2018 IL App (1st) 170175-U

SIXTH DIVISION
July 13, 2018

No. 1-17-0175

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CAMBRIDGE GROUP TECHNOLOGIES, LTD. and KURT FUQUA,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 11 CH 40182
MOTOROLA, INC., MOTOROLA SOLUTIONS, INC., as a successor to MOTOROLA, INC., and MOTOROLA MOBILITY, INC., as a successor to MOTOROLA, INC.,	)	
Defendants-Appellees.	)	Honorable Sophia H. Hall, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly granted defendants' section 2-619 motion to dismiss for lack of standing as to the individual plaintiff, who was not a signatory to the contract at issue; summary judgment was proper where the complaint was filed over 10 years from the date of accrual; summary judgment was also proper where plaintiffs' unjust enrichment claim expressly referenced the parties' written agreement; and due to the incomplete record before this court, any ambiguities were resolved against plaintiffs and the trial court's decision was presumed proper, rendering summary judgment appropriate.

¶ 2 Plaintiffs, Cambridge Group Technologies, Ltd. (Cambridge) and Kurt Fuqua, appeal from the circuit court's decision that dismissed Fuqua with prejudice, and the decisions that granted summary judgment in favor of defendants, Motorola, Inc., Motorola Solutions, Inc. and Motorola Mobility, Inc. (hereinafter collectively referred to as Motorola) on all counts brought by Cambridge. Plaintiffs argue that the circuit court's decisions were erroneous for various reasons, namely, that genuine disputes of material fact exist within all issues on appeal, and thus, the outcome of this case should be decided by a jury. We disagree with plaintiffs' contentions, and affirm the trial court's rulings.

¶ 3 I. BACKGROUND

¶ 4 This case stems from an agreement entered into over two decades ago by Cambridge, a software development corporation solely owned by Fuqua, and Motorola, a microchip manufacturer and developer, for the development of voice-recognition software that was to be used in automobiles. Specifically, Motorola sought software that would allow drivers to be able to access and use automobile functions through spoken commands using natural language. On March 16, 1998, Cambridge and Motorola[1] entered into a software licensing agreement (agreement) that was signed by two Motorola representatives, and Fuqua, on behalf of Cambridge. The agreement provided that Cambridge would develop natural language, speech recognition software (software) for use with Motorola's microchips in automobiles. Cambridge also agreed to develop and deliver German and Japanese language modules for the software. The agreement required Cambridge to create and deliver two related products called "World Voice" and "World Bench" in the following progressively-completed versions: "alpha," "beta," "final," and "accepted."

[1] To be clear, Cambridge entered into the agreement with Motorola, Inc. but as a result of a subsequent corporate reorganization, Motorola, Inc. now consists of Motorola Mobility, Inc. and Motorola Solutions, Inc.

¶ 5 The agreement stated that Cambridge was to provide the software to Motorola in 12 milestones, with each milestone being a successive software improvement, except Milestone 1, which was the execution of the agreement. Appendix B of the agreement defined the "Licensed Software Delivery Milestones" as follows:

MILESTONE	DESCRIPTION	COMPLETION DATE
Milestone 1.	Execution of this Agreement	Effective Date
Milestone 2	Delivery of World Bench Developer Tool, Alpha VERSION and WORLD VOICE Engine Suite Alpha VERSION	40 days after Cambridge receives payment for Milestone 1
Milestone 3	Delivery of World Bench Developer Tool, beta VERSION and WORLD VOICE Engine Suite Beta VERSION	1 month after Milestone 2
Milestone 4	Delivery of World Bench Developer Tool release VERSION	2 months after Milestone 3
Milestone 5	First release of the LICENSED SOFTWARE and delivery to MOTOROLA	2 months after Milestone 3
Milestone 6	Acceptance of the LICENSED SOFTWARE by MOTOROLA	30 days after Milestone 5
German Milestone A	Begin development of German Language Grammar	Subsequent to Milestone 6
German Milestone B	German Language Grammar mid point	Subsequent to German Milestone A
German Milestone C	Acceptance of the German Language Grammar	8 months after German Milestone A
Japanese Milestone A	Begin development of Japanese Language Grammar	Subsequent to Milestone 6
Japanese Milestone B	Japanese Language Grammar mid point	Subsequent to Japanese Milestone A
Japanese Milestone C	Acceptance Delivery of Japanese Language Grammar	12 months after Milestone 6

¶ 6 Section 2, titled "Grants," in relevant part stated:

"2.1 Subject to the payments of Section 3 being paid, Cambridge grants to Motorola a perpetual, royalty-bearing, nonexclusive, irrevocable (except for failure to pay the royalties of Section 3) worldwide right and license under Cambridge's patents, copyrights, trademarks, licenses, and trade secrets[.]"

¶ 7 Section 3 of the agreement set forth the terms of consideration as follows:

"In consideration for the rights and license granted herein, and subject to the conditions set forth elsewhere in this Agreement, Motorola agrees to pay Cambridge as follows:

3.1.1 $400,000 within ten (10) days after the completion of Milestone one (1) ($200,00 of which are considered non-recurring engineer costs), and

3.1.2 $50,000 within thirty (30) days after the completion of Milestone two (2), and

3.1.3 $100,000 within thirty (30) days after the completion of Milestone three (3), and

3.1.4 $50,000 within thirty (30) days after the completion of Milestone four (4), and

3.1.5 $50,000 within thirty (30) days after the completion of Milestone five (5), and

3.1.6 $50,000 within thirty (30) days after the completion of Milestone six (6), and

3.1.7 $50,000 within thirty (30) days after the completion of German Milestone seven (A), and

3.1.8 $50,000 within thirty (30) days after the completion of German Milestone eight (B), and

3.1.9 $60,000 within thirty (30) days after the completion of German Milestone C, and

3.1.10 $50,000 within thirty (30) days after the completion of Japanese Milestone A, and

3.1.11 $50,000 within thirty (30) days after the completion of Japanese Milestone B, and

3.1.12 $60,000 within thirty (30) days after the completion of Japanese Milestone C.

3.1.13 Notwithstanding the above, Motorola agrees that the goal for making the payments of Sections 3.1.2 through 3.1.12 shall be within ten (10) days after Motorola's receipt of a written invoice instead of thirty (30) days. If a payment is received by Cambridge after such ten (10) days, Cambridge may inform Motorola of the number of days elapsed after such tenth day, and subsequent Milestones may be delayed by an equal number of days. In the event a payment is made after the thirtieth (30th) day, Motorola agrees to increase the amount of such payment by an interest based on the annual percentage rate of eight percent (8%)."

¶ 8 Motorola paid Cambridge for Milestone 1, Milestone 2, Japanese Milestones A and B, and German Milestones A and B, totaling $650,000. Motorola never paid the remaining six milestones due to disagreements that arose between the parties, and which form the basis of this litigation. It is undisputed that Motorola's payments for Milestones 3, 4, 5, and 6 were due on the following dates: Milestone 3 ($100,000) due May 7, 1999; Milestone 4 ($50,000) due July 29, 2001; Milestone 5 ($50,000) due July 29, 2001; and Milestone 6 ($50,000) due August 31, 2001.

¶ 9 Also relevant is section 3.6 of the agreement, which stated:

"Within thirty (30) days after the end of each calendar quarter, Motorola shall furnish to Cambridge a statement in suitable form certified by a responsible representative showing all said licensed software subject to royalties which were distributed by Motorola, affiliates, and authorized distributors and the amount of royalty payable thereon, including information regarding the number of units, the number of additional grammars, and version upgrade units. If no licensed software has been so distributed, that fact shall be shown on such statement. Payment of such royalties, if any, shall be included with such statement."

¶ 10 Section 4.8.1 contained a clause requiring attribution for intellectual property, which stated:

> "All products incorporating licensed software must bear notice of Cambridge's copyrights, patents, trademarks, and service marks as required by Cambridge. Additionally, Motorola agrees to employ reasonable inventory control mechanisms to track or control the distribution of licenses and shall employ unique serial numbers for each OEM as issued by Cambridge."

¶ 11 Section 13 of the agreement addressed the issue of termination, and, in relevant part, stated:

> "13.2 If a Party fails to perform any of its obligations under this Agreement and such failure remains uncured for a period of thirty (30) days after receipt by such Party of written notice thereof from the non-defaulting Party, the non-defaulting Party, in addition to any other rights available to it under law or in equity, may withhold its performance or may terminate this Agreement at any time by giving notice thereof in writing to the defaulting Party.
>
> * * *
>
> 13.4 Motorola may terminate this Agreement at any time for convenience, and sublicenses already issued by Motorola shall remain in effect despite such termination. Nothing in this Agreement shall obligate Motorola to commercialize the licensed software. If Motorola so terminates prior to the completion of the Milestones of Section 3.1, Motorola agrees to pay Cambridge for all Milestones started prior to such termination. No further payments or compensation shall be due Cambridge.

13.5 If, after the completion of Milestone 6 in appendix B, Motorola decides to discontinue the distribution of licensed software, Motorola shall provide Cambridge with written notice six (6) months prior to such discontinuance."

¶ 12 The agreement also contained a mediation clause in Section 20.3, stating:

"The Parties agree that any disputes which arise out of or are based upon this Agreement shall be subject to mediation before any legal or administrative process may be initiated by either party, except disputes relating to intellectual property which by their nature require immediate or extraordinary relief. The Parties agree to cooperate in good faith in the selection of a mediator, and to share equally any costs incurred in the mediation process."

¶ 13 By August 2001, tensions between the parties had heightened. On August 27, 2001, Cambridge sent Motorola a letter stating, "There are currently four (4) milestone payments outstanding and past due (#3,4,5,6)." In a letter dated August 29, 2001, Bill Pfaff of Motorola stated that in previous discussions, he had extended an invitation to Cambridge to come to Austin, Texas to demonstrate that the software functioned and to address concerns regarding unacceptable deliverables, but "heard nothing from you for over 18 months and reasonably concluded from your silence that you had abandoned the effort." The letter further stated that "[t]his project is not working[,]" but that Motorola wished to resolve any disputes "swiftly and amicably" under the following terms:

"First, Cambridge Group should immediately cease all work under the Agreement including any parting and development work and return all Motorola property. Also, discontinue all efforts, if any, related to training and development of documentation, as well as maintenance."

Cambridge responded to Motorola on September 10, 2001, in a letter stating that "[Motorola's] instruction to 'immediately cease all work under the Agreement' can only be interpreted as a termination of the Software License Agreement between Cambridge and Motorola" and requesting that "[i]f you did not intend for your letter to constitute a termination of the Agreement, please let me know immediately."

¶ 14 On September 20, 2001, Motorola sent Cambridge a "Notice of Default and Intent to Termination [*sic*] for Cause[,]" that stated:

> "Pursuant to Section 13.2 of the Agreement, this letter constitutes formal written notice of default for Cambridge's failure to perform its obligations under the Agreement. Specifically, Cambridge has breached its continuing warranty obligations under Section 6 of the Agreement because the licensed software does not function in accordance with all specifications included or referenced in Appendix A of the Agreement and does not operate satisfactorily. If Cambridge fails to cure all defaults within thirty (30) days of receipt of this notice, Motorola intends to terminate the Agreement by written notice, all in accordance with Section 13.2."

¶ 15 Cambridge responded to the notice of termination on October 3, 2001, stating that "Motorola already terminated the Agreement at its convenience in [its] August 29th letter, and when its realized the consequences of such termination *** Motorola tried to convert the earlier termination into a trumped-up and invalid terminations for 'cause' in [its] September 20th letter." Cambridge also stated that if Motorola was unwilling to meet in Chicago, then "please consider this a demand for mediation in accordance with Section 20.3 of the Agreement."

¶ 16 On November 19, 2001, Motorola sent a "Notice of Termination for Cause[,]" stating that Cambridge failed to perform its obligations under the Agreement, and has failed to cure all defaults within 30 days of Motorola's prior notice of intent to terminate. Thus, Motorola stated it was "exercising its option to terminate for cause as provided under Section 13.2."

¶ 17 Cambridge responded on November 27, 2001, that Cambridge "believes that Motorola's purported termination 'for cause' is invalid and unjustified." Specifically, Cambridge's response letter further stated:

> "In addition to the fact that Motorola previously terminated the License Agreement for its convenience on August 29, 2001, Motorola's subsequent attempts to terminate 'for cause' have disregarded Motorola's undeniable prior acceptance of the software, pursuant to the terms of the License Agreement, and have failed to indicate how the licensed software failed to comply with the specifications as required in Appendix A of the contract. Thus, any opportunity to cure, even if cure were required, is illusory."

¶ 18 The parties attended mediation on December 6, 2001, which was unsuccessful in resolving their disputes.

¶ 19 The lawsuit underlying this appeal was filed on November 21, 2011, by Cambridge Group Two Ltd. (Cambridge Two), which was a corporation formed by Fuqua three days prior to filing suit. Cambridge had been involuntarily dissolved on December 1, 1997, and was not reinstated at the time suit was filed. Cambridge Two's complaint and subsequent versions thereof were dismissed with leave to re-plead based on a lack of standing because Cambridge Two was not a party to the Agreement.

¶ 20 On November 19, 2013, the third amended complaint (complaint), brought by Cambridge and Fuqua as plaintiffs, was filed. The complaint stated that Cambridge was reinstated as a corporation on November 13, 2013. The complaint contained the following respectively numerated counts: (I) breach of contract for failure to pay Japanese C and German C Milestones;

(II) breach of contract for discontinuing distribution without notice; (III) breach of contract for failure to pay for Milestones 3, 4, 5, and 6; (IV) unjust enrichment as a result of Motorola's distribution of a derivative version of the software; and (V) breach of contract for failure to pay royalties on distribution of a derivative version of the software.

¶ 21 In February 2014, Motorola filed a motion to dismiss pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2012)), arguing in relevant part that Fuqua lacked standing to bring suit because he was not a party to the agreement, and was not a third party beneficiary thereof. Plaintiffs response was filed on April 9, 2014, and asserted that Fuqua had standing because he was the "100% owner of [Cambridge], its sole director, sole officer, sole shareholder, sole employee, and personally created the software involved in this matter and personally owns it, and has licensed it out through Cambridge." On July 2, 2014, the circuit court entered an order that stated, "Plaintiff Kurt Fuqua is [d]ismissed with prejudice." The order also reflected that oral argument had been held; however, the record on appeal does not contain a transcript from that date. Thereafter, the parties proceeded with discovery.

¶ 22 On December 26, 2014, Cambridge filed a motion to deem admitted Motorola's answers to requests to admit, arguing that Motorola failed to include verifications to its answers. On January 5, 2015, Motorola filed a motion for leave to serve verifications to their request to admit answers. On January 6, 2015, the parties were in court for status, and the court's order for that date stated in relevant part:

> "1. Plaintiff hereby withdraws its Motion to Deem Admitted [without] Prejudice;
>
> 2. Defendants hereby withdraw their Motion for Leave to Serve Verifications [without] Prejudice."

¶ 23 On January 26, 2015, Fuqua testified at his deposition. The record on appeal only contains excerpts from Fuqua's deposition, not the entire transcript. We glean the following testimony from the portions of his deposition to which we are privy. At his deposition, Fuqua testified that in 2009 he began work for a Swiss company called SVOX, and helped negotiate an agreement between SVOX and Google. Fuqua was the project manager for the project that stemmed from the agreement between SVOX and Google concerning the license of "PICO," a text-to-speech system that SVOX previously began to develop, and the adaptation of PICO for the Android operating system. At some point, SVOX requested that Fuqua move to Switzerland. Fuqua testified that he could not take a lot of equipment with him when he moved, but he was able to bring his laptop. Fuqua testified that although he paid for the laptop, SVOX was supposed to reimburse him, but did not. Fuqua also stated that some of his "personal files" were on that laptop, including the source code for the World Bench portion of the software that was the subject of the agreement between Cambridge and Motorola. Fuqua stated that it was not until 2012 that he learned that Motorola was distributing a derivative version of the software. Specifically, he stated the derivative version of the software at issue was "a piece" of World Bench that was "stuck into Android." Fuqua further stated that he never gave SVOX permission to use the source code. When asked how he thought SVOX took the source code from him, Fuqua responded, "I told you before that I don't know the exact mechanism by which they took the, the source code, but the fact that they did misappropriate is clear to me." Fuqua further testified that SVOX had "access through a network" to his laptop, and thus, the derivative version, or source code, files.

¶ 24 On May 29, 2015, the deposition of Bjorn Rudolfsson, a head software engineer for SVOX, was taken. The record on appeal lacks a complete copy of the transcript from his deposition, and thus, we have similarly gathered the following testimony from the excerpts presented. Rudolfsson testified that he and Fuqua worked on the same team from the time Fuqua joined SVOX. Rudolfsson stated that SVOX's text-to-speech software, PICO, was originally developed using the "X-SAMPA" phonetic alphabet, but that Fuqua proposed including functionality for the "IPA" phonetic alphabet also. Rudolfsson testified that SVOX's agreement with Google did not require them to include IPA functionality, but that Fuqua suggested that it be included. Rudolfsson testified that Fuqua then created a phonetic alphabet conversion code, allowing a way to convert between the IPA and X-SAMPA alphabets. Rudolfsson stated that Fuqua sent Google "drops," or various iterations of the code he had been working on, and that the phonetic alphabet converter was included in some of the drops that Fuqua sent to Google. Rudolfsson further testified that Fuqua's testimony that SVOX stole his code was "not true," because "it was implemented by Mr. Fuqua during the course of this project. *** [H]e provided this to us as part of the code." Rudolfsson stated that Fuqua's testimony that he never willingly gave the code to SVOX was not true, and that it was similarly untrue that SVOX misappropriated Fuqua's code.

¶ 25 From February through April 2015, numerous other depositions were taken, including those of Alan Weiss, Bill Pfaff, Charles Powers, and David Boldt.

¶ 26 On August 28, 2015, Motorola filed a motion for summary judgment, arguing that Cambridge's claims for milestone payments are barred by the statute of limitations (count I and count III), that Motorola never commenced distribution of the licensed software (count II), that Cambridge's unjust enrichment claim fails as a matter of law (count IV), and that there is no breach of contract where the contract was terminated long before distribution occurred (count V). Motorola argued that "limitations bars any claim that accrued before November 19, 2001. The date ten years before this suit was filed." Cambridge filed its response on October 19, 2015, and asserted that its claims for milestone payments (counts I and III) were timely because Cambridge's cause of action for breach of contract did not accrue until the December 6, 2001, mediation, which is the earliest point that Motorola refused to make payment. Cambridge also argued that whether distribution occurred was a question of fact, and that it had presented sufficient factual support for its unjust enrichment claim. Further, Cambridge asserted that despite termination of the contract, Motorola was still liable for royalties. Cambridge's response indicated that an affidavit from Fuqua was attached as Exhibit 18. However, the record on appeal only contains exhibits up to Exhibit 14. Motorola replied thereafter, contending that the parties agree that any action that accrued before November 19, 2001, is time-barred by the statute of limitations, thus all milestone-based claims are time-barred.

¶ 27 In a written decision, dated February 19, 2016, the circuit court granted summary judgment in favor of Motorola on counts I, III, IV, and V, and denied summary judgment as to count II. The court found that Cambridge's breach of contract claims for unpaid milestones (counts I and III) were time-barred by the applicable 10-year statute of limitations, because the agreement was an installment contract and any cause of action accrued on each installment due date—all of which were before the limitations period cutoff date of November 19, 2001. The court's reason for denying judgment on count II is somewhat unclear, but it seems to this court that the court below determined that although Motorola had provided the deposition testimony of Bill Pfaff, who stated that Motorola did not have access to the software, and never distributed it, Motorola nonetheless failed to "cite to and [*sic*] other testimony establishing the source of Pfaff's knowledge." The court went on to explain that counts IV and V, for breach of contract and unjust enrichment, respectively, were "based on the same allegations." The court stated that it treated "the two counts as one[,]" because if there is a claim for breach of contract, then a claim for unjust enrichment cannot exist. The court's order also stated:

> "Cambridge's claim for unpaid running royalties, for the use of the 200 lines of code in the Android operating system, does not fall within the agreement between the parties because Motorola obtained the use of that [c]ode legally from another party, Google. [Citation.] Thus, even if the code is derivative, Fuqua provided it to SVOX, and if SVOX improperly used it, that is not a breach of the agreement between Cambridge and Motorola.
>
> Furthermore, if SVOX misappropriated the code from Cambridge, then Cambridge may have a claim against SVOX for violation of the Federal Copyright Act. The Federal Copyright Act provides that the right to 'distribute copies of the work by sale or otherwise' is held exclusively by the copyright owner. Motorola argues that in order for Cambridge to have a valid claim against Motorola, Cambridge would have to establish that it is the rightful owner of the 200 lines of Code in the Android Operating system, not Google who received it under the contract with SVOX for whom Fuqua worked. A determination of who owns the copyright regarding the 200 lines of code presents a federal question to be determined under the Copyright Act."

Cambridge filed a motion to reconsider the court's ruling, which was denied on August 12, 2016.

¶ 28 The record indicates that on August 10, 2016, Cambridge filed a motion to deem facts admitted, but did not provide a date for it to be presented to the court. However, on August 26, 2016, Cambridge filed another motion to deem facts admitted, and this time included a notice of motion that stated the motion would be presented to the court on September 1, 2016. The record contains a transcript of the court proceedings that took place on September 1, 2016, but the motion to deem facts admitted was not mentioned.

¶ 29 On October 3, 2016, Motorola filed a revised[2] motion for summary judgment on count II, arguing that the notice requirement of section 13.5 of the agreement did not apply because commercial distribution of the final product never occurred. Cambridge filed a "memorandum in opposition to summary judgment on count II" on October 4, 2016. Cambridge also filed a "response in opposition to summary judgment on count II" on October 7, 2016. The record is unclear as to why Cambridge filed two similar documents; however, one noteworthy divergence between the two is that an affidavit from Fuqua was attached to Cambridge's "response." In Fuqua's affidavit attached to the response, he attested that, "On March 26, 1999, I was an eyewitness to the distribution of the alpha version of the Licensed Software products by Motorola in Schaumburg, Illinois to Morgan Jones, D. Lynn Sheperd, and Emmanuel Prouvese." Fuqua further stated, "In April[] 1999, Motorola confirmed to me through Brian McCalley that it had also distributed the beta version of the Licensed Software products."

¶ 30 The court granted Motorola's motion for summary judgment on count II in a written decision, dated December 16, 2016. The court also ordered that, "Pursuant to Illinois Supreme Court Rule 304(a), there is no just reason for delaying enforcement or appeal of this final judgment." Plaintiffs filed their timely notice of appeal on January 13, 2017.

¶ 31 On April 17, 2018, this court scheduled this matter for oral argument on May 31, 2018. On April 23, 2018, counsel for plaintiffs filed a motion to withdraw as counsel that was granted by this court on May 3, 2018, with plaintiffs granted 21 days to find new counsel. Also on that

[2] Motorola's summary judgment motion was labeled as "revised," because prior to its filing, Motorola filed a different motion for summary judgment on count II, and Cambridge filed a cross-motion for summary judgment. On September 12, 2016, after extensive briefing by the parties, the motions were entered and continued, and the court ordered the parties to amend and consolidate their briefing. Our review of the revised briefing indicates that Cambridge opted not to pursue its cross-motion for summary judgment.

date, the May 31, 2018, oral argument date was stricken. On May 23, 2018, Fuqua entered a *pro se* appearance. No counsel ever filed a new appearance on behalf of Cambridge. On May 30, 2018, this court reset the matter for oral argument on June 28, 2018, and oral argument proceeded on that date with Fuqua representing himself *pro se*, and Motorola being represented by counsel.

¶ 32 II. ANALYSIS

¶ 33 Plaintiffs make the following arguments on appeal: (1) the trial court erred when it dismissed Fuqua; (2) the trial court erred in determining that plaintiffs' claims under counts I and III were time barred by the statute of limitations; (3) the trial court erred when it failed to rule on Cambridge's motion to deem facts admitted; and (4) the trial court erred in determining that no genuine issue of material fact existed as to counts IV and V. We address each in turn. However, prior to addressing each contention, we must first point out shortcomings in the parties' briefs.

¶ 34 A. Brief Deficiencies

¶ 35 First, we find problematic both plaintiffs' and Motorola's complete lack of record citations in their briefs. Neither plaintiffs, nor Motorola included a single proper record citation in the entirety of their briefs. To say this is problematic is a gross understatement. According to subsections (h)(7) and (i) of Rule 341, both appellant's and appellee's briefs are to contain:

> "Argument, which shall contain the contentions of the [appellee] and the reasons therefor, with citation of the authorities and the pages of the record relied on. Evidence shall not be copied at length, but reference shall be made to the pages of the record on appeal where evidence may be found." Ill. S. Ct. R. 341(h)(7) (eff. Jul. 1, 2017); see also Ill. S. Ct. R. 341(i) (eff. Jul. 1, 2017).

Subsection (h)(7) twice references the "pages of the record" in stating what citations a party is to provide in its argument section. Here, however, both plaintiffs and Motorola have only included citations to their own respective appendices. This means that when the parties cite to the same document, for example, plaintiffs' complaint, each of their briefs includes a citation to a different location in each of their appendices, which has made this court's review exponentially more difficult. Had the parties followed our supreme court rules, then their briefs would have included the same record citation when referencing the same piece of the record. We remind the parties that compliance with these procedural rules is mandatory, and we caution them that this court may strike a brief or dismiss an appeal for failure to comply with the applicable rules of appellate procedure. *McCann v. Dart*, 2015 IL App (1st) 141291, ¶ 12. We decline to apply either of these consequences here, where both parties disregarded this rule. Nonetheless, we stress that complying with Rule 341 "has the added benefit of framing more readable, navigable, and comprehensible briefs." *People v. Miranda*, 2018 IL App (1st) 170218, ¶ 35 (Hyman, J., specially concurring).

¶ 36 Next, we take issue with the use of footnotes in Motorola's brief. Illinois Supreme Court Rule 341 sets forth the requirements of parties' appellate briefs. Ill. S. Ct. R. 341 (eff. Jul. 1, 2017). Subsection (a), in relevant part, expressly states, "Footnotes are discouraged, but if used, may be single-spaced." Ill. S. Ct. R. 341(a) (eff. Jul. 1, 2017). Motorola's brief contains 162 footnotes, which consist of a mix of citations to its appendix and substantive points. Our primary gripe is not with the voluminous number of footnotes in Motorola's brief, but the way in which they were used. Motorola included its appendix citations (which should have been record citations) in its footnotes, rather than in the text of its brief. Including citations to pertinent evidence at the bottom of the page as opposed to immediately following the related argument impedes this court's review, and we implore Motorola to discontinue formatting its briefs in such a way.

¶ 37 Finally, and perhaps most importantly, plaintiffs have failed to provide this court with entire transcripts from the depositions of, *inter alia*, Fuqua and Rudolfsson, rendering the record on appeal incomplete. It seems that plaintiffs have merely supplied excerpts from the depositions that were filed in the trial court under seal, and have included sections of deposition transcripts in their appendix that do not appear elsewhere in the record. It is unclear whether complete transcripts were ever provided to the trial court. The table of contents of plaintiffs' appendix lists the following exhibits:

> "J. Deposition of B. Rudolffson, relevant part;
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> ***
>
> N. 3O(b)(6) Deposition of Kurt Fuqua, portions under seal;
>
> ***
>
> U. Deposition of Kurt Fuqua."

¶ 38 An initial reading of this list indicates that exhibits "J" and "N" are excerpts, and exhibit "U" is the entire deposition. However, plaintiffs' exhibit "U" only contains the transcript from the afternoon portion of Fuqua's deposition, not the earlier hours of testimony that he gave, and thus is not a complete transcript. The only full transcripts included in the record on appeal were from witnesses, such as Charles R. Powers and David M. Boldt, whose testimony played little, if any, role in the dispositive motions at issue on appeal. It is well-settled that it is the burden of the appealing party to supply this court with a sufficiently complete record to allow for meaningful appellate review. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-91 (1984). "In the absence of a sufficiently complete record, a reviewing court will resolve all insufficiencies apparent therein against the appellant and will presume that the trial court's ruling had a sufficient legal basis." *Lamb-Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558, ¶ 22 (citing *Id.*). In this appeal, we are tasked with determining whether a genuine issue of material fact exists, and full deposition transcripts are crucial to such review. As such, we construe any deficiencies in the record against plaintiffs.

¶ 39 B. Dismissal of Fuqua

¶ 40 Turning to the substantive arguments in plaintiffs' appeal, we first address plaintiffs' contention that the trial court erred when it dismissed Fuqua from this lawsuit. On July 2, 2014, the trial court granted Motorola's section 2-619 motion to dismiss, specifically dismissing Fuqua with prejudice. Plaintiffs make much of the fact that the trial court's order did not state a basis for his dismissal. However, an appeal from a section 2-619 dismissal is of the same nature as one following a grant of summary judgment, and thus, our review is *de novo*. *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993). "A *de novo* review entails performing the same analysis a trial court would perform." *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). Similarly, "we may affirm the trial court's decision on any basis that appears in the record before us, whether or not the trial court in fact relied on that basis, and even if the trial court's reasoning was incorrect." *Father & Sons Home Improvement II, Inc. v. Stuart*, 2016 IL App (1st) 143666, ¶ 27. As a result, the lack of the trial court's reasoning behind its decision to dismiss Fuqua is not fatal to our review.

¶ 41 1. *Standing as to Counts I, III, and IV (Breach of Contract)*

¶ 42 Motorola argues that Fuqua lacked standing to bring breach of contract claims against Motorola because he was not a party to the agreement. "Whether the plaintiff has standing to sue is to be determined from the allegations contained in the complaint." (Internal quotations marks omitted.) *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 16. However, a plaintiff need not plead facts establishing standing because it is defendant's burden to both plead and prove a plaintiff's lack of standing. *Id*. Generally, for purposes of determining whether standing exists, "only a party to a contract, or one in privity with a party, may sue on a contract." *Id*. ¶ 18.

¶ 43 We agree with Motorola's argument, and find that Fuqua was not a party to the agreement at issue here. In the first line of the agreement, it states "This Agreement is entered into by and between Motorola Inc. *** and *Cambridge Group Technologies, Ltd., an Illinois corporation*." (Emphasis added.) The agreement also states, "Cambridge and Motorola may be referred to herein as a Party or Parties, as the case may require." These provisions make clear that Cambridge, not Fuqua, was the party that entered into the agreement with Motorola. On the signature page of the agreement, two representatives from Motorola signed on its behalf and Fuqua signed on behalf of Cambridge. There is no indication that Fuqua ever intended to sign the agreement in his individual capacity. Further, the agreement consistently refers to "Cambridge," not Fuqua. In fact, the agreement does not contain the words "Kurt Fuqua," except in the form of Fuqua's signature. Thus, it is clear to this court that Fuqua was not a party to the agreement.

¶ 44 Plaintiffs also argue that even though Fuqua was not a signatory to the agreement, he was a third-party beneficiary thereof. "A third party beneficiary may sue under a contract even when not a party to it, provided the benefit of the contract is direct to him, as opposed to being merely incidental." *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 199-200 (1999). Motorola argues that plaintiffs have waived this argument because they raise it for the first time on appeal. Looking at Motorola's section 2-619 motion to dismiss, Motorola argued that Fuqua should be dismissed because he was not a party to the agreement, and thus, lacked standing to bring any claims. Plaintiffs responded that Fuqua had standing because he was Cambridge's "sole director, sole officer, sole shareholder and sole employee" and he "personally created the software involved in this matter and personally owns it, and has licensed it out through Cambridge." Plaintiffs never argued that Fuqua was an intended third-party beneficiary of the agreement. Although Motorola has suggested the concept of waiver applies here, we clarify that waiver is the intentional relinquishment of a known right, while forfeiture—which is at issue here—applies when an issue is not raised in a timely manner. See *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2013 IL 110505, ¶ 26. After reviewing plaintiffs' response to Motorola's section 2-619 motion to dismiss, we determine that plaintiffs are attempting to raise this argument for the first time here, and thus, we find that plaintiffs forfeited any argument regarding Fuqua's status as a purported intended third-party beneficiary.

¶ 45 Even assuming *arguendo* that the issue was properly preserved, we would still find that Fuqua lacked standing to sue Motorola for breach of contract. In determining whether a party was an intended third-party beneficiary of a contract, "it must appear from the language of the contract when properly construed that the contract was made for the direct benefit of the third person and that the benefit was not merely incidental." *Gallagher*, 309 Ill. App. 3d at 200. In fact, "[t]he promisor's intention must be shown by an express provision in the contract identifying the third-party beneficiary." *Id.* Here, the agreement does not contain any provisions that indicate that it was intentionally entered into for Fuqua's benefit. Additionally, the agreement does not once mention Fuqua. Therefore, it is clear Fuqua was not an intended third-party beneficiary of the agreement. Because he was not a party to the agreement and was not an intended third-party beneficiary thereof, Fuqua lacked standing to bring the breach of contract claims (counts I, III, and V) against Motorola, rendering his dismissal proper.

¶ 46 2. *Standing as to Count IV (Unjust Enrichment)*

¶ 47 Plaintiffs argue that even if the trial court dismissed Fuqua because he was not a party to the agreement, the court erred in dismissing his claim for unjust enrichment (count IV) because it is not controlled by the agreement. Similar to plaintiffs' argument that Fuqua was an intended third-party beneficiary of the agreement, plaintiffs' argument regarding his unjust enrichment claim is being raised for the first time on appeal, and is therefore forfeited. See *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15 ("Generally, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal"). Because forfeiture is "binding on the parties but [does] not limit this court's jurisdiction" (*Maniez v. Citibank, F.S.B.*, 404 Ill. App. 3d 941, 948 (2010)), we opt to address plaintiffs' forfeited argument for the sake of completeness, and because Motorola had the opportunity to provide an opposing argument in its response brief.

¶ 48 Plaintiffs assert that Fuqua had standing to bring count IV for unjust enrichment because he was the owner of the copyright at issue, and was entitled to proper attribution of his copyright, which defendants failed to provide. For purposes of clarity, we address this contention with plaintiffs' other arguments regarding count IV later in this order. See *infra* ¶ 73-75.

¶ 49 3. *Subject Matter Jurisdiction*

¶ 50 Plaintiffs next argue that the court below lost subject matter jurisdiction once it dismissed Fuqua from this case. "Although this issue was not raised in the circuit court, lack of subject matter jurisdiction may be raised for the first time on appeal by any party or this court *sua sponte*." *Sherman West Court v. Arnold*, 407 Ill. App. 3d 748, 750 (2011). Plaintiffs argue that the court lacked subject matter jurisdiction when it found Motorola obtained use of the software legally from a third-party because such a claim arises under the Copyright Act of 1976 (17 U.S.C. § 101 *et seq.* (2000)), and is properly in federal court. We are perplexed by plaintiffs' assertion that, "After [Fuqua's] dismissal, the trial court ruled without subject matter jurisdiction *** on what she erroneously found to be a claim for relief arising under the Copyright Act, and in so ruling, effectively denied [Fuqua] exclusive control of his work." Only two sentences later, plaintiffs assert, "The court lacked subject matter jurisdiction to rule on such a claim – a right arising under the Copyright Act." Read together, plaintiffs' contentions oppose one another, thus we are unsure of plaintiffs' position.

¶ 51 In spite of the ambiguity surrounding plaintiffs' argument, it is clear to this court that the trial court did not lack subject matter jurisdiction. Contrary to plaintiffs' assertion that the court below actually decided the question of copyright ownership, we find no support in the record for such a contention. The court below never made a finding as to who owned the copyright at issue, and stated in its February 19, 2016, order that, "A determination of who owns the copyright regarding the 200 lines of code presents a federal question to be determined under the Federal Copyright Act." We note that 28 U.S.C. § 1338(a) states:

> "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights. For purposes of this subsection, the term "State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin

> Islands, American Samoa, Guam, and the Northern Mariana Islands." 28 U.S.C. § 1338(a) (2012).

Thus, it is accurate that the determination of ownership of the copyright at issue here rests solely within the jurisdiction of the federal courts. However, such a question was never decided here. Simply put, the circuit court could not have lacked jurisdiction to resolve an issue that it did not actually resolve in the first place.

¶ 52 Plaintiffs also argue that the court lacked subject matter jurisdiction over Fuqua's property rights because Fuqua was a necessary party to the case, and the grant of summary judgment on all remaining counts denied his due process. Motorola responds that Fuqua was not a necessary party because he was not a party to the contract at issue.

¶ 53 "A necessary party is one whose presence in the suit is required for any of three reasons: (1) to protect an interest which the absentee has in the subject matter of the controversy which would be materially affected by a judgment entered in his absence [Citation.]; (2) to reach a decision which will protect the interests of those who are before the court [Citation.]; or (3) to enable the court to make a complete determination of the controversy [Citation.]." *Lerner v. Zipperman*, 69 Ill. App. 3d 620, 623 (1979).

¶ 54 Motorola argues that none of these three scenarios apply here, and we agree for the following reasons. First, the subject matter of the controversy here is the agreement, which Fuqua was not a party to, and thus any judgment entered on plaintiffs' claims, which stem from the agreement, do not materially affect Fuqua. Second, if Fuqua were a party to the lawsuit, his presence would not protect Cambridge's interest in any manner. Third, the trial court was able to make a determination of all of the issues before it without Fuqua as a party. Therefore, Fuqua cannot satisfy any of the three reasons that would render him a necessary party. We further note that although plaintiffs have cited to numerous cases that involve necessary party-related issues, plaintiffs fail to provide any explanation as to how Fuqua was, in fact, a necessary party to this litigation. Thus, we are unaware of plaintiff's reasoning for making this argument. We draw attention to this, not because plaintiffs' omission here is fatal, but because undeveloped arguments are a problem that exist throughout plaintiffs' brief, and which needlessly hinder our review. We remind plaintiffs that, "A reviewing court is entitled to have the issues clearly defined and supported by pertinent authority and cohesive arguments; it is not a repository into which an appellant may dump the burden of argument and research, nor is it the obligation of this court to act as an advocate or seek error in the record." (Internal quotation marks omitted.) *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009). Ultimately, we find that Fuqua was not a necessary party, and the trial court did not lack subject matter jurisdiction after his dismissal.

¶ 55 C. Counts I and III

¶ 56 Plaintiffs argue that the trial court erred when it granted summary judgment as to counts I and III, finding that they were barred by the 10-year statute of limitations. "Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). In reviewing an appeal from a summary judgment ruling, our review is *de novo*. *Id.*

¶ 57 Section 13-206 of the Illinois Code of Civil Procedure provides that any action based on a written contract "shall be commenced within 10 years next after the cause of action accrued." 735 ILCS 5/13-206 (West 2012). Specifically, "[w]here a money obligation is payable in installments, a separate cause of action accrues on, and the statute of limitations begins to run against, each installment as it becomes due." (Internal quotation marks omitted.) *Foster v.*

Mitsubishi Motors North America, Inc., 2016 IL App (4th) 160199, ¶ 17; see also *C-B Realty and Trading Corp. v. Chicago and North Western Railway Co.*, 289 Ill. App. 3d 892, 897 (1997). "[B]ecause each breach of a continuous duty has its own accrual date, a plaintiff may sue on any breach which occurred within the limitation's period, even if earlier breaches occurred outside the limitation period. [Citation.]" *C-B Realty and Trading Corp.*, 289 Ill. App. 3d at 897.

¶ 58 Here, the trial court found that the payment for each milestone was due 30 days after completion of that milestone, and thus counts I and III were barred by the 10-year statute of limitations. Plaintiffs contend that its claims are not time-barred. Motorola responds that the agreement was an installment contract and the trial court correctly found that the payment due date for Japanese C and German C Milestones and Milestones 3, 4, 5, and 6 was over ten years prior to the filing of plaintiffs' original complaint on November 19, 2011. We note that the parties and the trial court consistently refer to November 19, 2011, as the date that the first complaint was filed. However, the first complaint, which was filed by Cambridge Two, was actually filed on November 21, 2011. This two-day discrepancy does not impact our analysis, but we point it out for purposes of accuracy. Ultimately, we find that the trial court correctly granted summary judgment in favor of Motorola on counts I and III based on the 10-year statute of limitations. Our analysis differs slightly between count I and count III, and thus, we address them separately.

¶ 59 1. *Count III*

¶ 60 Although non-sequential, we first address count III, which alleged breach of contract for failure to pay Milestones 3, 4, 5 and 6. Section 3.1 of the agreement stated that payment for each milestone was due within 30 days after the completion of that milestone. It is undisputed that the milestones at issue in count III were completed on the following dates: Milestone 3 on April 7, 1999; Milestone 4 on June 29, 2001; Milestone 5 on June 29, 2001; and Milestone 6 on August 1, 2001. Thus, according to the agreement, the payment for each of those milestones became due 30 days thereafter, or on May 7, 1999, July 29, 2001, July 29, 2001, and August 31, 2001, respectively. Plaintiffs concede that a 10-year limitations period applies, but argue that their cause of action did not accrue until Motorola refused to make payment, which occurred, at the earliest, at the December 6, 2001, mediation. Motorola responds that the mediation did not trigger the statute of limitations.

¶ 61 It has long been recognized that, "[t]he statute of limitations begins to run when facts exist which authorize the bringing of an action. [Citation.] A cause of action accrues and the statute of limitations begins to run when a creditor may legally demand payment from a debtor." *Kozasa v. Guardian Electric Manufacturing Co.*, 99 Ill. App. 3d 669, 673 (1981). The facts of this case show that Cambridge could legally demand payment from Motorola on the 31st day (if not the 30th day) after a milestone's completion, because according to the express terms of the agreement, payment for each milestone was due "within 30 days after the completion of [a] milestone." Further, each milestone payment was an installment payment and the cause of action for each missed payment accrued on the date it was due. Thus, Cambridge's claim in count III accrued and the statute of limitations began to run for Milestones 3 through 6 on the following dates: Milestone 3 on May 7, 1999, Milestone 4 on July 29, 2001, Milestone 5 on July 29, 2001, and Milestone 6 on August 31, 2001. In order for Cambridge to have timely filed a claim for failure to pay any of these milestones, it would have had to file its complaint within ten years of the accrual dates. Because Cambridge's complaint was filed on November 21, 2011, and any claim for breach of contract regarding Milestones 3, 4, 5, and 6 accrued over ten years prior to that date, Cambridge's count III is time-barred by the applicable statute of limitations. See 735

ILCS 5/13-206 (West 2012). As such, the trial court properly granted summary judgment on count III.

¶ 62 We reject plaintiffs' argument that its causes of action in count III (and count I) did not accrue until December 6, 2001, when the parties attended mediation and Cambridge first demanded payment. Plaintiffs contend that according to section 20.3 of the agreement, participation in mediation was a condition precedent to filing suit. We disagree. "A condition precedent is defined as a condition in which performance by one party is required before the other party is obligated to perform." *Midwest Builder Distributing, Inc. v. Lord and Essex, Inc.*, 383 Ill. App. 3d 645, 668 (2007).

¶ 63 In relevant part, section 20.3 of the agreement stated, "The Parties agree that any disputes which arise out of or are based upon this Agreement shall be subject to mediation before any legal or administrative process may be initiated by either party." Although it may have been necessary for the parties to mediate their disagreements prior to initiating a lawsuit, such a requirement has no effect on when the statute of limitations begins to run. The statute of limitations began to run on the date that Cambridge *could* legally demand payment from Motorola, not on the date that Cambridge alleges it first made such a demand. (Emphasis added.) See *Kozasa*, 99 Ill. App. 3d at 673. Even if the date that Cambridge first made its demand was relevant, which it is not, we would not find that the date of the mediation was the first time Cambridge demanded payment when it is clear through its letter dated August 27, 2001, that Cambridge previously sought payment for Milestones 3, 4, 5, and 6, which it stated were "outstanding and past due." Further, a condition precedent is defined as a limitation on a party's *performance* under the contract, not a party's ability to bring suit. (Emphasis added.) *Midwest Builder Distributing, Inc.*, 383 Ill. App. 3d at 668. Ultimately, plaintiffs have not cited, and we have not found, any legal support for the proposition that an agreement to conduct mediation prior to the filing of a lawsuit impacts the accrual date for contractual claims.

¶ 64 Plaintiffs further argue that the trial court erred when it determined that "Cambridge has failed to show that the Milestone payments were disputed and submitted to mediation," because such a determination resolves an issue of fact, which should be left to the fact finder. Having determined that the date of mediation had no impact on the accrual date for plaintiffs' causes of action, the issue of whether the milestone payments were addressed at mediation is irrelevant. "[W]e may affirm the trial court's decision on any basis that appears in the record before us, whether or not the trial court in fact relied on that basis, and even if the trial court's reasoning was incorrect." *Father & Sons Home Improvement II, Inc.*, 2016 IL App (1st) 143666, ¶ 27. Thus, we affirm the trial court's decision on count III for the reasons stated above.

¶ 65 2. *Count I*

¶ 66 Plaintiffs also argue that count I of its complaint was not time-barred by the 10-year statute of limitations. Count I of plaintiffs' complaint alleged breach of contract for failure to pay the Japanese C Milestone and German C Milestone. Specifically, plaintiffs contend that the trial court's February 19, 2016, order granting summary judgment erroneously stated that German C and Japanese C Milestones both had an undisputed due date of September 28, 2001. Plaintiffs assert that, in fact, these two milestones were never completed, and thus, a material issue of fact remains. Motorola responds that payment for these two milestones became due on August 29, 2001, when it exercised its option to terminate the agreement for convenience. We agree with Motorola, and find count I is also time-barred.

¶ 67 In order to resolve this issue, we must determine when the agreement was terminated, which impacts when the cause of action for uncompleted milestones accrued. We find that

Motorola's August 29, 2001, letter terminated the agreement for convenience. According to section 13.4 of the agreement, "Motorola may terminate this Agreement at any time for convenience[.] *** If Motorola so terminates prior to the completion of the Milestones of Section 3.1, Motorola agrees to pay Cambridge for all Milestones started prior to such termination." On August 29, 2001, Motorola sent Cambridge a letter that stated, "This project is not working," and instructed Cambridge to "immediately cease all work under the Agreement including any porting and development work and return all Motorola property." The letter further stated, "Also discontinue all efforts, if any, related to training and development of documentation, as well as maintenance." This language clearly evidences Motorola's intent to terminate the agreement. In fact, Cambridge's September 10, 2001, response letter stated that the "instruction to 'immediately cease all work under the Agreement' can only be interpreted as a termination of the Software License Agreement between Cambridge and Motorola." Motorola's subsequent letter attempting to terminate for cause does not negate Motorola's initial decision to terminate for convenience. Significantly, Cambridge previously recognized this in its October 3, 2001, letter when it stated, "Motorola's invalid attempt to convert the termination into one for 'cause' (a term not found in Section 13.2 or elsewhere in the Agreement) is a transparent attempt to avoid the consequences of Motorola's prior material breaches of the Agreement." Also, in its November 27, 2001, letter, Cambridge stated that it believed that Motorola's purported termination for cause was invalid and that Motorola had previously terminated the agreement for its convenience on August 29, 2001. Therefore, it is clear that Cambridge believed the agreement was terminated for convenience via the August 29, 2001, letter.

¶ 68 It is undisputed that upon receipt of Motorola's August 29, 2001, letter, Cambridge had started but not completed German C Milestone and Japanese C Milestone. Therefore, according to section 13.4 of the agreement, payment for these two milestones became due upon Motorola's termination for convenience on August 29, 2001, and Cambridge could have legally demanded payment as of the termination. The statute of limitations began to run on August 29, 2001, the date that Cambridge could legally demand payment from Motorola, (*Kozasa*, 99 Ill. App. 3d at 673), and thus, count I is also time-barred.

¶ 69 D. Counts IV and V

¶ 70 Plaintiffs next argue that the court below improperly granted summary judgment as to count IV (unjust enrichment) and count V (breach of contract). Motorola responds that the trial court's decision was proper because the unjust enrichment count was rooted in a written contract, which is improper, and the breach of contract count stems from an agreement that was terminated long before any alleged distribution occurred. Further, Motorola argues that it received the derivative version of the software from a third party, and that federal law preempts Cambridge's claim. In reaching its decision to grant summary judgment on counts IV and V, the circuit court treated the two counts as one, and found that Cambridge's claim for unpaid royalties did not fall within section 3.4 of the agreement, because "Motorola obtained the use of [the 200 lines of code in the Android operating system] legally from another party, Google." The court further stated "even if the code is a derivative, Fuqua provided it to SVOX, and if SVOX improperly used it, that is not a breach of the agreement between Cambridge and Motorola." The court went on to explain that if SVOX misappropriated the code from Cambridge, then Cambridge may have a claim against SVOX under the Copyright Act, but such a claim would require a determination of who owns the copyright for the 200 lines of code, a federal question to be determined under the Copyright Act.

¶ 71 We first address the grant of summary judgment as to count IV for unjust enrichment. "To state a claim for 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." (Internal quotations marks omitted.) *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 25. Unjust enrichment is not an independent cause of action, but is "a condition that may be brought about by unlawful or improper conduct as defined by law, such as fraud, duress, or undue influence." (Internal quotation marks omitted.) *Id.* Significantly, the theory of unjust enrichment is inapplicable where an express contract, oral or written, controls the parties' relationship. *Id.* "A plaintiff is permitted to plead breach of contract claims in addition to unjust enrichment. [Citation.] Thus, although a plaintiff may plead claims alternatively based on express contract and an unjust enrichment, the unjust enrichment claim cannot include allegations of an express contract. [Citation.]" *Id.*

¶ 72 Here, count IV of plaintiff's complaint, for unjust enrichment, alleges that on August 1, 2001, Motorola accepted a final, saleable version of the software at issue. Count IV further alleges that according to the agreement, Motorola is required to pay Cambridge the full royalty amount for use or distribution of a derivative version of the software. The complaint stated that in May 2012, Cambridge became aware that since 2009 Motorola had been and was continuing to use and distribute a derivative version of the software without providing an accounting or attribution. Count IV also cited to the agreement, which was attached as an exhibit to the complaint.

¶ 73 We find that summary judgment on plaintiffs' count IV was properly granted in favor of Motorola. Looking at plaintiffs' complaint, it is clear that the crux of the facts alleged in count

IV stem from the agreement. In fact, count IV cites to four separate sections of the agreement, specifically sections 1.3, 3.4, 3.5, and 4.8.1. Count IV alleges that Motorola "began enriching themselves at Cambridge's expense by distributing the Licensed Software without payment of proper royalty," which is a clear reference to the royalty payments contemplated in section 3.4 and 3.5 of the agreement. In fact, the complaint actually goes so far as to cite to those sections of the agreement. Additionally, the prayer for relief of count IV sought damages "at the agreed unit rate," which is a clear reference to the agreement, plus prejudgment interest. No other relief was sought.

¶ 74 At oral argument of this case, Fuqua, acting *pro se*, argued that his claim for unjust enrichment stemmed from Motorola's alleged failure to properly provide attribution to him. Section 4.8.1 of the agreement, the attribution clause, in relevant part states, "All products incorporating licensed software must bear notice of Cambridge's copyrights, patents, trademarks, and service marks as required by Cambridge." This language makes explicit reference to Cambridge only, and does not mention any of Fuqua's personally-owned intellectual property. Further, on the issue of attribution, count IV states, "After filing this lawsuit in 2011, Cambridge and Fuqua discovered for the first time in May 2012 that Motorola continues to use and distribute a derivative version of the [l]icensed [s]oftware without paying royalties, without providing any accounting, without attribution, or fulfilling other contractual requirements." Count IV then asserts, "Every copy of the derivative product distributed without proper royalty payment, accounting and attribution constitutes new and separate damages to Cambridge and Fuqua personally." It is clear from this language that any claim that Fuqua asserts for attribution stems from the agreement, to which he was not a party. In both his brief and at oral argument, Fuqua was unable to provide legal authority to support his assertion that he has a claim for false attribution that does not stem from the attribution clause of the agreement. Similarly, our own research has not resulted in any authority which acknowledges a common law claim for false attribution. Additionally, as we have already found, Fuqua was not an intended third-party beneficiary of the agreement. At oral argument, Fuqua suggested that the attribution clause was included in the agreement for his benefit. However, there is neither reference to Fuqua in the attribution clause, nor anywhere else in the agreement, besides his name on the signature page. There is simply no evidence before this court that establishes that Fuqua was intended to personally benefit from the agreement at issue here.

¶ 75 Further, plaintiffs' unjust enrichment count specifically references provisions of the agreement. We recognize that it was entirely proper for plaintiffs to plead both an unjust enrichment count and a breach of contract count. *Gagnon*, 2012 IL App (1st) 120645, ¶ 25. However, it was improper for plaintiffs' unjust enrichment count to contain any reference to or incorporation of the parties' express, written agreement, and certainly should not have sought damages based on the terms of the agreement, as was clearly done here through the complaint's references to the agreements' royalties and attribution clauses. Because plaintiffs' count IV included allegations that specifically reference the agreement, summary judgment on this count was proper. Additionally, the agreement was attached to the complaint as an exhibit, making it a part thereof. "An exhibit attached to a complaint becomes part of the pleading for every purpose, including the decision on a motion to dismiss." *Id.* ¶ 18. We find the dismissal of count IV was proper. Fuqua has failed to establish that he was an intended third-party beneficiary of the attribution clause or of the agreement in general. Fuqua's claim for unjust enrichment also fails for the same reasons that Cambridge's unjust enrichment claim fails, namely, count IV includes specific allegations based on the agreement, and thus, is deficient as a matter of law regardless of who was the plaintiff. *Id.*

¶ 76 Contrary to the trial court's decision to treat counts IV and V as one in the same, we examine them separately. We next direct our review to the trial court's grant of summary judgment as to count V for breach of contract. Plaintiffs assert that they presented sufficient facts to support count V, the trial court improperly decided a question of fact when it found that "Fuqua provided [the software] to SVOX," and the trial court improperly determined that the Copyright Act preempted their claim for breach of contract. Motorola responds that the agreement was terminated long before any alleged distribution, and thus no claim for breach of contract existed. Further, Motorola asserts that it innocently received the derivative version of the software in question from a third party.

¶ 77 "To establish a breach of contract claim, a plaintiff must prove the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and damages or injury to the plaintiff resulting from the breach." *Carlson v. Rehabilitation Institute of Chicago*, 2016 IL App (1st) 143853, ¶ 13.

¶ 78 Count V of plaintiff's complaint, for breach of contract, contained nearly identical allegations as count IV, and stated that by using and distributing the derivative version of the software, Motorola had breached the agreement. Our review of the record indicates that Fuqua's deposition testimony, and to a lesser extent Rudolfsson's testimony, were crucial pieces of evidence submitted in support of Motorola's motion for summary judgment. Both Motorola's motion for summary judgment, and Cambridge's response thereto, heavily relied on and cited to portions of Fuqua's deposition and Rudolfsson's deposition. In fact, the trial court noted in its February 19, 2016, order, that "both parties rely on Kurt Fuqua's testimony in the affidavit and deposition regarding the facts surrounding the creation of the 200 lines of code which are at issue." Unfortunately, the record before us does not contain a full transcript from either Fuqua's or Rudolfsson's deposition. To be clear, the record on appeal contains the exhibits that the trial court allowed to be filed under seal, and thus, we are able to view and consider those documents. However, the portion of Fuqua's deposition that was filed under seal as an attachment to Cambridge's response to the motion for summary judgment only contains 8 pages of a transcript that easily exceeds 200 pages. Likewise, the portion of Rudolfsson's deposition that was filed under seal only contains 20 pages of the approximately 100 pages of transcript.

¶ 79 Additionally, the other pages of Fuqua's deposition transcript that were improperly included in the parties' appendices do little to aid in this court's review. *Pikovsky v. 8440-8460 North Skokie Boulevard Condominium Ass'n, Inc.*, 2011 IL App (1st) 103742, ¶ 16 (stating that "a reviewing court will not supplement the record on appeal with the documents attached to the appellant's brief as an appendix, where there is no stipulation between the parties to supplement the record and there was no motion in the reviewing court to supplement the record with the material"). On numerous occasions in their brief, plaintiffs cite to a specific portion of Fuqua's deposition, for example, certain lines of testimony that Fuqua gave as an answer to a question, but fail to provide the page(s) of transcript before and/or after said answer was given. At times, a transcript page stops in the middle of a follow-up question, or prior to the witness providing an answer. It is the responsibility of the appellant to see that the record is complete, to enable a reviewing court to resolve the questions raised since the record on appeal binds the parties and also controls the reviewing court in its consideration of the appeal." *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 795 (2009). The sporadic pages of testimony that we have been provided do not provide any context to Fuqua's testimony. This court cannot determine whether a genuine issue of fact exists when we are unable to review the entirety of the evidence. Because the record is insufficiently complete, we resolve the incompleteness against plaintiffs, and presume the trial court's ruling had a sufficient legal basis. *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶ 22. Therefore, we affirm the trial court's decision to grant summary judgment in favor of Motorola on count V.

¶ 80 E. Count II

¶ 81 We find it pertinent to point out that our review did not include count II of plaintiff's complaint. We are unsure if plaintiffs intended to appeal the order granting judgment in favor of Motorola on count II. If they intended to do so, they were unsuccessful. Plaintiffs' notice of appeal stated that plaintiffs were appealing from "the [t]rial [c]ourt's final order granting defendants' motions for summary judgment entered on December 16, 2016, from earlier grants of partial summary judgment, and from other errors embodied in other orders, including but not limited to requests to deem admitted, the dismissal of plaintiff Kurt Fuqua from the matter, and other rulings." On December 16, 2016, the trial court granted summary judgment on count II of plaintiffs' complaint. However, plaintiffs' opening brief did not contain any indication that plaintiffs sought the reversal of summary judgment on count II. Plaintiffs' brief does not mention count II in the argument section, and does not contain any assertions as to why summary judgment on count II was improper. Further, Motorola stated in its response brief that "on December 16, 2016, the trial court granted Motorola's Revised Motion for Summary Judgment on Count II (*which is not the subject of this appeal*)." (Emphasis added.) We find that if plaintiffs intended to seek the reversal of summary judgment on count II, they have forfeited any argument in support thereof. *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 297 (2010) (holding that a party forfeits argument on appeal by failing to develop the argument or cite any authority in support thereof). As previously stated, "A reviewing court is entitled to have the issues clearly defined and supported by pertinent authority and cohesive arguments; it is not a repository into which an appellant may dump the burden of argument and research, nor is it the obligation of this court to act as an advocate or seek error in the record." (Internal quotation marks omitted.) *Lindsey*, 397 Ill. App. 3d at 459. Because plaintiffs have not presented any argument or authority in support of the reversal of the trial court's decision as to count II, we affirm the court's order granting summary judgment.

¶ 82 F. Plaintiffs' Motion to Deem Admitted

¶ 83 As a final matter, we address plaintiffs' contention that the trial court erred when it failed to rule on Cambridge's motion to deem facts admitted. Cambridge filed the motion to deem facts admitted at issue on August 26, 2016, and gave notice that it would be presented to the court on September 1, 2016. Our review of the transcript from September 1, 2016, indicates that Cambridge never presented its motion to deem facts admitted to the court on that date. Instead, the parties argued the then-pending motion for summary judgment. Further, the record does not contain any indication that Cambridge ever attempted to bring its motion to deem facts admitted before the court for a ruling, or brought to the court's attention that it had not ruled on its motion before filing its notice of appeal. Cambridge is attempting to raise this argument for the first time on appeal, which it cannot do. See *Mabry*, 2012 IL App (1st) 111464, ¶ 15. Any argument regarding the court's purported failure to rule on Cambridge's motion to deem facts admitted is, therefore, forfeited.

¶ 84 III. CONCLUSION

¶ 85 Based on the foregoing, we affirm the decisions of the circuit court that granted Motorola's section 2-619 motion to dismiss Fuqua, and granted summary judgment in favor of Motorola on all counts.

¶ 86 Affirmed.