

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

Lopez v. Fordham University

69 A.D.3d 532 (1st Dep't 2010) · Decided January 28, 2010

SUMMARY

The court held that the plaintiff failed to establish prima facie that Fordham University had notice of the recurring hazardous floor condition or was negligent. It also affirmed dismissal of the third-party claims against the construction contractor because Fordham failed to raise a factual issue concerning negligent installation or contractual noncompliance, and the expert evidence was speculative.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, First Department
WRITING FOR THE COURT	Mazzarelli, J.E.; Sweeny, J.; Moskowitz, J.; Román, J.
JURISDICTION	New York
DECIDED	January 28, 2010
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal involving summary judgment on a premises-negligence claim and dismissal of third-party construction-related claims.
STANDARD OF REVIEW	Summary judgment is appropriate where the moving party establishes entitlement to judgment as a matter of law and the opposing party fails to raise a triable issue of fact; the appellate court reviewed whether the parties made the required prima facie showings.
PRECEDENTIAL VALUE	published appellate decision
PARTIES	Lopez v. Fordham University

TOPICS

- premises liability
- negligence
- summary judgment
- construction law
- civil procedure

PRACTICE AREAS

- premises liability
- negligence
- construction law
- civil procedure

QUESTIONS PRESENTED

1. Whether the plaintiff established prima facie that Fordham had actual or constructive notice of a recurring hazardous condition on the kitchen floor.
2. Whether the plaintiff's responsibility for keeping the kitchen clean precluded Fordham's liability when the injury occurred during food preparation rather than cleaning.
3. Whether Fordham raised a triable issue that Turner negligently installed the drain or failed to comply with its contractual obligations.
4. Whether Fordham's expert opinion, based on an inspection approximately six years after the accident and lacking factual support, was sufficient to raise a triable issue.

HOLDINGS

1. The plaintiff failed to establish prima facie that Fordham had notice of the alleged recurring hazardous condition or otherwise demonstrate conclusively any negligence by Fordham.
2. The plaintiff's responsibility for keeping the kitchen clean did not resolve the negligence issue because she was injured while preparing food, not while cleaning the floor.
3. The third-party and second third-party complaints were properly dismissed because Turner established prima facie that the accident did not result from negligence in its construction work, and Fordham failed to raise a triable issue regarding drain installation or contractual compliance.

FACTUAL BACKGROUND

Lopez, who worked in a restaurant kitchen on Fordham's Bronx campus, was injured while preparing food near a sink and drainage system. She testified that she frequently saw water on the floor, sometimes complained about it to her nonparty employer, and saw oil on the floor before her fall, but offered no evidence that Fordham had been notified or how long the oil had been present. The sink and drainage system had been designed, inspected, and approved by Fordham's architects and engineers and found code-compliant when the project was completed approximately one year before the accident.

PROCEDURAL HISTORY

The lower court dismissed the plaintiff's claim against Fordham and dismissed the third-party and second third-party complaints involving Turner. The Appellate Division concluded that the plaintiff failed to establish Fordham's negligence and that Fordham failed to raise a triable issue concerning Turner's alleged construction negligence or contractual noncompliance.

DISPOSITION

affirmed

CASES CITED

- Casado v. OUB Houses Hous. Co. Inc., 59 A.D.3d 272 (1st Dep't 2009)

- *Brugnano v. Merrill Lynch & Co.*, 216 A.D.2d 18 (1st Dep't 1995), lv dismissed in part and denied in part, 86 N.Y.2d 880 (1995)
- *Gomez v. New York City Hous. Auth.*, 217 A.D.2d 110, 117 (1st Dep't 1995)

OPINION

PER CURIAM.

Plaintiff failed to establish prima facie that Fordham had notice of the alleged recurring hazardous condition of the floor near the sink and drainage system in the kitchen of a restaurant *533on Fordham's Bronx campus where she worked (see *Casado v OUB Houses Hous. Co. Inc.*, 59 AD3d 272 [2009]). She testified that she frequently saw water on the floor and on occasion complained about it to her (nonparty) employer, but offered no evidence that Fordham was notified of the condition.

She also testified that she saw oil on the floor before she fell, but did not indicate how long it had been there or how it came to be there. Contrary to plaintiffs argument, it is not the issue of her comparative negligence, if any, that precludes summary judgment in her favor, but the fact that she failed to demonstrate conclusively any negligence on Fordham's part.

The basis for Fordham's motion was that since plaintiff was responsible for keeping the kitchen clean, Fordham was not responsible for the condition of the floor that posed the hazard (see *Brugnano v Merrill Lynch & Co.*, 216 AD2d 18 [1995], lv dismissed in part and denied in part 86 NY2d 880 [1995]).

However, it is undisputed that plaintiff was injured not while cleaning the floor but while engaged in food preparation. The third-party and second third-party complaints were correctly dismissed since Turner established prima facie that the accident did not result from any negligence on its part in connection with the construction of the building and Fordham failed to raise issues of fact whether Turner properly installed the drain and whether it complied with its contractual obligations.

The record reflects that the sink and drainage system were designed, inspected and approved by Fordham's architects and engineers and were found in compliance with the applicable codes by the New York City health and building departments when the project was completed a year before the accident occurred. Fordham's expert's opinion was based on inspection and testing conducted approximately six years after the accident occurred and was therefore speculative (see *Gomez v New York City Hous.*

Auth., 217 AD2d 110, 117 [1995]). Moreover, the expert's opinion that the drain that was installed was not the drain that was approved by Fordham was without factual support and was contradicted by witnesses who worked on the job. Concur—Mazzarelli, J.E, Sweeny, Moskowitz and Román, JJ.

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