farmers Automobile Insurance Ass'n v. Danner*, 2012 IL

App (4th) 110461, ¶ 30, 967 N.E.2d 836. On appeal from a trial court's decision granting a motion for summary judgment, our review is *de novo*. *In re Application of Douglas County Treasurer*, 2014 IL App (4th) 130261, ¶ 23, 5 N.E.3d 214; *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007).

¶ 80 "To state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160, 545 N.E.2d 672, 679 (1989).

> "Where the benefit was transferred to the defendant by a third party, a claim for unjust enrichment is recognized in the following situations: (1) where the benefit should have been given to the plaintiff, but the third party mistakenly gave it to the defendant instead; (2) where the defendant procured the benefit from the third party through some type of wrongful conduct; or (3) where the plaintiff for some other reason had a better claim to the benefit than the defendant." *National Union Fire Insurance Co. of Pittsburgh, PA v. DiMucci*, 2015 IL App (1st) 122725, ¶ 67, 34 N.E.3d 1023.

"Because it is an equitable remedy, unjust enrichment is only available when there is no adequate remedy at law." *Nesby v. Country Mutual Insurance Co.*, 346 Ill. App. 3d 564, 567, 805 N.E.2d 241, 243 (2004).

¶ 81 This case requires a determination of which entity owned the stockpiled materials

on the leased premises and hinges on the interplay between three documents—the Stark lease, the Scharf lease, and the settlement agreement.

> "A court must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent. [Citations.] Moreover, because words derive their meaning from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others." *Gallagher v. Lenart*, 226 Ill. 2d 208, 233, 874 N.E.2d 43, 58 (2007).

¶ 82 The Stark lease gave Stark the right to remove sand and gravel "in and underlying" the leased premises in return for the payment of royalties to the property owners. The lease was to terminate on December 31, 2003. However, after termination of the lease, Stark retained the right to remove its machinery and equipment and "to sell and remove all sand and gravel stockpiled on the subject premises on which royalties have previously been paid." Any equipment or material not removed during the one-year period was to become the property of the property owners.

¶ 83 The Scharf lease gave Scharf the right to remove sand and gravel "in and underlying" the leased premises in return for the payment of royalties to the property owners. The lease was to begin on January 1, 2004. In the event that machinery or stockpiled materials belonging to the former tenant, *i.e.*, Stark, remained on the leased premises, Scharf was not required to excavate that area until "such machinery and stockpiles had been removed." The Scharf lease also stated Stark would be allowed "twelve months to remove its equipment and materials belonging to Stark from the premises after January 1, 2004." The lease also stated,

"Except for Stark Excavation, [the property owners] shall deliver sole and exclusive possession of the leased premises to [Scharf] on January 1, 2004."

¶ 84 The settlement agreement, executed on April 29, 2004, but dated December 31, 2003, indicated the property owners and Stark sought to "settle all remaining issues pertaining to the lease." The agreement stated "[t]he materials so stockpiled are the property of [Stark] and may be removed from the leased premises by [Stark] not later than December 31, 2004." Stark agreed to pay $106,898.05 for materials removed from the leased premises or stockpiled thereon. Any stockpiled materials remaining on the leased premises after December 31, 2004, would become the property of the property owners.

¶ 85 The parties agree the subject materials were excavated by Stark and placed on "top" of the ground in separately sorted stockpiles. The question becomes who owned the stockpiled materials on and after January 1, 2004. As Judge Drazewski correctly found, Scharf did not own the stockpiled materials, as the stockpiles were "on top of" the ground and Scharf's lease only entitled it to the material "in and underlying" the leased premises.

¶ 86 Given this analysis, the stockpiled materials then belonged to either the property owners or Stark. According to the Stark lease, Stark had one year after the termination of the lease to remove any stockpiled materials "on which royalties have previously been paid." Contrary to Scharf's interpretation, the Stark lease does not state Stark could only remove the stockpiled materials if it paid royalties by December 31, 2003. Instead, it says Stark must first pay royalties before the stockpiled materials could be removed. Thus, the stockpiled materials belonged to Stark but only if it paid the royalties prior to the expiration of the one-year period after termination.

¶ 87 Scharf makes much about the backdated settlement agreement. However, we find

Scharf's argument is a red herring. The settlement agreement was unnecessary given the fact that Stark had the right under its lease to remove stockpiled materials on which it had paid royalties. However, nothing prohibited Stark and the property owners from entering into an agreement whereby they agreed to settle "all remaining issues" and negotiate a price to be paid for the stockpiled materials. See *Olson v. Etheridge*, 177 Ill. 2d 396, 410, 686 N.E.2d 563, 569 (1997) (agreeing "that 'parties to a contract should remain free to amend or rescind their agreement so long as there is no detriment to a third party who has provided no consideration for the benefit received' ") (quoting *Board of Education of Community School District No. 220 v. Village of Hoffman Estates*, 126 Ill. App. 3d 625, 628, 467 N.E.2d 1064, 1067 (1984)).

¶ 88 Judge Lawrence found Stark engaged in "wrongful" conduct when it "wrongfully backdated" the settlement agreement "to allow Stark access to the leased premises." He also found "Stark's right under the Stark lease terminated on December 31, 2003." We disagree with these findings. The Stark lease allowed Stark to remove equipment and stockpiled materials for a period of one year after the lease terminated. Scharf was aware of Stark's right to remove its equipment and materials. Stark's conduct would have been wrongful if the Stark lease prohibited Stark from having any access at all after December 31, 2003, followed by Stark's removal of the materials and then the property owners and Stark later agreeing to allow Stark the right to do so.

¶ 89 Scharf contends Stark was unjustly enriched by the profits from the sale of the stockpiled materials over which Stark had no ownership interest. We find Stark did have an ownership interest, albeit a conditional one, in the stockpiled materials. Stark expended the resources in excavating the sand and gravel from the leased premises and in sorting the material into stockpiles. Nothing in Scharf's lease indicates it obtained ownership of the stockpiled

materials, and Scharf cannot dictate the parameters of a contractual agreement of which it was not a party or a direct beneficiary. See *155 Harbor Drive Condominium Ass'n v. Harbor Point, Inc.*, 209 Ill. App. 3d 631, 646, 568 N.E.2d 365, 374 (1991) (stating "[o]nly third parties who are direct beneficiaries have rights under a contract"). To allow Scharf to benefit from Stark's labor would result in unjust enrichment to Scharf. Moreover, any complaint Scharf had with regard to its lease and the stockpiled materials was a matter between it and the property owners, and that disagreement resulted in a lawsuit and ultimately a settlement. Thus, Scharf had an adequate remedy at law.

¶ 90 We find Judge Lawrence erred in granting summary judgment in favor of Scharf on its claims of unjust enrichment and trespass. Although Judge Lawrence found Stark removed stockpiled materials it did not own, it did not commit a trespass against Scharf. Even under the terms of the lease, Stark still had access to the property until December 2004, with the agreement it was granted access to remove the stockpiled materials. If anything, Stark converted property of the property owners when it removed stockpiled materials on which it had not paid any royalties, but that matter was remedied in the settlement agreement. Based on the foregoing, we remand for the issuance of an order entering judgment in favor of Stark.

¶ 91 2. *Stark's Claims of Conversion and Trespass*

¶ 92 Stark argues the trial court should have entered summary judgment in its favor on its claims of conversion and trespass. We disagree.

¶ 93 "A trespass is an invasion of the interest in the exclusive possession of land." *Peoples Gas Light & Coke Co. v. Joel Kennedy Construction Corp.*, 357 Ill. App. 3d 579, 583, 829 N.E.2d 866, 870 (2005). Moreover, "[a]ny unlawful exercise of authority over the goods of another will support a trespass, even though no physical force is exercised." *Callagan v.*

American Trust & Savings Bank, 196 Ill. App. 102, 106-07 (1915).

¶ 94 "To prove conversion, a plaintiff must establish that (1) he has a right to the property; (2) he has an absolute and unconditional right to the immediate possession of the property; (3) he made a demand for possession; and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property." *Cirrincione v. Johnson*, 184 Ill. 2d 109, 114, 703 N.E.2d 67, 70 (1998); see also *Edwards v. City of Chicago*, 389 Ill. App. 3d 350, 353, 905 N.E.2d 897, 900 (2009).

¶ 95 In the case *sub judice*, Stark had a conditional right to the stockpiled materials on the leased premises. However, until Stark paid royalties on the stockpiled materials, the property owners owned the stockpiled materials. Scharf cannot be found guilty of conversion because Stark did not own the stockpiled materials until April 29, 2004. Until that time, the stockpiled materials belonged to the property owners. Moreover, Scharf cannot be found guilty of trespass because Scharf was the lawful leaseholder of the property starting January 1, 2004. Accordingly, we find the trial court did not err in denying Stark's motion for summary judgment on its claims of conversion and trespass.

¶ 96 3. *Damages*

¶ 97 Stark argues in the alternative that the trial court's award of $980,076.28 should be reversed and the cause remanded with directions to reduce or remit the award to no more than $544,028.99. Given our decision reversing the court's grant of summary judgment in favor of Scharf, this issue is moot and we need not address it.

¶ 98 B. Scharf's Cross-Appeal

¶ 99 1. *Tremper's Affidavit*

¶ 100 Scharf argues the trial court erred in granting summary judgment in favor of Stark

on Scharf's trespass, conversion, and interference with a contractual relation because Judge Drazewski's decision was based on the erroneous striking of Tremper's affidavit and the erroneous interpretation of the Scharf lease. We disagree.

¶ 101 Generally, a trial court's evidentiary rulings are reviewed under an abuse-of-discretion standard. *Jackson v. Graham*, 323 Ill. App. 3d 766, 773, 753 N.E.2d 525, 531 (2001). "However, in this case, we are reviewing the trial court's ruling on a motion to strike an affidavit, which motion was made in conjunction with the court's ruling on a motion for summary judgment. In such cases, the appropriate standard of review is *de novo*." *Jackson*, 323 Ill. App. 3d at 773, 753 N.E.2d at 531.

¶ 102 When interpreting a contract, courts employ the "four corners" rule and look to the language of a contract alone to give effect to the intent of the parties. *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462, 706 N.E.2d 882, 884 (1999).

> "If the language of the contract is facially unambiguous, then the contract is interpreted by the trial court as a matter of law without the use of parol evidence. [Citation.] If, however, the trial court finds that the language of the contract is susceptible to more than one meaning, then an ambiguity is present. [Citation.] Only then may parol evidence be admitted to aid the trier of fact in resolving the ambiguity." *Air Safety*, 185 Ill. 2d at 462-63, 706 N.E.2d at 884.

"Where a contract is a complete integration of the parties' agreement, the parol evidence rule 'generally precludes evidence of understandings, not reflected in writing, reached before or at the time of its execution which would vary or modify its terms.' " *Policemen's Benevolent Labor*

Committee v. County of Kane, 2012 IL App (2d) 110993, ¶ 18, 973 N.E.2d 1024 (quoting *J & B Steel Contractors, Inc. v. C. Iber & Sons, Inc.*, 162 Ill. 2d 265, 269, 642 N.E.2d 1215, 1217 (1994)).

¶ 103 Before deciding whether parol evidence may be admitted, we must first determine whether the contractual language at issue is ambiguous. "[A] court must construe the words of a contract within the context of the contract as a whole." *William Blair & Co. v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 335, 830 N.E.2d 760, 770 (2005). In the Scharf lease, the property owners granted to Scharf "the sand and gravel in and underlying" the leased premises, upon which Scharf had the right "to remove therefrom sand and gravel as [Scharf] may see fit." The Scharf lease also gave Stark 12 months to remove "equipment and materials belonging to Stark." The Stark lease allowed Stark "to sell and remove all sand and gravel stockpiled on the subject premises on which royalties have previously been paid." There is nothing ambiguous in these clauses. The two leases set out the rights of each party as to the leased premises. Because we find the leases are clear and facially unambiguous, it would be improper to consider the parol evidence in Tremper's affidavit. Thus, we find the trial court did not err in striking the affidavit.

¶ 104 We also find Judge Drazewski did not erroneously interpret the Scharf lease. Scharf did not remove the stockpiled materials from in and underlying the leased premises. Instead, the material was excavated by Stark and placed on top of the ground in separately sorted stockpiles. The purpose of the Scharf lease was to allow it to mine the leased premises and extract sand and gravel, as its predecessor Stark had done. However, nothing in the Scharf lease gave Scharf the right to the stockpiled materials, and we will not read such a right into its lease.

¶ 105 2. *Scharf's Motion to Amend the Pleadings*

¶ 106 Scharf argues the trial court erred in denying its motion to amend the pleadings to

conform to the proofs. We find this issue forfeited.

¶ 107 Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2017) provides that an appellant's brief shall contain "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on."

> "A reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented [citation], and it is not a repository into which an appellant may foist the burden of argument and research [citation]; it is neither the function nor the obligation of this court to act as an advocate or search the record for error[.]" *Obert v. Saville*, 253 Ill. App. 3d 677, 682, 624 N.E.2d 928, 931 (1993).

¶ 108 A party's failure to comply with Rule 341 is grounds for disregarding its arguments on appeal. *Jeffrey M. Goldberg & Associates, Ltd. v. Collins Tuttle & Co.*, 264 Ill. App. 3d 878, 886, 637 N.E.2d 1103, 1109 (1994); see also *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises, Inc.*, 2013 IL 115106, ¶ 56, 4 N.E.3d 1 (stating the "[f]ailure to comply with the rule's requirements results in forfeiture"); *People v. Universal Public Transportation, Inc.*, 2012 IL App (1st) 073303-B, ¶ 50, 974 N.E.2d 251 (finding the appellant forfeited its argument by failing to cite to the pages in the record relied on).

¶ 109 As stated, the record on appeal consists of 20 volumes and over 3500 pages of material. In its cross-appeal, Scharf argues the trial court erred in denying its motion to amend the pleadings to conform to the proofs. However, Scharf's brief failed to cite to the pages of the record where the motion can be found. This court "will not sift through the record or complete legal research to find support for this issue." *Walters v. Rodriguez*, 2011 IL App (1st) 103488,

¶ 6, 960 N.E.2d 1226. Accordingly, we find it forfeited.

¶ 110 3. *Punitive Damages*

¶ 111 Scharf argues the trial court erred in failing to award punitive damages in its favor. Given our decision reversing the court's grant of summary judgment in favor of Scharf, this issue is moot and we need not address it.

¶ 112 III. CONCLUSION

¶ 113 For the reasons stated, with respect to Stark's appeal, we reverse the trial court's judgment granting summary judgment in favor of Scharf and remand with directions. We affirm the denial of summary judgment in favor of Stark. With respect to Scharf's cross-appeal, we affirm.

¶ 114 Affirmed in part and reversed in part; cause remanded with directions.