2014 IL App (2d) 130737-U
No. 2-13-0737
Order filed May 27, 2014



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| MOSTARDI PLATT ENVIRONMENTAL, INC., | ) | Appeal from the Circuit Court of Du Page County. |
| Plaintiff and Counterdefendant-Appellant, | ) | |
| v. | ) | No. 08-L-324 |
| POWER HOLDINGS, LLC, | ) | |
| Defendant and Counterplaintiff-Appellee. | ) | Honorable Dorothy French Mallen, Judge, Presiding. |

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court properly: (1) denied Mostardi's motion regarding discovery and conducted an *in camera* review of Power's privilege log; (2) vacated the partial summary judgment granted in favor of Mostardi; (3) denied Mostardi's *quantum meruit* claim; and (4) determined that Mostardi breached the contract, thus entitling Power to a $20,000 judgment on its breach of contract counterclaim. Therefore, we affirmed.

¶ 2 This case involves a contract dispute, in which Mostardi Platt Environmental, Inc. (Mostardi), filed suit against Power Holdings, LLC (Power). Power counterclaimed. After a

bench trial, the trial court found that Mostardi, not Power, had breached the contract, and it entered a $20,000 judgment against Mostardi. Mostardi appeals, arguing that the trial court erred by: (1) denying its motion for a protective order regarding Power's alleged discovery violations; (2) conducting an *in camera* review of a log of Power's emails rather than the actual documents; (3) vacating the order granting partial summary judgment in favor of Mostardi; (4) denying its cause of action for *quantum meruit*; and (5) determining that Mostardi, not Power, breached the contract. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Power was formed for the limited purpose of developing a coal-to-synthetic natural gas (SNG) facility in southern Illinois (the project). Power hired Mostardi, a consulting firm specializing in environmental compliance management and other areas, to prepare a "Prevention of Significant Deterioration" (PSD) air permit application for submission to the Illinois Environmental Protection Agency (IEPA). Mostardi was hired to complete two services: one, air quality construction permitting services (permitting services), which entailed completing the necessary documentation for Power to obtain a PSD air permit; and two, modeling services, which entailed predicting and modeling the impact of the SNG facility on the air quality of the surrounding area.

¶ 5 A. Parties' Agreements & Correspondence

¶ 6 On May 3, 2006, Mostardi submitted a proposal to Power, which Power accepted (original agreement). Pursuant to the original agreement, the cost estimate for permitting services was $23,820, and the cost estimate for modeling services was $48,312, for a total cost of

"$67,632."[1] Under that agreement, Mostardi would bill the proposed services on a time-and-expense basis. Also, Mostardi would not exceed the price quoted unless cause was shown for the additional work, and the scope was approved or requested by Power. "Any services not specifically listed" in the original agreement, "but requested by" Power could be completed on a time-and-expense basis, and these items would be "identified separately on each invoice." Finally, Power agreed to pay invoices within 30 days of receipt.

¶ 7 On June 11, 2007, Mostardi sent Power a letter that amended the original agreement, and Power agreed (revised agreement). The revised agreement provided as follows. For permitting services, the price was set at a total lump sum of $50,000. That cost included all permit application preparation work conducted "up to and including today's date and additional work required to file the permit application." All parties agreed that this portion of permitting services would be deemed complete when the IEPA posted the permit for public review. Then, Mostardi would submit an invoice for $27,462, which was $50,000 less the $22,537 that Power had already paid. The $27,462 "hold back" amount was due 30 days after the IEPA posted the permit. Any services needed after the permit was posted would be separately negotiated.

¶ 8 Second, for modeling services, the revised agreement set the price at a total lump sum of $100,000, and that cost included all engineering and modeling work conducted "up to and including today's date," as well as additional modeling services required. Mostardi would submit an invoice for $86,744.60, which was $100,000 less the $13,255.40 that Power had already paid, and this amount was immediately due.

[1] The original agreement contains a mathematical error, for the total is actually $72,132.

¶ 9 Finally, in a footnote to the revised agreement, Mostardi agreed to conduct up to three iterations of the startup modeling as part of the base scope of services.

¶ 10 Pursuant to the revised agreement, Power paid Mostardi the balance of the modeling services. For the permitting services, Power did not pay the hold back amount of $27,462 because it was not due until 30 days after the IEPA posted the permit.

¶ 11 On July 30, 2007, Mostardi emailed Power, advising that the project had changed significantly and that it needed "to convert" the revised agreement to a time-and-expense agreement. Likewise, in August 2007, Mostardi claimed that it was "out of budget" due to extensive changes to the project and that the parties needed to address the major project revisions and payment. Power assumed that Mostardi wished to discuss the revised agreement fixing the price to lump sums, and several emails were exchanged between the parties. Power noted its concern of an open-ended contract with no control on expenditures but assured Mostardi it would be "fair and professional." Power also acknowledged "unanticipated changes" to Mostardi's scope of work since the revised agreement that entitled Mostardi to "justifiable additional compensation." Power requested Mostardi to "qualify and to quantify" how scope changes had impacted its costs and to delineate modeling services from permitting services.

¶ 12 In October 2007 emails, Power noted that for modeling services, Mostardi had accepted a lump sum of $100,000 pursuant to the revised agreement. Since the revised agreement, Mostardi had not provided "a cogent or accurate summary" of project expenses that was consistent with that agreement. However, Power had reviewed the time reports and invoice data that were provided by Mostardi in order to create a "worksheet." In the worksheet, Power identified $20,193 of time associated with modeling services that it agreed it should pay. Power thus offered to pay Mostardi $20,000 for those services. In another email, Power indicated that

Mostardi "may have additional hours" to add to the worksheet, and Power agreed to pay "an invoice prepared in such a manner."

¶ 13 Regarding permitting services, Power refused to pay additional money. Although Power conceded that the permit might be more complex than anticipated at the time of the revised agreement, expenses related to the permit had not exceeded the targeted lump sum of $50,000, and the hold back amount was not due until the IEPA posted the permit.

¶ 14 The permit application was filed with the IEPA on October 18, 2007, but Mostardi revoked Power's right to use the application on October 22, 2007. As a result, Power hired four consultants, Black & Veatch, Conestoga Rovers & Associates, ENSR Corporation, and Civil & Environmental Consultants, Inc., to complete the services for the project. The IEPA posted the permit on January 17, 2009.

¶ 15 B. Complaints & Partial Summary Judgment

¶ 16 In the meantime, on March 18, 2008, Mostardi filed a two-count complaint, alleging breach of contract and, in the alternative, a *quantum meruit* theory of recovery. In its breach of contract claim, Mostardi alleged that after the revised agreement, Power revised and changed the scope of Mostardi's services, and Mostardi complied with Power's request. Mostardi alleged that it performed all the terms required in the original and revised agreements, as well as the changes and modifications to the revised agreement requested by Power. In addition, Mostardi alleged that it submitted invoices to Power for the services it rendered and the costs it advanced. Acknowledging that Power had paid $122,544, Mostardi claimed that Power still owed $89,117.

¶ 17 Power answered Mostardi's complaint and filed a counterclaim, including its own breach of contract claim. Power alleged that Mostardi breached the contract when it walked off the job after the permit application was submitted to the IEPA (October 18, 2007).

¶ 18 In addition, Power moved to dismiss count II of Mostardi's complaint on the basis that a valid contract governed the parties' relationship, thus defeating relief under a *quantum meruit* theory. The trial court granted Power's motion to dismiss the *quantum meruit* count.

¶ 19 On June 7, 2010, Mostardi filed a first amended complaint that added two counts seeking rescission of the revised agreement due to mutual and unilateral mistake.

¶ 20 On August 4, 2010, Mostardi moved for partial summary judgment. Mostardi argued that the IEPA had posted the permit on January 17, 2009, meaning that under the revised agreement, Power owed it the hold back amount. The trial court granted Mostardi's motion for partial summary judgment but stayed enforcement pending any judgment entered on Power's counterclaims.

¶ 21 Later, on February 21, 2012, Mostardi was given to leave to filed a second amended complaint that again added a *quantum meruit* claim (count II).

¶ 22 B. Discovery

¶ 23 On September 13, 2010, Mostardi filed a motion to preserve. Mostardi based its motion in part on the deposition testimony of Joseph Darguzas, vice president of Power, who stated that once a document between the parties was final, he deleted the drafts. Darguzas also admitted deleting emails that he believed were no longer useful for his purposes. Mostardi requested the court to allow a computer forensic consultant, Dan Jerger, to conduct an examination of Darguzas's computer.

¶ 24 In response to Mostardi's request, the parties worked out an agreement (stipulation), which the court entered on December 3, 2010. Pursuant to the stipulation, Jerger was allowed to search the hard drive of Darguzas's computer for "deleted material only" that contained at least 1 out of 38 key words. Using a software program, Jerger would also "try to determine whether any

deleted material was intentionally" deleted. The relevant date range for discoverable documents was June 2007 through January 2009. The stipulation did not require the disclosure of materials that were not relevant or that were protected under the attorney-client privilege or the attorney-product doctrine.

¶ 25 Over several days in December 2010, Jerger conducted a forensic examination of Darguzas's hard drive. From that examination, Jerger created an index (Jerger index) of approximately 360 pages, which was a tabular index of 4,704 "fragments." The fragments contained information such as "date," "from," "to," and "subject." The 4,704 fragments were converted to a printed format, totaling 13,178 pages. These pages were reviewed by Power's attorney and Darguzas. Of the 13,178 pages, Power produced over 5,000 pages and withheld the remaining pages. For the pages it withheld, Power created a "privilege log" categorizing the bases for withholding as irrelevant, personal, or privileged.

¶ 26 In a first amended motion to compel, Mostardi sought review of the Jerger index to determine whether Power had properly withheld documents. On July 14, 2011, the court ordered Power to revise its privilege log to include additional information. Then, the revised privilege log, the Jerger index, and a "cast of characters" from both parties would be submitted to the court for an *in camera* review.

¶ 27 Power revised its privilege log by including a description of the document, its basis for withholding it, and information allowing the court to cross-reference the document to the Jerger index. The court then conducted an *in camera* review of the Jerger index, Power's revised privilege log, and the parties' cast of characters. When the parties appeared in court on November 29, 2011, the court indicated that it was sustaining Power's objections to producing

certain documents on the bases of privilege, relevance, and being outside the relevant time frame. Accordingly, the court denied Mostardi's first amended motion to compel.

¶ 28 Next, the parties discussed another motion that Mostardi had recently filed. On November 23, 2011, Mostardi, through additional counsel that it had recently retained, filed an emergency motion for a protective order. Mostardi's motion, which was later amended, alleged several discovery violations by Power. Relevant here, Mostardi: (1) listed specific emails that Power had not produced in its discovery responses but were discovered by subpoenaed records from Conestoga Rovers & Associates, another consultant hired to complete the project; (2) claimed that Power had not produced any emails from its company email accounts; and (3) claimed that Power had not produced any emails between June and August 30, 2007, which was a "crucial period" in the parties' relationship. Among other requests, Mostardi asked the court to allow Jerger to image Power's electronic storage devices and server.

¶ 29 Power responded to Mostardi's motion for a protective order,[2] arguing that Mostardi had made numerous misrepresentations relating to its document production. First, Power pointed out that it had produced approximately 300 emails from a company email account and approximately 90 documents from June 1 to August 30, 2007. Second, Power had produced one of the emails that Mostardi alleged that it had withheld. Third, some of the documents listed by Mostardi were internal documents of Conestoga Rovers & Associates; thus, Power could not "withhold" emails that did not involve Power personnel. Fourth, Power used web-based email administered by a third party and thus did not have a "server" or electronic storage device for Mostardi to image. Finally, Power pointed out that discovery had closed on January 11, 2010.

[2] Because the parties submitted briefs, it was no longer considered an emergency motion.

¶ 30 At the February 7, 2012, hearing on the motion for a protective order, Mostardi argued that what had occurred was "really the electronic equivalency of shredding documents" by deleting data. According to Mostardi, Power's "new defense" was that it could not produce the documents because it did not have them; instead, a third-party web administrator had the documents. In addition, Mostardi argued that it was improper for Power to give the court a privilege log of the documents, rather than the documents themselves, for the *in camera* inspection.

¶ 31 At this point, the court questioned Mostardi about what issues the missing documents would address or what Mostardi was trying to prove. Mostardi argued that the documents were relevant to the changes in the scope of work, settling with Mostardi, and hiring other consultants to finish the job. In addition, Mostardi admitted that the "gaping hole" in discovery was not the dates it had originally alleged, but rather from October 23 to December 13, 2007.

¶ 32 Power countered that Mostardi made misrepresentations and was on a fishing expedition. Even with the new time frame of October 23 to December 13, 2007, Power noted that it had attached an exhibit showing that Mostardi's claims were "again, wrong." Regarding the server, Power argued that it could not be imaged because it was a "cloud." Power's overall argument was that it had gone through and searched all documents that were relevant, and it had produced them, as reflected in its "Rule 214 affidavit." See Ill. S. Ct. R. 214 (eff. Jan. 1, 1996) (imposing an affirmative duty to file an affidavit attesting to the completeness of its production).

¶ 33 In ruling on Mostardi's motion for a protective order, the court began by noting that it had read Power's revised privilege log, which included headlines of the emails. The court was "confident that each and every document [was] going to continue on in the way it began," and there was no evidence that Power was hiding information in its emails. According to the court,

there was "a point at which we must stop the digging, stop the researching, and move on to what the case is about." Noting it was a bench trial, the court stated that it was "hard to pull the wool over the judge's eyes." In addition, the court was "not convinced that these missing documents" would address any material issues. In the end, it did not matter if there were a conspiracy at Power to take Mostardi off the contract because "you don't have a why in a breach of contract. *** It's either you [did] comply with the contract, or you didn't comply with the contract." Stating that "we're done with this part of discovery," the court denied the motion for a protective order, which was essentially, in the court's view, a motion to compel discovery.

¶ 34 On March 6, 2012, Mostardi moved to reconsider the court's decision denying its motion for a protective order. The court denied this motion, reasoning as follows. In reviewing the second amended complaint, Mostardi had not shown the relevancy of the information that it sought from Power. If Mostardi believed that there was a conspiracy relating to hiring another consultant to complete the project, it did not allege a count for "fraud, conspiracy or anything that can go to what was going on before the alleged breach occurred." The court further stated:

> "I am denying the motion to reconsider because I do believe that these same arguments were presented this time as they were presented before. The basis of my exercise of discretion is that based upon what was presented to me as to what the issues were, and I said it last time, I don't know what you're looking for, and you don't get to go into somebody's *** computer with deleted documents, you don't get to go in there, unless you explain to the judge what is the relevant evidence that you think you are going to be able to retrieve to prove your case."

¶ 35 C. Trial Court's Decision

¶ 36 A bench trial occurred over several days in January to March 2013. Witnesses included Mostardi employee Joseph Macak and Power employees Darguzas and Steven Shaw. The relevant trial testimony is summarized within the trial court's detailed, 16-page written decision. The court stated as follows.

¶ 37 Both parties agreed that the original and revised agreements governed their relationship, and the two documents had to be read together. The contract terms in those agreements were clear and unambiguous. The original agreement gave an estimate of the cost for permitting services and modeling services. The charges were to be paid on a time-and-expense basis within 30 days of receipt of an invoice. The revised agreement then amended the original agreement from time and expense to a fixed lump sum, which included three iterations of startup modeling. Reading the original and revised agreements together, Mostardi was not entitled to any further compensation for permitting services or modeling services "unless 1) the services were outside the contemplation of the [original and revised agreements] and/or 2) [Mostardi] had completed more than three startup" iterations.

¶ 38 The court began by considering Mostardi's claim that Power had breached the contract. When Mostardi contacted Power about "going out of budget," Shaw from Power asked Mostardi "to invoice him for what [Mostardi] considered to be outside the scope of the lump sum contract." Shaw would then determine whether Power agreed that the hours were outside the scope contemplated. Shaw also asked Mostardi to designate the hours as permitting services or modeling services. Macak's testimony that Mostardi could not separate out the time was "disingenuous." Pursuant to the original and revised agreements, Mostardi "could and did easily separate these two activities." Instead of complying with Power's "reasonable request" that it be billed for services which Mostardi thought were outside the scope of what was agreed upon,

Mostardi sent Power a $90,489 invoice for "all hours and expenses incurred from July 18, 2006 through December 27, 2007." This invoice did not comply with the requirements of the original or revised agreements. It gave no credit for Power's prior payments; it failed to separate the two categories of work; and, it did not delineate what was outside of the contemplated scope of work or what work was done after the third startup iteration.

¶ 39 In addition, although Shaw from Power admitted that Mostardi performed services "not originally contemplated" by the original and revised agreements, he offered to settle the dispute by paying $20,000. Mostardi rejected that offer. While "there was no dispute that services were rendered outside of the contemplated scope," Mostardi failed to provide any accounting or description of those services. As a result, the court rejected Mostardi's claim that Power had breached the contract. Power could not be held in breach of contract when it had not received any invoice requesting that it pay for (1) work outside the scope of the original and revised agreements or (2) startup iterations "subsequent to the third startup iteration."

¶ 40 Regarding count II, based on a theory of *quantum meruit*, the court determined that the original and revised agreements controlled the parties' rights and obligations. Accordingly, because there was a valid contract, Mostardi could not state a valid cause of action for *quantum meruit*, and the court dismissed that count with prejudice. The court also denied relief on counts III and IV, seeking rescission based on mutual and unilateral mistake.

¶ 41 Turning to Power's counterclaim that Mostardi breached the contract, the court agreed and entered judgment for Power. Power sought costs for completing the permit application from the date it was filed until the date it was posted for public review (October 18, 2007 - January 17, 2009). Power alleged that Mostardi failed to provide "support" after the permit application was filed. Mostardi, on the other hand, claimed that the services included in the lump sum of the

revised agreement pertained only to work done through the *filing*, rather than the *posting*, of the permit application.

¶ 42 Again, the court noted that the language of the agreements was clear and unambiguous. The revised agreement called for a lump sum of $50,000 for all permitting services, with a hold back provision of $27,462, which was not due until 30 days after the permit was posted. The court noted that it made "perfect sense why" there was a hold back amount of the "lump sum until 30 days after" the permit was posted for public review "if further services under the lump sum agreement" were "expected after filing the application." "This [became] further clarified by the provision that services after the posting of the permit" would be separately negotiated. According to the court, if Mostardi were not required to provide permitting services through posting, then the language would have read that services after the "filing" of the permit application would be separately negotiated. The revised agreement required Mostardi "to continue its role concerning the permit application preparation services through posting of the permit." The court thus found that Mostardi had breached the revised agreement by failing to provide "post-filing support."

¶ 43 The court noted that partial summary judgment had previously been entered in favor of Mostardi for the hold back amount of $27,462 after the permit had been posted. The court further noted that both parties, for separate reasons, had asked the court to vacate the partial summary judgment order. In particular, Mostardi had asked the court to vacate that order so that it could pursue its remedy of rescission in counts III and IV. The court granted the request to vacate the partial summary judgment order.

¶ 44 In addition, the trial court reasoned that the partial summary judgment order should not have been granted in the first place. According to the court, there were genuine issues of

material fact, such as whether Mostardi had met all of its obligations under the original and revised agreements, thereby entitling it to the hold back amount. Because the court determined that Mostardi had not met all of its obligations, such as the "post-filing" support that it agreed to provide after the permit application was filed, Mostardi was not entitled to recover the hold back amount.

¶ 45 Turning to modeling services, the court noted that Power alleged that Mostardi had failed to complete two tasks: "CALPUFF" and an endangered species analysis. The court agreed that the revised agreement required Mostardi to complete those two services and that Power hired other companies to complete the services that Mostardi failed to perform.

¶ 46 In damages, Power sought $36,405 for work performed by Black & Veatch. Because the court found that Power failed to prove that that payment to Black & Veatch was for services that Mostardi was obligated to perform, it denied that relief. The remainder of Power's claims for damages fell under the parameter of the revised agreement with Mostardi, however. Power paid Conestoga Rovers & Associates $40,096 for permit application review. When that figure was reduced by the $27,462.20 hold back amount that Power agreed to pay, the amount due to Power for services rendered by Conestoga Rovers & Associates was $12,633.80. Power also paid: (1) ENSR Corporation $7,666.50 for CALPUFF (California Puff Model) services and (2) Civil and Environmental Consultants, Inc. $1,231 for endangered species services, for a grand total of $21,531.30.

¶ 47 Finally, the court noted that Mostardi filed an affirmative defense claiming that the original agreement limited its liability to $20,000. The court agreed and determined that Power's damages were limited to $20,000.

¶ 48 Mostardi timely appealed.

¶ 49 II. ANALYSIS

¶ 50 A. Discovery

¶ 51 Mostardi's first argument on appeal is that Power committed "significant discovery violations that warranted sanctions." Mostardi argues that the trial court's failure to hold Power "accountable for its transgressions" was an abuse of discretion. In particular, Mostardi appeals the denial of its motion for a protective order, which the court treated as a general motion to compel discovery. Mostardi requests this court to reverse and remand so that full discovery disclosure can be accomplished. Alternatively, Mostardi requests this court to sanction Power by reversing the judgment and entering a verdict in its favor.

¶ 52 Under Illinois Supreme Court Rule 201(b)(1) (eff. Jan. 1, 2013), "a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents ***." Trial courts are afforded wide latitude in determining the permissible scope of discovery. *Payne v. Hall*, 2013 IL App (1st) 113519, ¶ 13. We will not disturb a trial court's rulings on discovery matters absent an abuse of discretion. *City of Champaign v. Sides*, 349 Ill. App. 3d 293, 302 (2004). A trial court abuses its discretion only if it acts arbitrarily, without the employment of conscientious judgment; exceeds the bounds of reason and ignores recognized principles of law; or, if no reasonable person would take the position adopted by the court. *Payne*, 2013 IL App (1st) 113519, ¶ 12.

¶ 53 Here, the trial court did not abuse its discretion by denying Mostardi's discovery motion. Mostardi's alleged discovery violations by Power are either meritless or based on information that was not relevant to the case.

¶ 54 First, Mostardi claims that Power did not produce: (1) emails from any of its company email accounts or (2) emails from Darguzas's hard drive during "the critical juncture of October 23 to December 13, 2007." For this second claim, Mostardi does not cite to the record, which results in forfeiture of the argument. See *Kreutzer v. Illinois Commerce Comm'n*, 2012 IL App (2d) 110619, ¶ 40 (the failure to cite to the record results in forfeiture under Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008)). In any event, we agree with Power that both claims are baseless. Power produced approximately 300 documents from its company email addresses and several documents from the period of October 23 to December 13, 2007. In its response to Mostardi's motion for a protective order, Power attached an exhibit to this effect.

¶ 55 Second, Mostardi argues that Power did not timely disclose its use of a third-party web-based administrator, which it used to shield electronic data from discovery. Mostardi argues that it learned in the eleventh hour that Power "buried other evidence with its third party repositories," and the trial court "stood by and allowed all of this discoverable evidence to go up in smoke." Again, this claim is baseless.

¶ 56 Not content with the search of Darguzas's hard drive, Mostardi requested to also image Power's electronic storage devices and server. Power responded that it did not have a server that could be imaged because its corporate email was operated by a third-party web administrator. The fact that Power utilized a web-based server that could not be imaged does not equate to "shielding" or "burying" evidence. As Power states, its document production included emails from its corporate email addresses, which necessarily originated from the web-based server.

¶ 57 More importantly, Mostardi gave no indication as to how the information it sought was relevant to the issues in the case. See *In re Estate of Blickenstaff*, 2012 IL App (4th) 120480, ¶ 48 (in order to protect against abuses and unfairness, the right to discovery is limited to

disclosure of matters that will be relevant to the case at hand; a court should deny a discovery request where there is insufficient evidence that the requested discovery is relevant or will lead to such evidence). The court correctly noted that this was a breach of contract case, with the issues being whether Mostardi "walked off the job," "completed the job," and "what the change orders were." When the court pressed Mostardi as to the relevance of the information it sought, Mostardi gave no indication as to the content of the missing evidence it hoped to discover. Instead, Mostardi made general, conclusory assertions that the missing information was relevant to the changes in the scope of work, settling with Mostardi, and Power's hiring of other consultants to complete the job. However, as the court noted, there was no "why" in a breach of contract case, and Mostardi did not explain how "these missing documents" would address any material issues in the case. *Cf. Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635, 658-59 (2002) (where the plaintiffs offered no argument as to the relevance of the undisclosed documents but instead suggested that they "may" contain evidence relevant to the defendants' credibility or suggesting a pattern of misconduct by the defendants, the discovery requests were merely a fishing expedition and would have been conducted with the "hope" of finding something relevant).

¶ 58 On the issue of relevance, Mostardi argues that it was not its burden to show relevance because only the responding party knows the content of the requested documents. However, the trial court properly noted that Mostardi could not "go in and demand everything in the whole world" if it did not "have a potential of leading to something that's going to be evidence." Discovery rulings are discretionary, and the trial court may deny or limit discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression. Ill. S. Ct. R. 201(c); *Yuretich v. Sole*, 259 Ill. App. 3d 311, 317 (1994). We agree with the trial court that

Mostardi could not simply "go into somebody's" computer unless it explained "the relevant evidence" that it thought it would "retrieve to prove" its case.

¶ 59 Mostardi's next alleged discovery violation is that Power engaged in "fractional disclosures." Mostardi argues that emails Power initially denied having were later discovered during Jergen's search of Darguzas's hard drive. Yet, as the trial court noted, Darguzas's admission that he had deleted various emails was not troubling on its face, because deleting emails was a business reality. In any event, Mostardi's argument to this effect is moot. Power agreed to Jergen's search of Darguzas's hard drive, which recovered any relevant emails that Darguzas had deleted. Power then produced the relevant documents that were not privileged.

¶ 60 In a related argument, Mostardi contends that Power did not produce certain emails between Darguzas and Conestoga Rovers & Associates. Rather, such documents, which were admitted at trial, were produced "via third party discovery from" Conestoga Rovers & Associates. However, we agree with Power that Mostardi has failed to show the relevance of these documents. In denying Mostardi's discovery motion, the court specifically noted that Mostardi "already" had information showing that Power hired another consultant to finish the project. Nevertheless, Mostardi had not alleged fraud or conspiracy in Power's hiring of Conestoga Rovers & Associates or other consultants to complete the project. Though this appeared to be the type of information Mostardi was looking for in its discovery motion, it was within the court's discretion to "stop the digging, stop the researching, and move on to what the case [was] about." Because the documents were not relevant to the issues in the case, Mostardi cannot show how it was prejudiced in not obtaining these documents from Power.

¶ 61 Mostardi's final argument with respect to discovery is that the trial court erred by reviewing a privilege log of the documents Power withheld as opposed to the documents themselves. We reject this argument for three reasons.

¶ 62 First, Mostardi cites no case for the proposition that it is improper for the court to review a privilege log rather than the actual documents, especially where the documents are voluminous. In fact, in a case cited by Mostardi, *Mueller Industries, Inc. v. Berkman*, 399 Ill. App. 3d 456, 480 (2010), *abrogated on other grounds by People v. Radojcic*, 2013 IL 11497, this court remanded the case to the trial court to conduct an *in camera* review of the documents at issue, noting that if the documents were voluminous, it was permissible for the court to review a privilege log containing a highly detailed description of each document. Like *Mueller Industries, Inc.*, the documents in this case were voluminous, totaling approximately 8,000 pages. Requiring the court to review 8,000 pages would be overly burdensome and would interfere with its broad discretion over discovery matters.

¶ 63 Second, the trial court did require Power to revise its privilege log with more detailed information. Power did so by including a description of the document, its basis for withholding it, and information allowing the court to cross-reference the documents to the Jerger index. The court noted that the revised privilege log contained headlines of the emails, and it was "confident that each and every document" would "continue" the way it began. According to the court, there was no evidence that Power was hiding information in its emails.

¶ 64 Third, Mostardi's argument on this issue is, at its core, predicated on its other allegations of Power's discovery violations. We have already determined that those allegations lack merit. Therefore, the trial court did not abuse its discretion in conducting an *in camera* review of the revised privilege log rather than the actual documents.

¶ 65 For all of these reasons, the court did not abuse its discretion in denying Mostardi's discovery motion. Given our conclusion, we need not consider Mostardi's alternative request that this court sanction Power by reversing the judgment and entering a verdict in its favor, or Power's argument that Mostardi did not properly preserve the issue of sanctions in the trial court.

¶ 66 B. Summary Judgment

¶ 67 Next, Mostardi argues that the trial court erred by vacating the grant of partial summary judgment in its favor. As we explain, Mostardi's request that the trial court vacate this ruling during the proceedings below bars Mostardi from raising this argument now.

¶ 68 The relevant sequence of events is as follows. Prior to trial, Mostardi moved for partial summary judgment, seeking to enforce the terms of the revised agreement. In particular, Mostardi argued that, once the IEPA posted the permit, it was entitled to the hold back amount of $27,462. The trial court granted Mostardi's motion but stayed enforcement pending any judgment entered on Power's counterclaims.

¶ 69 Following the bench trial, the parties submitted written closing arguments. As part of its closing argument, Power pointed out that Mostardi, in counts III and IV, sought rescission of the revised agreement based on mutual and unilateral mistake. Power cited *Overton v. Kingsbrooke Development, Inc.*, 338 Ill. App. 3d 321, 332 (2003), for the proposition that the remedy of rescission necessitates disaffirming the contract to allow the parties to return to the status quo. In other words, a party must elect a remedy based on the affirmance or disaffirmance of the contract, but the election of one is the abandonment of the other. *Id*. Based on the grant of Mostardi's motion for partial summary judgment, Power argued that Mostardi had obtained judgment on the revised agreement, the "very agreement that it now" sought to rescind in counts III and IV. Mostardi responded to this argument in its written closing argument. It noted that

judgment had been stayed on the partial summary judgment and that the trial court had the authority to vacate that ruling.

¶ 70 In its written decision, the trial court agreed with Power that Mostardi could not seek relief pursuant to the revised agreement and at the same time, seek to rescind it. The court noted that partial summary judgment was granted on the revised agreement. "Having received the benefits of enforcing" the revised agreement, "rescission [was] no longer available" to Mostardi. The court then stated that Mostardi had asked it to vacate the partial summary judgment so that it could seek rescission. The court granted this relief and vacated the partial summary judgment, thus allowing Mostardi to pursue the remedy of rescission.

¶ 71 "The rule of invited error or acquiescence is a procedural default sometimes described as estoppel." *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). Accordingly, a party cannot complain of error which that party induced the court to make or to which that party consented. *Id*. The rationale behind the rule is that it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings. *Id*.

¶ 72 Mostardi requested the court to vacate the partial summary judgment so that it could pursue its rescission counts. Though Mostardi did not prevail on the rescission counts, it cannot now complain of a ruling that it requested and received in the trial court.

¶ 73 C. *Quantum Meruit* Count

¶ 74 Mostardi also argues that the trial court erred by determining that it could not state a valid cause of action for *quantum meruit.* In its written decision, the court determined that the original and revised agreements controlled the parties' rights and obligations, meaning Mostardi could not recover under a *quantum meruit* theory. Mostardi argues that the court's decision "clashes"

with *Patrick Engineering v. City of Naperville*, 2011 IL App (2d) 10065, *rev'd on other grounds*, 2012 IL 113148. We disagree.

¶ 75 In *Patrick Engineering*, the plaintiff, a contractor, sued the defendant, the City of Naperville, for breach of contract and also for recovery in *quantum meruit*. *Id*. ¶¶ 1, 14. The City moved to dismiss the contractor's complaint, arguing that the contractor could not assert a claim for *quantum meruit* because a contract governed the entire relationship between the parties. *Id*. ¶ 16. The trial court granted the City's motion to dismiss, and the contractor appealed. *Id*. ¶ 45.

¶ 76 On appeal, this court noted that *quantum meruit* is an equitable theory under which a party can obtain restitution for the unjust enrichment of the other party. *Id*. ¶ 47. We further noted that *quantum meruit* is often pleaded as an alternative to a breach of contract claim so that the plaintiff can recover the value of its work even if the trial court finds that the plaintiff cannot recover under the contract. *Id*. This is because under Illinois law, plaintiffs are permitted to plead such alternate theories of recovery, even when they rest on inconsistent sets of facts. *Id*.

¶ 77 With these principles in mind, this court reversed the trial court's dismissal of the *quantum meruit* count. *Id*. ¶ 50. We stated that the trial court was incorrect in finding that both parties agreed that their relationship was governed by a valid contract. *Id*. Although both parties agreed that a contract existed, they disagreed as to its scope and applicability to the work performed by the contractor, and thus did not agree that their relationship was governed by the contract. *Id*. The trial court's finding was made prior to the consideration of any evidence regarding the contract, which was premature. *Id*.

¶ 78 The case at bar is wholly distinguishable from *Patrick Engineering*, where the *quantum meruit* count was improperly dismissed on the pleadings. In other words, the trial court's

dismissal of the *quantum meruit* count in *Patrick Engineering* was premature because the parties disputed whether the contract controlled. Here, Mostardi pled breach of contract and *quantum meruit*, in the alternative. After a bench trial, rather than at the pleadings stage, the trial court determined that the existence of a valid contract defeated Mostardi's *quantum meruit* count. Indeed, the court noted in its written decision that both parties agreed that the original and revised agreements governed their relationship. Nothing in *Patrick Engineering* changes the rule that a party cannot recover in *quantum meruit* where a valid contract governs the relationship between the parties. See *id*. ¶ 45. Because a valid contract controlled the parties, the trial court did not err by determining that Mostardi was not entitled to relief under a *quantum meruit* theory.[3]

¶ 79 D. Breach of Contract

¶ 80 Mostardi's next argument is that Power breached the contract. Mostardi thus argues that the trial court's finding that it breached the contract was against the manifest weight of the evidence.

¶ 81 When two parties reduce an agreement to a written contract, that writing is presumed to reflect the intention of the parties. *Doornbos Heating & Air Conditioning, Inc., v. James Schlekner*, 403 Ill. App. 3d 468, 488 (2010). "The primary goal of contract interpretation is to give effect to the parties' intent." *Covinsky v. Hannah Marine Corp.*, 388 Ill. App. 3d 478, 483-84 (2009). This court interprets a contract as a whole and applies the plain and ordinary meaning to unambiguous terms. *Id*. at 484. The interpretation of a contract presents a question of law and

[3] Though the trial court stated that it dismissed with prejudice the *quantum meruit* count, it is more accurate to say that the court *denied* relief, given that a trial occurred.

is therefore entitled to *de novo* review. *Doornbos Heating & Air Conditioning, Inc.*, 403 Ill. App. 3d at 488.

¶ 82 Conversely, the court's finding as to whether a breach of contract occurred is a question of fact that will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Id*. The trial court, as trier of fact, is in a superior position to observe the witnesses while testifying, to judge their credibility, and to determine the weight that their testimony should receive. *Hessler v. Crystal Lake Chrysler-Plymouth, Inc.*, 338 Ill. App. 3d 1010, 1022 (2003). Therefore, where the testimony is conflicting in a bench trial, the court's findings will not be disturbed unless they are against the manifest weight of the evidence. *Id*. "A factual finding is against the manifest weight of the evidence if the opposite conclusion is plainly evident, or where the decision is unreasonable, arbitrary, or without a basis in the evidence." *Asset Recovery Contracting, LLC v. Walsh Construction Co.*, 2012 IL App (1st) 101226, ¶ 74.

¶ 83 First, Mostardi argues that its out-of-scope work was requested and approved by Power, meaning that Mostardi was permitted to charge for such work on a time-and-expense basis. In support of this argument, Mostardi points out that Power agreed that "unanticipated changes" entitled Mostardi to additional compensation. As we explain, there is no dispute that Mostardi rendered services outside of the contemplated scope of the original and revised agreements. However, Mostardi rejected Power's offer to pay for that work, and it failed to submit invoices entitling it to more.

¶ 84 The trial court's decision discussed this issue in detail. According to the court, the original and revised agreements had to be read together, and the contract terms were clear and unambiguous. While the original agreement provided that Power would pay Mostardi on a time-and-expense basis, the revised agreement amended the payment terms to a lump sum. As the

court stated, Mostardi was not entitled to any further compensation for permitting services or modeling services beyond the lump sums unless the services were outside the contemplation of the original and revised agreements. The original agreement provided that "[a]ny services not specifically listed" but "requested by" Power could be completed on a time-and-expense basis, and these items would be "identified separately on each invoice." Therefore, Mostardi was required to submit invoices for work outside the scope of the original and revised agreements.

¶ 85 When Mostardi contacted Power about "going out of budget," Power's employee Shaw asked Mostardi "to invoice him for what [Mostardi] considered to be outside the scope of the lump sum contract" so that Shaw could determine whether Power agreed that the hours were outside the scope contemplated. Though Mostardi did not provide "a cogent or accurate summary" of project expenses, Shaw reviewed the time reports and invoice data provided by Mostardi and determined that Mostardi had performed services "not originally contemplated" by the original and revised agreements. Shaw estimated that $20,000 in such fees had been incurred and offered to settle the dispute by paying that amount. Mostardi rejected that offer.

¶ 86 After rejecting Power's offer, the court noted that Mostardi "did not provide Mr. Shaw with any further data or with any amount due as work outside the scope." According to the court, although Macak from Mostardi could have contacted Shaw outlining the services he thought were outside the scope, he never did so. Mostardi was required to submit invoices for out-of-scope work, but Mostardi "never billed for those services." Accordingly, while "there was no dispute that services were rendered outside of the contemplated scope," Mostardi "failed to provide any accounting or description of those services." Therefore, the trial court's finding that Power did not breach the contract by failing to pay for such out-of-scope work was not against the manifest weight of the evidence.

¶ 87 Second, Mostardi argues that it was not obligated to itemize its invoices under the original agreement. This argument is easily rejected. We have already stated that under the plain language of the original agreement, Mostardi was required to itemize its invoices for out-of-scope work. Under the original agreement, such out-of-scope work would be "identified separately on each invoice."

¶ 88 Alternatively, Mostardi argues that it did itemize the invoices. We reject this argument because it contradicts the testimony of its own witness as well as the evidence. For the out-of-scope work, Shaw asked Mostardi to designate the hours as permitting services or modeling services. Macak testified that this time could not be separated, and the court found this testimony to be "disingenuous." The court noted that in both the original and revised agreements, Mostardi "could and did easily separate these two activities." It further noted that at trial, Macak never explained how the two services could be separated for purposes of the original and revised agreements but not for invoicing purposes.

¶ 89 Rather than complying with Power's "reasonable request" that it be billed for services that Mostardi thought were outside the scope of what was agreed upon, Mostardi sent Power an invoice for "all hours and expenses incurred from July 18, 2006 through December 27, 2007." The court found that this invoice, which charged $90,489 for work from the beginning to the end of the project, did not comply with the requirements of the original or revised agreements. It gave no credit for Power's prior payments; it failed to separate the two categories of work; and, it did not delineate what was outside of the contemplated scope of work. It was "beyond the comprehension" of the court how Mostardi expected to be paid with this invoice, which is the same invoice Mostardi refers to on appeal. Mostardi was required to itemize its invoices for out-

of-scope work, and the trial court's finding that it failed to do so was not against the manifest weight of the evidence.

¶ 90 Third, Mostardi argues that Power was never forced to hire other consultants to finish the job, which was the basis of Power's counterclaim. Power argued that Mostardi breached the contract by failing to provide support from the date the permit application was filed (October 18, 2007) to the date the permit was posted by the IEPA (January 17, 2009). Mostardi argues that it did not breach the revised agreement because its duties ceased on the filing, rather than the posting, of the permit application. The clear and unambiguous language of the revised agreement runs contrary to Mostardi's argument.

¶ 91 The revised agreement called for a lump sum of $50,000 for all permitting services, with a hold back amount of $27,462 that was not due until 30 days after the permit was posted. Mostardi points to the following language as evidence that the lump sum covered only services required to file the permit application: the lump sum cost "includes all application preparation work conducted up to and including today's date and additional work required to file the permit application." However, in making this argument, Mostardi ignores the next sentence of the revised agreement, which stated, "All parties agree that this portion of permitting services will be deemed complete when [the IEPA] posts the draft construction permit for public review and comment." Finally, the revised agreement provided that "[s]ervices needed after posting of the draft Permit" would be "separately negotiated." The plain language of the revised agreement thus required Mostardi to provide support from the filing of the permit application to the posting of the permit, but it did not require Mostardi to provide support after the permit was posted.

¶ 92 In its decision, the court stated that it made "perfect sense" to have a hold back provision 30 days after posting if further services were expected after filing the application. Conversely,

services after the posting of the permit would be separately negotiated. We agree with the court that if Mostardi were not required to provide support after filing the permit application, then the revised agreement would have stated that services after the filing of the permit application would be separately negotiated.

¶ 93 Mostardi does not dispute that it failed to provide support after the permit application was filed. Therefore, the trial court's finding that Mostardi breached the contract by failing to provide support after the permit application was filed was not against the manifest weight of the evidence. For this reason, we also reject Mostardi's argument that the damages awarded to Power ($20,000) should be offset by the hold back amount of $27,462.

¶ 94 E. Additional Theories of Recovery

¶ 95 Mostardi next argues that Power benefited from its substantial performance of the revised agreement. See *James v. Lifeline Mobile Medics*, 341 Ill. App. 3d 451, 455 (2003) (a party seeking to enforce a contract has the burden of proving he has substantially complied with the material terms of the agreement). However, like the previous argument, it is based on the faulty premise that Mostardi "fulfilled its duty when the air permit application was filed with the IEPA." As stated above, the trial court properly determined that Mostardi materially breached the revised agreement by failing to provide support after the permit application was filed to the date of posting. Likewise, the court found that Mostardi breached the revised agreement by failing to complete two tasks related to modeling services; namely, CALPUFF and an endangered species analysis. Therefore, Mostardi cannot recover under the doctrine of substantial performance. See *id.* (a party who materially breaches a contract cannot take advantage of the terms of the contract that benefit him, nor can he recover damages from the other party to the contract).

¶ 96 Mostardi also argues that the impossibility of performance doctrine applies in this case because it could not comply with another consultant's (Black & Veatch's) "design plant changes without overhauling its work."

¶ 97 Impossibility of performance as a basis for rescission of a contract refers to those factual situations where the purposes for which the contract was made have, on one side, become impossible to perform. *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 403 Ill. App. 3d 1, 6 (2010). "The doctrine excuses performance where performance is rendered objectively impossible due to destruction of the subject matter of the contract or by operation of law." *Id*. The doctrine has been narrowly applied based on the judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances. *Id*. Significantly, the doctrine does not apply to excuse performance as long as it lies within the power of the promisor to remove the obstacle of performance. *Downs v. Rosenthal Collins Group, LLC*, 2011 IL App (1st) 090970, ¶ 39.

¶ 98 Mostardi failed to show that its performance of the contract, which consisted of permitting services and modeling services, was impossible. Rather than impossibility, Mostardi's continual objection to the contract was that it did not adequately compensate the work required for the project. See *Illinois-American Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098, 1107 (2002) (doctrine of impossibility of performance did not apply where the plaintiff failed to present sufficient evidence that performance, even if difficult, was impossible). Therefore, Mostardi has not demonstrated that the impossibility of performance doctrine applies here.

¶ 99 Finally, Mostardi argues that the trial court failed "to adjust the damage calculation to excise work that Mostardi was not obligated to do." As we explain, however, this argument is forfeited.

¶ 100 Power hired other consultants to complete the services that Mostardi failed to perform. The court reviewed the invoices from these consultants to determine which ones fell under the parameter of the revised agreement with Mostardi. In doing so, it rejected $36,406 in damages Power sought for work performed by Black & Veatch. Mostardi argues that the trial court failed to "consider the impact of this cul-de-sac on the costs quoted" for the other consultants, and it "did not adjust" the amount paid to Conestoga & Rovers & Associates "for the post-submission work." This type of meritless and incomprehensible argument is forfeited for failure to comply with Rule 341(h)(7). See *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 875 (2010) (Rule 341(h)(7) requires a clear statement of contentions with supporting citation of authorities; ill-defined and insufficiently presented issues that do not satisfy the rule are considered forfeited).

¶ 101 III. CONCLUSION

¶ 102 For all of these reasons, we affirm the judgment of the Du Page County circuit court.

¶ 103 Affirmed.