No. 1-09-3128

SIXTH DIVISION
March 29, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HI-LO CLIMBERS, L.L.C. and LEWELLYN HANSEN, Plaintiffs-Appellants, v. LEON E. ZYGMUN, DESIGNED EQUIPMENT CORP., and LEON E. ZYGMUN & CO., INC., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 04 CH 07753 The Honorable Daniel A. Riley, Judge Presiding.

PRESIDING JUSTICE GARCIA delivered the judgment of the court.
Justices McBride and R.E. Gordon concurred in the judgment.

O R D E R

Held: Trial court's decision was not against the manifest weight of the evidence in finding (1) the plaintiffs failed to prove the defendants breached their contractual obligation to purchase 80% of their scaffolding equipment from plaintiffs, (2) the plaintiffs' subsequent refusal to sell equipment to the defendants relieved the defendants of their obligation to purchase the plaintiffs' scaffolding equipment, (3) the plaintiffs did not establish the defendant's alleged breach of a non-competition agreement caused them damages, and (4) the defendants were not liable for tortious interference. The trial court also properly found that the plaintiffs failed to present evidence of spoliation.

Following a bench trial in a breach of contract action stemming from the sale of a scaffolding business, the trial court entered judgment in favor of defendants Leon E. Zygmun, Designed Equipment Corporation ("DEC") and Leon E. Zygmun & Co., Inc. ("LEZ"), the sellers of the business, and against plaintiffs Hi-Lo Climbers, L.L.C. ("Hi-Lo") and Lewellyn Hansen, the purchasers of the business. We affirm. The plaintiffs failed to demonstrate that the defendants did not comply with production requests during the discovery phase of the case to prove the spoliation claim; it was not against the manifest weight of the evidence for the trial court to find that the defendants did not violate their contractual promise to purchase 80% of DEC's scaffolding equipment from the plaintiffs; the court correctly found that upon the plaintiffs' refusal to sell equipment to the defendants, the defendants were released from any future obligation to purchase equipment from the plaintiffs; finally, regardless of whether Zygmun breached his covenant not to compete with the plaintiffs, the plaintiffs did not establish the alleged breach caused them any damages, which precludes recovery.

BACKGROUND

In 2001, Leon Zygmun was the president and principal shareholder of LEZ, and his wife, Patricia Zygmun, was its corporate secretary. LEZ owned Hi-Lo, which manufactured, sold, and distributed scaffolding equipment. Patricia and Leon were also principal shareholders of DEC, with Patricia as its president and Leon as its vice president. DEC provided sales, rental, service and labor in the scaffolding industry, with operations in Chicago, Miami, Houston, and San Diego, and was a customer and distributor of products manufactured and sold by Hi-Lo.

On March 13, 2001, defendant Zygmun and plaintiff Hansen executed an Asset Purchase

Agreement ("Purchase Agreement") whereby LEZ sold Hi-Lo's assets to Hansen for $4,180,000. At the closing, Hansen tendered $3 million, financed by a bank loan, and executed a note for the balance of $1,180,000 payable to LEZ. Under the terms of the note, LEZ was to receive $24,900 monthly. Two days later, on March 15, 2001, the parties executed an Addendum to the Purchase Agreement ("Addendum") in which DEC agreed to purchase 80% of all its scaffolding equipment needs from Hi-Lo and to remain a dealer of Hi-Lo equipment for not less than five years. Paragraph five of the Addendum addressed the timeliness of payment from DEC to Hi-Lo for scaffolding equipment: "DEC does hereby agree that it will pay all of its invoicing from HI-LO in not less[1] than forty-five (45) days from the later of the date of invoicing or date of delivery of the products DEC purchases from [Hi-Lo]."

At the time of closing on March 13, 2001, the parties also entered into a Non-Disclosure and Non-Competition Agreement ("Non-Competition Agreement"). Paragraph 3(a) of the Non-Competition Agreement provided that defendants Zygmun and LEZ may not "engage or participate, anywhere throughout the world ***, in any business which is competitive with [Hi-Lo's scaffolding business]." Pursuant to the Non-Competition Agreement, Zygmun and LEZ were precluded from soliciting any customer of Hi-Lo "to purchase from any source other than [Hi-Lo] any product or service which could be supplied by [Hi-Lo], or attempt in any way, directly or indirectly, to obtain for itself, himself or others or to divert from [Hi-Lo] any rights, benefits, sales, or profits arising out of or in connection with [Hi-Lo's business]."

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[1] The text of the Addendum is presented verbatim. It appears the parties intended this to say "more" rather than "less."

The Non-Competition Agreement provided exceptions for DEC operations:

> "Zygmun has the right to be involved in any aspect of [DEC's] business, as conducted as of the date of closing, whether or not such business competes with [Hi-Lo] as long as such competition is limited to the Chicago Metropolitan area and/or with any customer of [DEC] prior to the date of Closing of the Purchase Agreement."

Paragraph 6 released Zygmun of any obligation under the non-compete agreement in the event Hi-Lo "fails to make timely payments under the terms of the Promissory Note, and said *** non-payment continues for a period of thirty (30) days."

Beginning around 2003, difficulties developed between the parties.

Litigation History

On May 11, 2004, Hansen and Hi-Lo filed this action against the defendants and former employees of Hi-Lo. The plaintiffs filed their fourth amended complaint on June 6, 2006. The complaint alleged that LEZ, Zygmun, and DEC violated the Non-Competition Agreement by conducting business with competitors of Hi-Lo; LEZ and Zygmun breached the Purchase Agreement by failing to ensure DEC purchased at least 80% of its scaffolding equipment from Hi-Lo; certain former Hi-Lo employees breached the terms of their employment by competing with Hi-Lo; Zygmun and DEC tortiously interfered with LEZ's contractual obligations to Hi-Lo; LEZ and Zygmun tortiously interfered with DEC's contractual obligations to Hi-Lo; LEZ, Zygmun, and DEC tortiously interfered with Hi-Lo's former employees' contractual obligations to

Hi-Lo; LEZ, Zygmun, and DEC conspired against Hi-Lo; and the former Hi-Lo employees misappropriated trade secrets and breached their fiduciary duties to Hi-Lo. The fourth amended complaint also included a charge alleging spoliation of evidence by defendants LEZ and Zygmun.

The plaintiffs sought damages, an order prohibiting LEZ, Zygmun, and DEC from competing with Hi-Lo, and an order directing DEC to buy 80% of its scaffolding from Hi-Lo for a time period equaling the duration of its alleged breach of this obligation.

The defendants filed an answer to the complaint and moved to dismiss the spoilation claim, which the trial court denied. A trial ensued. After trial commenced in October 2008, Hanson dismissed his personal claims against the former employees of Hi-Lo. At the close of the plaintiffs' case, the trial court granted the motion of the former employees of Hi-Lo for a directed finding of no liability. The plaintiffs' claims against the three principal defendants remained.

Trial Evidence

Hansen testified on direct examination that sales from Hi-Lo to DEC began at a satisfactory volume, but declined beginning in 2003 and reached zero from 2005 through March 2006. He stated that in 2002, DEC was delinquent in paying Hi-Lo invoices in violation of the Addendum, by failing to pay within 45 days of the invoice date or the date of delivery. In 2003, DEC owed Hi-Lo $43,000, which it did not pay in full until after suit was filed in 2004. As a result of the delinquent invoices, Hi-Lo stopped accepting orders from DEC for scaffolding equipment.

Hansen testified that in May or June 2003, former Hi-Lo employee John Barone

contacted Hansen to purchase $400,000 in scaffolding equipment from Hi-Lo for Barone's new Florida-based scaffolding company, All American Swing Stage. Barone requested Hansen finance the transaction because he could not make the purchase under different terms. Hansen turned the sale down because Hi-Lo could not afford to finance the sale. Barone then contacted Zygmun to arrange the purchase on similar terms. On August 1, 2003, DEC financed and sold $400,000 worth of scaffolding equipment to Barone.

In October 2003, Hanson stopped paying on the note payable to LEZ. By October 2003, Hanson had stopped making payments on the bank loan used to finance his payment at closing of the purchase of Hi-Lo. Pursuant to a subordination agreement between Zygmun and the bank, Hanson was not permitted to make payments to Zygmun unless he was current on the bank loan. Hansen resumed paying Zygmun about a year later, but stopped again in October 2005 and never resumed making payments according to the record before us.

In his testimony, Zygmun admitted that as of April 3, 2003, DEC was over 90 days late in paying certain invoices from Hi-Lo. He confirmed that in 2003, DEC had over $40,000 in delinquent invoices from Hi-Lo. According to Zygmun, DEC's overall sales of scaffolding were decreasing, so that the volume of purchases from Hi-Lo decreased as well, though he maintained he continued buying 80% of his scaffolding equipment from Hi-Lo in 2003. According to Zygmun, Hi-Lo became increasingly unwilling to sell to DEC because of DEC's tardiness in paying its invoices. When Hi-Lo refused to fill an order, Zygmun instructed his employees to consider other suppliers.

Frank DiBenedetto, a DEC employee, called by the plaintiffs, testified on cross-

examination that sales between Hi-Lo and DEC stopped in April 2004 when Hi-Lo refused outright to sell to DEC. At that point, DEC was forced to make purchases from other scaffolding suppliers.

DiBenedetto's testimony on cross-examination was consistent with the testimony Patricia Zygmun gave during direct examination in the plaintiffs' case-in-chief. According to Patricia Zygmun, Hi-Lo was slow in filling DEC's sales orders beginning in 2003, until Hi-Lo "simply didn't fill [DEC] orders" beginning in 2004.[2]

As president of DEC, Patricia Zygmun also oversaw much of the document production for the defendants. She admitted some documents were discarded after the plaintiffs served their requests to produce. She asserted it was standard practice at DEC and LEZ to periodically purge old documents. She claimed she discarded only "way old" inventory lists that did not pertain to the plaintiffs' requests to produce. In response to the production requests, Patricia Zygmun

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[2] In their brief's Statement of Facts, the defendants misstate the year sales stopped between DEC and Hi-Lo: "In 2003, Hi-Lo LLC stopped selling product to DEC." We remind defense counsel of the duty to accurately present the facts. Illinois Supreme Court Rule 341(h)(6) (eff. March 16, 2007) also mandates that the Statement of Facts be presented "without argument or comment," a provision repeatedly violated in the defendants' brief as demonstrated by the following taken from the Statement of Facts spanning 30 pages: page 17, Hansen "could not realistically believe that DEC's purchases from HI-LO LLC would remain constant;" page 18, "DEC's sale to the Florida Company did not violate any of the agreements signed by the parties;" and page 24, the plaintiff's expert "used faulty assumptions."

testified she turned over 30,000 pages of purchase orders, invoices, check stubs, receiving tickets, and shipping documents (collectively "source documents") pertaining to DEC's transactions with its vendors. She testified the produced documents were a complete and accurate record of DEC's purchases for the relevant time period. She kept no other records pertaining to purchases by DEC from its vendors.

The defendants introduced into evidence exhibit 112, a summary of the source documents that included DEC's accounts payable files produced and tendered to the plaintiffs. As a defense witness, Patricia Zygmun verified that the vendors listed in the source documents were accurately reflected on exhibit 112.

Christopher Leisner, a CPA and certified management consultant, was qualified as an expert witness for the plaintiffs. Leisner testified he could not verify the accuracy of the source documents because DEC failed to produce a managerial report that identified historical purchases by unit item, vendor, and purchase price. He opined he did not receive a complete set of source documents. He later qualified that statement by saying he had "no way of knowing" whether he had all of DEC's purchase orders and invoices. He testified that in the absence of supporting documents, he could not confirm the completeness of the documents produced. Without adequate supporting documents, he lacked sufficient detail to say that DEC purchased 80% of its scaffolding equipment from Hi-Lo. Though based on reasonable estimates made on the basis of the source documents actually tendered, Leisner concluded DEC did not meet its minium purchase requirement.

James Schultz, a CPA and a business valuation analyst, testified as an expert for the

defendants. Schultz was critical of Leisner's conclusion that DEC failed to purchase 80% of its scaffolding equipment from Hi-Lo. According to Schultz, Leisner failed to take into account that DEC offered six product lines. Schultz implied that some product lines had no connection to the scaffolding equipment sold by Hi-Lo and therefore should not have been considered in determining whether DEC purchased 80% of its scaffolding needs from Hi-Lo. Schultz acknowledged that while all purchase orders and invoices had not been produced by DEC, enough were produced to provide relevant and sufficient data. According to Schultz, Leisner's report erroneously assumed that six months of DEC's sales information was sufficient to extrapolate purchase orders to arrive at the 80% calculation. Schultz testified "no six-month period is representative of any company."

Ruling

In a written decision, the trial court found for the defendants. The court first determined no spoliation occurred. "The defendants ultimately produced the original source documents for each transaction of [DEC] for the period of time in question." The court found Leisner's testimony wanting because he "was unable to provide [that] any specific transaction or any document was missing." Ultimately, the court found spoliation did not lie because the plaintiffs failed to identify a document, the absence of which, prevented the plaintiffs from proving their case.

The court also concluded the plaintiffs failed to prove that DEC purchased less than 80% of its scaffolding units from Hi-Lo. It agreed with Schultz that "Leisner's *** report is unreliable" because DEC had several product lines, many of which did not involve Hi-Lo's type

of scaffolding. Leisner's reliance on a six-month picture of Hi-Lo's business was also unpersuasive because it failed to allow for cyclical downturns in business that often occur. According to the trial court, Leisner overestimated DEC's sales revenues for the period in question. Based on defense exhibit 112, the trial court expressly found that "except for small purchases from [another manufacturer] (appx. $6,000), all purchases of powered and modular scaffolding were made from Hi-Lo *** when Hi-Lo was willing to sell to defendants."

The trial court ruled that beginning in April 2004, DEC was relieved of the requirement to purchase 80% of its scaffolding equipment from Hi-Lo because Hi-Lo refused to sell to DEC. As the trial court expressed: "Clearly, you cannot refuse to sell product and, at the same time, claim damages for failure to make minimum purchases."

The trial court found Zygmun did not violate the Non-Competition Agreement because DEC's sale of equipment to Barone's All American was in "the ordinary course of business" after Hi-Lo turned down the sale under the terms required to complete the sale. The court also noted that All American was "located in a different area of Florida [than Hi-Lo's operations] and there was no evidence that any sales or profits were diverted from the plaintiff." In any event, Zygmun was released from the terms of the Non-Competition Agreement when Hansen became delinquent on the note payable to LEZ.

Finally, the court was unpersuaded by the plaintiffs' tortious interference claim because "the defendants' financial health appears rather dependent on the success of plaintiff." In other words, the plaintiffs and defendants shared a financial interest in the success of Hi-Lo.

The court entered judgment for the defendants on "each and every count." This timely

appeal followed.

ANALYSIS

The plaintiffs raise five arguments on appeal. The first three - DEC violated the 80% requirement, it was an abuse of discretion to admit the source documents and exhibit 112, and the defendants' disposal of documents, after receipt of the production requests, constituted spoliation of evidence - all go to whether DEC breached the 80% purchase requirement in light of the properly admitted evidence. The plaintiffs' fourth contention is that Zygmun violated the plain language of the Non-Competition Agreement before Hansen became delinquent on the note payable to the defendants. The final contention is that DEC's sale to Barone's All American tortiously interfered with the Non-Competition Agreement.

Minimum Purchase Requirement

The plaintiffs contend DEC violated its contractual obligation to purchase at least 80% of its scaffolding equipment from Hi-Lo. "In order to plead a cause of action for breach of contract, a plaintiff must allege: (1) the existence of a valid and enforceable contract; (2) substantial performance by the plaintiff; (3) a breach by the defendant; and (4) resultant damages." *W.W. Vincent and Co. v. First Colony Life Insurance Co.*, 351 Ill. App. 3d 752, 759, 814 N.E.2d 960 (2004).

The parties agree that whether DEC's purchases from Hi-Lo reached the 80% benchmark was a question of fact for the trial court. " 'The standard of review in a bench trial is whether the judgment is against the manifest weight of the evidence.' " *System Development Services, Inc. v.*

Haarmann, 389 Ill. App. 3d 561, 570, 907 N.E.2d 63 (2009), quoting *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App.3d 849, 859, 893 N.E.2d 981 (2008). " 'A judgment is against the manifest weight of the evidence only if the opposite conclusion is apparent or when findings appear to be arbitrary, unreasonable, or not based on the evidence.' " *Haarmann*, 389 Ill. App. 3d at 570, quoting *International Capital Corp. v. Moyer*, 347 Ill. App. 3d 116, 122, 806 N.E.2d 1166 (2004).

A. Document Production and Spoliation

The plaintiffs' contention that DEC violated its contractual obligation to purchase 80% of its equipment from Hi-Lo is based in large part on its argument that the defendants failed to produce documents required by the properly served requests to produce. To further support their claim of breach of contract, the plaintiffs' assert a spoliation claim against the defendants.

A claim for spoliation falls under the rubric of negligence law. A plaintiff must demonstrate the producing party breached a duty to preserve evidence, causing the plaintiff damages. *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 194-95, 652 N.E.2d 267 (1995).

The plaintiffs correctly note that Patricia admitted she discarded certain documents after she received the plaintiffs' request to produce. She testified, however, that the discarded documents were "way old" and not pertinent to DEC's purchases of scaffolding after 2001. The plaintiffs also point to Zygmun's admission that he discarded documents. His unimpeached testimony, however, was that these documents were not source documents; they were merely supporting accounts receivable and accounts payable print-outs, not primary documentation of DEC's purchases.

The plaintiffs cite *Liebert Corp. v. Mazur*, 357 Ill. App. 3d 265, 827 N.E.2d 909 (2005), where the defendants "deliberately" destroyed critical evidence, to support their contention.

We find that case unlike the situation before us. Here, Patricia and Leon Zygmun testified their document disposal was nothing more than routine purging of unnecessary clutter; the plaintiffs have not demonstrated otherwise. The plaintiffs have failed to establish that, "but for the defendant's loss or destruction of the evidence, the plaintiff had a reasonable probability of succeeding in the underlying suit." *Boyd*, 166 Ill.2d at 196 n.2.

Though the plaintiffs claim before us that not all source documents were contained in the boxes the defendants produced, the trial court credited Patricia's testimony that she verified the completeness of the source documents against list of vendors provided by Hi-Lo. As to boxes the plaintiffs contend were never produced, Patricia testified those boxes contained bank statements, checks, cancelled checks, payroll records, payroll journals and personnel records never requested by the plaintiffs. According to Patricia, these documents did not constitute evidence of DEC's sales figures relevant to the plaintiffs' claims.

The plaintiffs note that only 22 pages of an accounts payable report 1,722 pages long were produced, but they fail to explain the importance of the missing pages. According to Patricia's testimony, the scaffolding product line about which the plaintiffs inquired in discovery was contained entirely within the 22 pages produced. The rest of the report pertained to product lines not within the scope of documents requested by the plaintiffs. The trial court, as trier of fact, based on the demeanor and the testimony of the witnesses, aided by the exhibits introduced into evidence, concluded the Zygmuns produced all necessary source documents evidencing

scaffolding sales by DEC for the relevant time period. That the plaintiffs' expert testified to the contrary simply means that the trier of fact had to resolve the conflict in the evidence, which the trial court did in favor of the defendants as it expressly credited Schultz's testimony that enough of the documents were produced to negate Leisner's conclusion.

Based on the record before us, the plaintiffs did not establish that the defendants failed to preserve documents needed to prove the plaintiffs' claim. Hence, the trial court properly rejected the plaintiffs' spoliation claim.

B. Trial Exhibits

The plaintiffs contend the trial court erred in admitting the defendants' exhibits 101-106 and 112. "The admission of exhibits into evidence is largely within the discretion of the trial court; furthermore, the admission of exhibits into evidence which contain a summary of testimony given is within the discretion of the trial court." *Little v. Tuscola Stone Co.*, 234 Ill. App. 3d 726, 731, 600 N.E.2d 1270 (1992). The plaintiffs concede in their reply brief that their only argument as to exhibits 101-106 was that they did not contain all relevant purchase orders, i.e. source documents, that were requested. This issue was resolved against the plaintiffs above.

The plaintiffs argue exhibit 112, a summary document, should not have been admitted because summary documents are generally not admissible if underlying source documents are available. However, "[s]ummaries may be admitted into evidence if the underlying records are voluminous and cannot be conveniently examined to extract the fact to be proved." *Veco Corp. v. Babcock*, 243 Ill. App. 3d 153, 166, 611 N.E.2d 1054 (1993). Here, 30,000 pages of documents were produced by the defendants pursuant to the plaintiffs' requests; exhibit 112, as a

summary of those documents, aided to distill those documents for the trier of fact.

That the defendants' attorneys may have compiled exhibit 112 did not negate Patricia's ability to authenticate the document. In *Veco*, the defendant contended the plaintiff's testimony to authenticate the summary document was "inadequate because he did not prepare the [summary] documents," but the court rejected this argument because "[a]ny competent witness who has seen original documents may testify concerning their authentication." *Veco*, 243 Ill. App. 3d at 166. Because Patricia was undeniably familiar with the original documents, her authentication of exhibit 112 was sufficient to support its offer into evidence.

The trial court acted well within its discretion in admitting the challenged exhibits.

C. The 80% Requirement

"The issue of whether a material breach of contract has been committed is a question of fact" for the trial court, whose decision is not disturbed unless it contradicts the manifest weight of the evidence. *Steam Sales Corp. v. Summers*, No. 2-10-0073, slip op. at 15 (Ill. App. Oct. 4, 2010). Leisner testified the defendants did not produce all the source documents; he believed some documents had been destroyed because Hi-Lo's counsel told him so. He also testified, however, that he had "no way of knowing" whether they were all produced. Finally, he stated, "I was looking more for not the actual source document itself, *which was produced*, but how those documents had been entered into the original books and records of the company." (Emphasis added.) In light of this testimony, the trial court was reasonable in failing to give much weight to Leisner's testimony.

Leisner's concern with "how those documents had been entered into the original books

and records of the company" reveals a misplaced focus. Rather than rely on the available source documents to determine whether the 80% purchase requirement was met, Leisner worried that "There's no system of internal control." In other words, he treated his review like an audit. The only issue before us, however, is whether a reasonable trier of fact could find DEC did not breach its obligation to purchase 80% of its scaffolding from Hi-Lo. Schultz testified that the source documents demonstrated it had. He also concluded Leisner erred in calculating the ratio of DEC's Hi-Lo sales to DEC's total sales because DEC sold products that were outside the parameters of the Purchase Agreement. In other words, Leisner incorrectly added those sales to the ratio's denominator to conclude the 80% figure was not reached. It was not unreasonable for the court to adopt Schultz's analysis.

We also find no fault with the trial court's conclusion that DEC was relieved of it obligation to purchase 80% of its scaffolding from Hi-Lo once Hi-Lo refused to sell to DEC beginning in April 2004. The doctrine of impossibility excuses contractual performance where performance becomes objectively impossible. See *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 478, 809 N.E.2d 180 (2004) ("at all times during the pendency of the sales contract, plaintiffs were ready, willing and able to perform but were prevented, and thus excused, from doing so by [the defendant's] refusal to schedule a closing date."); *Allstate Contractors, Inc. v. Marriott Corp.*, 273 Ill. App. 3d 820, 828, 652 N.E.2d 1113 (1995) (affirming jury's determination that the defendants improperly terminated contract for nonperformance where defendants prevented plaintiffs from performing).

In refusing to sell to DEC based on delinquent invoices, the plaintiffs effectively changed

the Addendum from allowing upto 45 days for DEC to pay the invoices from Hi-Lo to requiring DEC to make cash purchases only. When Hi-Lo refused to accept purchase orders from DEC, it excused DEC from its obligation under the Addendum.. See *Schwinder*, 348 Ill. App. 3d at 478.

That DEC was over 45 days late in paying some invoices does not change this conclusion. Hi-Lo was not free to change the terms of the Addendum in its favor and then file a breach action when DEC failed to abide by Hi-Lo's new terms. To the extent DEC breached the Addendum, Hi-Lo's recourse was to seek damages for the breach. Hi-Lo was not free to breach the Addendum in turn while demanding full compliance by DEC. We note the defendants eventually made good on the invoices and the plaintiffs did not seek damages for the late payments.

The plaintiffs insinuate DEC's inability to purchase from Hi-Lo was self-imposed because it failed to pay the invoices timely, which should not relieve DEC's liability for breach of contract. The plaintiffs offer no authority for their novel proposition that late payments by DEC gave the plaintiffs the right to unilaterally stop selling to DEC and then claim entitlement to the value of lost sales that plaintiffs themselves refused to make.

The trial court was not unreasonable in finding DEC not liable for failure to purchase scaffolding equipment from Hi-Lo after Hi-Lo refused to sell to DEC.

The Non-Competition Agreement

The plaintiffs contend Zygmun breached the Non-Competition Agreement by arranging for DEC's manufacture and sale of over $400,000 in scaffolding equipment to Barone's All American. We agree with the parties that whether Zygmun breached the agreement is reviewed against the manifest weight of the evidence. *Haarmann*, 389 Ill. App. 3d at 570; *Summers*, No.

2-10-007, slip op. at 15. The trial court found that based on Hi-Lo's rejection of Barone's terms for the purchase, Zygmun did not breach the Non-Competition agreement and, in any event, the plaintiffs suffered no damages when they refused to sell to Barone under the same terms. This finding is disturbed only if deemed arbitrary or unreasonable. *Haarmann*, 389 Ill. App. 3d at 570.

The plaintiffs acknowledge that their Non-Competition claim amounts to a claim for breach of contract. They therefore concede they must establish not only the existence of a valid contract, substantial performance by the plaintiffs, and a breach by the defendants, but also "resultant damages." *Vincent*, 351 Ill. App. 3d at 759. Hansen testified DEC's sale to All American had an "adverse effect" on Hi-Lo, but neither his testimony nor the plaintiffs' brief explains how this was so. The plaintiffs offer nothing to rebut the trial court's conclusion that "there was no evidence that any sales or profits were diverted from the plaintiff" where American Swing and Hi-Lo operated in different parts of Florida. Accordingly, even if the plaintiffs could demonstrate Zygmun breached the Non-Competition Agreement - a finding we do not reach here - they have failed to establish any resultant damages from the alleged breach. The trial court's conclusion on this issue was neither arbitrary nor unreasonable.

The plaintiffs also contend Zygmun violated the Non-Competition Agreement by hiring former Hi-Lo employees within five years of the sale of Hi-Lo. The plaintiffs point to no evidence, however, that Zygmun or DEC did anything to solicit those employees to work for DEC. The trial court found no such evidence. Moreover, nothing in the Non-Competition Agreement explicitly precluded DEC from hiring former Hi-Lo employees. The plaintiffs have

not met their burden to demonstrate that the mere hiring of a competitor's former employees, absent any evidence of solicitation, constitutes "competitive" practice under the terms of the Non-Competition Agreement.

Tortious Interference

The plaintiffs' final contention is that they presented sufficient evidence to establish DEC interfered with Zygmun's Non-Competition Agreement. "Recovery under an action for tortious interference with a contractual relation requires that a plaintiff plead and prove (1) the existence of a valid and enforceable contract between the plaintiff and a third party, (2) that defendant was aware of the contract, (3) that defendant intentionally and unjustifiedly induced a breach of the contract, (4) that the wrongful conduct of defendant caused a subsequent breach of the contract by the third party, and (5) that plaintiff was damaged as a result." *Poulos v. Lutheran Social Services of Illinois, Inc.*, 312 Ill. App. 3d 731, 742, 728 N.E.2d 547 (2000). "It is well established that a defendant cannot tortiously interfere with a contract to which he is a party." *Fiumetto v. Garrett Enterprises, Inc.*, 321 Ill. App. 3d 946, 957, 255, 749 N.E.2d 992 (2001) (executive acting on behalf of corporation could not be liable for inducing corporation to violate contract with plaintiff).

Here, the plaintiffs themselves acknowledge Zygmun "personally arranged for the sale by DEC" to All American, which formed the primary basis of the plaintiff's non-competition claim. We understand the plaintiffs to argue that defendant Zygmun acted through DEC to induce Zygmun to violate his Agreement with the plaintiffs. The illogic of this contention is the sort rejected by *Fiumentto.*

The trial court properly rejected the plaintiffs' tortious interference claim. See *Bowers v. State Farm Mutual Automobile Insurance Co.*, 403 Ill. App. 3d 173, 176, 932 N.E.2d 607 (2010) (a court of review "can affirm *** on any basis that appears in the record.").

CONCLUSION

The circuit court properly rejected the plaintiffs' spoliation claim because the defendants neither violated their discovery obligations nor destroyed pertinent documents. The circuit court acted within its discretion in admitting disputed exhibits. Under the manifest weight of the evidence standard, the court's findings that (1) upto April 2004, the plaintiffs failed to establish the defendants violated their obligation to purchase 80% of their scaffolding equipment from DEC, (2) beginning in April 2004, the defendants were relieved of that obligation by the plaintiffs' refusal to sell to them, and (3) the plaintiffs did not establish they were injured by Zygmun's alleged violation of the Non-Competition Agreement were reasonable. Zygmun cannot be liable for tortiously interfering with a contract to which he is a party.

Affirmed.