

IN THE COURT OF APPEALS FOR THE
STATE OF GEORGIA

_____,
*
*
Plaintiff/Appellant *
* Court of Appeals No.

VS *
*
_____. *
*
Defendants/Appellees *

BRIEF OF APPELLEE _____

PART ONE

STATEMENT OF THE CASE

On September 10, 1996, the plaintiff _____, acting both pro se and through his attorney, _____, filed a complaint in the Superior Court of _____ County, Georgia against _____, et al, and _____. (R- 4-6.) In that complaint, the plaintiff alleged, in paragraph 4: "Defendants have willfully and tortuously interfered with a contract between plaintiff and one of his clients, resulting in damage to plaintiff in an amount in excess of \$10,000.00." (R-4-5.) That is the sole allegation of wrongdoing on the part of the defendants, i.e., that they allegedly interfered with a contract between the plaintiff _____ and one of his clients. On December 30, 1997, the plaintiff filed an amendment to the complaint, wherein he added paragraph 7, as follows: "Defendants have tortuously interfered with a business relationship of plaintiff and one of his clients, resulting in damages to plaintiff in an amount in excess of \$10,000.00." (R-64.)

In interrogatories directed to the plaintiff, the plaintiff was asked specifically to identify the contract with which the defendants allegedly interfered. (R-14, Interrogatory 3.). In response, he identified his contract with _____, and attached a copy of that contract to his response. (R .-44).

The defendants filed their defensive pleadings, denying any such interference. (R-17). On November 21, 1997, defendant

_____ filed his motion for summary judgment, (R-48), together with supporting affidavits, exhibits and other documents, (Appellee is unable to provide a cite to the record for these factual matters considered by the Court for the reason that Appellant has specifically directed the Clerk to omit such matters from the record on appeal), and after an oral hearing on the matter, the Trial Court issued an order on the 20th day of January, 1999, granting the motion of defendants for summary judgment. (R-70).

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

A. The plaintiff has failed to submit to this Court an adequate record upon which the Court can find any error in the Trial Court's ruling, and the Trial Court's order must therefore be affirmed.

In his notice of appeal, the plaintiff instructed the Clerk of the Trial Court to send only selected portions of the record which he apparently believed would be supportive of his position, and to omit everything else. (R.-1-2). Having done so, Appellant has failed to provide this court with a record sufficient to permit reversal, and the Trial Court's decision must be affirmed.

A recent decision directly on point is that of *Roach v. Roach*, ___ S.E. 2d ___, 1999 WL 102223 (Ga. App. Mar. 02, 1999)(NO. A981687). There, the appellant instructed the trial court clerk to send only certain specified portions of the record, and to omit everything else. That is precisely what Appellant _____ did here. After noting that the Appellant had failed to follow the letter of the law regarding notices of appeal, the Court of Appeals nevertheless stated that it was apparent, after careful study of the record sent up by the clerk, and after discussions with the clerk, that the Appellant had omitted some portions of the evidence upon which the superior court relied in making its decision. Because of that omission, the Court held that it was required to affirm the decision of the trial court.

" `The notice of appeal filed by [plaintiff] is not in the form directed by OCGA 5-6-37 in that, rather than designating portions of the record to be omitted on appeal, [plaintiff has] instructed that only items listed on the notice of appeal be included in the record sent to this court. Under the statutory scheme, the notice of appeal provides information concerning omission of portions of the record before the lower court. Nonetheless, after study of the record sent up and communication with the clerk of the court below, it is apparent that under the directs contained in the notice of appeal, some portion of the evidence upon which the superior court relied in this case has been omitted from the record on appeal.

" `It is well established that the burden is on the party alleging error to show it by the record and that where the proof necessary for determination of the issues on appeal is omitted from the record, an appellate court must assume that the judgment below was correct and affirm.. *Brown v. Franchiseur*, 247 Ga. 463, (277 S.E.2d 16) ; *Jackson v. Dept. of Transp.*, 201 Ga.App. 863, 865, (412 S.E.2d 847); *Transport Indem. Co. v. Hartford Ins. Co.*, 198 Ga.App. 265, 266, (401 S.E.2d 294); *Riverbend Ford-Mercury v. Kirksey*, 196 Ga.App. 307, 309(1) (395 S.E.2d 898); *Taylor v. Colwell Mtg. Corp.*, 187 Ga.App. 397, (370 S.E.2d 520).' *Bennett v. Executive Benefits*, 210 Ga.App. 429 (436

S.E.2d 544).

" ` "On consideration of summary judgments we and the trial court must look at the entire record" Lawson v. Duke Oil Co., 155 Ga.App. 363, 364, (270 S.E.2d

898)(1980).' MacKinnon v. Hodge, 204 Ga.App. 539, (420 S.E.2d 341). Consequently, appellants who omit portions of the record which they view as not pertaining to any issue on appeal create a probably fatal defect in their appeals. 'Such omissions from the appellate record from matters on summary judgment generally prove fatal to appellate review since it must be assumed by a reviewing court that the trial court's grant of summary judgment is properly supported by the trial court record and since appellant has the burden of showing error affirmatively by the record on appeal. Transport Indem. Co. v. Hartford Ins. Co., 198 Ga. App. 265, 266 (supra)' Dillman v. Hahres, 201 Ga.App. 210, 211, (411 S.E.2d 43)." Peacock v. Campbell, 223 Ga.App. 620, (478 S.E.2d 409).

The appellate record designated by plaintiff contains only the evidence filed contemporaneously with the last one of three motions for partial summary judgment filed by defendant. The evidence filed in support of the two previous motions is not included in the appellate record. The superior court's order recites that it considered the "entire record." Since plaintiff has omitted some portion of the evidence upon which the superior court relied, we must affirm. Tahamtan v. Sawnee Electric Membership Corporation, 228 Ga.App. 485, 486, (491 S.E.2d 918); Ferros v. Georgia State Patrol, 211 Ga.App. 50, 51, (438 S.E.2d 163) (211 Ga.App. 50, 438 S.E.2d 163).

Judgment affirmed."

In the case now before the Court, the Appellant committed the same errors fatal to his appeal. He omitted from the record the Appellee's brief in support of his motion for summary judgment; the affidavits of _____-. (together with 25 exhibits labeled A through Y); the affidavit of _____; the appendix of Alabama Law provided by Appellee; and numerous other matters expressly considered by the Trial Court in granting the motion for summary judgment. The Motion for Summary Judgment filed by Appellee, found at R-48, shows on its face that it is based on these specific affidavits, together with all other matters on file in the case. (R-48). "Comes now _____, named as Defendant in the above-styled action, and based upon the affidavit of _____, and the affidavit of _____, and all other matters on file in said case, moves the Court to enter summary judgment on behalf of said Defendant, on the basis that there is no genuine issue as to any material fact, and that said Defendant is entitled to judgment as a matter of law." (R-48). (Emphasis added).

In addition, the co-defendant and co-appellee in this Court, _____, filed a motion for summary judgment, and in support relied upon numerous matters which Appellant has chosen to omit from the record on appeal. See the Motion of _____ for Summary Judgment (R-67), wherein the Appellee states that it relies upon all pleading currently filed with the clerk; the motion for summary judgment filed by Defendant/Appellee _____, together with the Statement of Material Facts and Theories of Recovery as to which there exists no genuine issue for trial, brief in support

of the motion for summary judgment, and all supporting documents and exhibits; certified copies of portions of the Lee County, Alabama Circuit Court Clerk's file in the case styled _____ v. _____ Civil Action Number _____, Circuit Court of Lee County, Alabama; and the Order granting Summary Judgment in favor of Defendant, _____, entered by the honorable _____ Judge of Superior Court, in the action styled _____, Civil Action Number _____. None of these matters was included by Appellant in the record on appeal.

This omission is fatal to Appellant's appeal, since it is clear that the trial Court considered all these matters. The Court's order granting Summary Judgment in favor of Appellees states: "Defendants having each filed a Motion for Summary Judgment and the court having carefully considered the entire record in this case, and further having held a hearing, it is the Court's opinion that there remains no genuine issue of material fact for resolution by the trier-of-fact and that defendants are entitled to judgment as a matter of law. Therefore, Defendants' motions for summary judgment are hereby GRANTED." (R-70) (Emphasis added).

In the case now before this Court, the Appellant has excluded from the record many items on file with and considered by the Trial Court, and has included only a portion of the record. Under these circumstances, it is impossible to conclude that the Court erred in granting the Defendant's motion for summary judgment. Therefore, based upon the authority cited above, the order of the Trial Court granting summary judgment must be affirmed. See Roach v. Roach, supra, and cases cited therein.

CONCLUSION

For the foregoing reasons, Appellee respectfully prays that this Court affirm the order of the Trial Court.

LAW FIRM, LLP.

BY: _____

Georgia Bar No. _____

Attorney for Defendants

Post Office Box _____

_____, Georgia 00000

(____) ____-_____

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