An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-1195

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

JACK W. WORSHAM,
Plaintiff,

v.

Guilford County
No. 99 CVS 4334

THE TRIONES PLASTICS, L.L.C.,
and KILOP USA, INC.,
Defendants.

Appeal by plaintiff from order and judgment entered 13 June 2001 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 5 June 2002.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by S. Leigh Rodenbough, IV, and Jennifer T. Harrod, for plaintiff appellant.

Keziah, Gates & Samet, L.L.P., by Andrew S. Lasine, for defendant appellees.

McCULLOUGH, Judge.

Plaintiff Jack W. Worsham appeals from an order granting summary judgment in favor of defendants, The Triones Plastics, L.L.C., and Kilop, USA, Inc., entered 13 June 2001 by the Honorable W. Douglas Albright at the 4 June 2001 Civil Session of Guilford County Superior Court.

The parties entered into a three-year lease on 15 February 1995 in which defendants were to occupy property owned by

plaintiff. The premises was equipped with two electrical services: a 2000 amp/220 volt service and a 600 amp/440 volt service. The 220 volt service was not up to code and thus not useable. The existing services being inadequate for defendants' needs, defendants converted the 440 volt service into a 220 volt service, and then later installed a new 440 volt service. Plaintiff was aware that defendants were making some modifications to the electrical service.

In October 1996, defendants entered into an equipment lease with World Plastics. In 1997, World Plastics removed defendants' equipment, including the 440 volt service from the premises without defendants' authorization. A dispute over the equipment removal ensued between defendants and World Plastics, resulting in a settlement where World Plastics paid $250,000 to defendants.

Defendants next negotiated an early termination of the lease with plaintiff. At this point, all remnants of the new 440 volt service had been removed from the building. Plaintiff made several inspections of the premises to see what damage needed repairing and what had been removed from the premises. Despite these inspections, plaintiff was unaware that the 440 volt service had been removed, although it was admittedly an important part of the building to him. The parties entered into a Settlement and Termination Agreement and Release on 31 October 1997. Pursuant to this agreement, defendant paid plaintiff $23,000 in damages and forfeited their security deposit in full settlement. This agreement included the following provisions:

> 2. Prior to the execution of this Agreement, Lessee shall have made certain repairs to certain damaged areas of the Leased Premises and shall have provided a thorough cleaning of the Leased Premises. Prior to the execution of this Agreement, *Lessor and Lessee shall have inspected the said Leased Premises and each of them confirms by executing this Agreement that each of them is satisfied with the repairs and cleaning and condition of the Leased Premises*.
>
> . . . .
>
> 4. In consideration for the promises contained in this Agreement . . . Lessor . . . hereby releases, acquits, and forever discharges Lessee . . . of and from any and all actions, causes of action, claims, demands, damages, costs, expense, compensation, and attorneys' fees of any kind or nature whatsoever, whether known or unknown, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or any other legal or equitable basis, including, without limitation, those alleged or which might have been alleged in connection with the Lease or the Leased Premises.

(Emphasis added.) Plaintiff learned in March 1998 that the 440 volt service was no longer present and operational.

Plaintiff originally filed a complaint 1 March 1999, and filed an amended complaint on 3 June 1999. Plaintiff alleged that defendants breached the lease, committed fraud, waste, and unfair and deceptive trade practices, requesting rescission of the Termination Agreement. Defendants answered on 22 October 1999 and set forth as one of their affirmative defenses release based on the language in the Termination Agreement. Defendants moved for summary judgment on 14 May 2001 on three grounds, including release, and the motion was granted by the trial court on 13 June

2001 on the basis that "no genuine issue of material fact exists as to defendants' affirmative defense of release[.]" Plaintiff appeals, and his sole assignment of error is that defendants are not entitled to a judgment as a matter of law on the grounds of defendants' affirmative defense of release.

I.

> Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990).

Talton v. Mac Tools, Inc., 118 N.C. App. 87, 90, 453 S.E.2d 563, 565 (1995).

Worsham contends that its claims are not barred by the release in the Termination Agreement because that agreement was fraudulently induced. "A release, like any other contract, is subject to avoidance by a showing that its execution resulted from fraud or a mutual mistake of fact." *Cunningham v. Brown*, 51 N.C. App. 264, 269, 276 S.E.2d 718, 723 (1981). The burden of proof with respect to avoiding a release after the execution thereof is admitted or established, is on the party making the assertion of fraud, in this case, the plaintiff.

> "A release from liability is vitiated by fraud in the same manner as any other instrument, and fraud vitiates the entire instrument and not merely that part to which the fraudulent misrepresentation relates. The burden is on the injured party, if he seeks to set aside a release for fraud, mistake, or other vitiating element, to prove the matters in avoidance."

Sexton v. Lilley, 4 N.C. App. 606, 609, 167 S.E.2d 467, 470 (1969) (quoting 7 Strong's N.C. Index 2d *Torts* § 7). *See* 28 Strong's N.C. Index 4th *Torts* §§ 20, 33 (1994).

Plaintiff contends that the all the affidavits, depositions and pleadings show that defendants actively concealed that the 440 volt service was removed, that such non-disclosure is tantamount to misrepresentation of material facts. Citing *Brooks v. Construction Co.*, 253 N.C. 214, 116 S.E.2d 454 (1960), plaintiff argues that he relied on defendants to call the removal of the 440 volt service to his attention as the law does not require one to deal with everyone as a rascal. *Cowart v. Honeycutt*, 257 N.C. 136, 143, 125 S.E.2d 382, 387 (1962).

Defendants point out that the language in the release covered all claims, known or unknown. Thus, it encompassed all possible causes of action whether or not the various demands or claims have been discussed or mentioned and whether or not the possible claims are all known. "Since this language was broad enough to cover all possible causes of action, whether or not the possible claims are all known, plaintiffs cannot rely on their ignorance of facts giving rise to a claim for fraud as a basis for avoiding the release." *Talton*, 118 N.C. App. at 90-91, 453 S.E.2d at 565; *Merrimon v. Telegraph Co.*, 207 N.C. 101, 105-06, 176 S.E. 246, 248 (1934).

We agree with defendants and find plaintiff's reliance on *Brooks* misplaced. *Brooks* dealt with a latent defect which could not be discovered by a diligent inspection. Here plaintiff had, as

he admits, "adequate opportunity to conduct a 'full inspection' of the premises and that defendants did nothing to prevent him from conducting such an inspection." Plaintiff acknowledges that he did not inspect the electrical system. Having had an adequate opportunity to inspect and find a non-latent defect, plaintiff cannot allege fraud merely for the purpose of overturning the Termination Agreement. *See Hyde v. Taylor*, 70 N.C. App. 523, 320 S.E.2d 904 (1984); *Marshall v. Keaveny*, 38 N.C. App. 644, 248 S.E.2d 750 (1978); *Goff v. Realty and Insurance Co.*, 21 N.C. App. 25, 203 S.E.2d 65, *cert. denied*, 285 N.C. 373, 205 S.E.2d 97 (1974).

Affirmed.

Judges WALKER and BRYANT concur.

Report per Rule 30(e).