

**Borja v City of New York**

2025 NY Slip Op 33535(U)

September 19, 2025

Supreme Court, New York County

Docket Number: Index No. 155707/2022

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 155707/2022

EDGAR BORJA,

MOTION DATE 02/28/2025

Plaintiff,

MOTION SEQ. NO. 003

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE NEW YORK SCHOOL CONSTRUCTION AUTHORITY, UTB-UNITED TECHNOLOGY INC., PRIME CONTRACTORS INC.,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and after a final submission date of June 26, 2025, Plaintiff Edgar Borja's ("Plaintiff") motion for summary judgment on the issue of liability with respect to his Labor Law § 240(1) claim against Defendants the City of New York, the New York City Department of Education ("Department of Education"), the New York City School Construction Authority ("Construction Authority"), and UTB-United Technology Inc. ("UTB-United") (collectively, with Prime Contractors Inc. "Defendants") is denied. Defendants' cross motion for summary judgment dismissing Plaintiff's Labor Law §§ 200, 240(1), and 241(6) claims is granted in part and denied in part.

I. Background

On January 4, 2022, non-party Musa Builders employed Plaintiff as a brick worker in an exterior modification of the building at 306 Fort Washington Avenue, New York, (the "Premises")

(NYSCEF Doc. 110 at 18; 21-22).<sup>1</sup> Construction Authority contracted UTB-United to complete the exterior brick work, and UTB-United subcontracted brickwork to non-party Musa Builders (NYSCEF Doc. 112 at 9; 11)

Plaintiff was placing bricks, while other workers were preparing wooden planks for a scaffold above him, when according to Plaintiff, a ten-foot long plank fell from above and hit him (NYSCEF Doc. 110 at 42; 51; 53-54). Plaintiff's coworker, Angel Castillo, who was present at the time of Plaintiff's accident, testified that Plaintiff was hit with a wooden plank handled by Michael Brock from two or three feet above (NYSCEF Doc. 124 at 21; 38). According to Michael Brock, he caught the plank before it fell, and while part of the plank may have hit Plaintiff, the force could not have been very strong as the plank weighed less than five pounds (NYSCEF Doc. 125 at 13; 15; 30). According to Plaintiff's supervisor, Muqaddas Sharif, Plaintiff continued working after the incident and returned to work the next day (NYSCEF Doc. 126 at 21-22). Plaintiff now moves for summary judgment on his Labor Law § 240(1) claim, while Defendants cross move for summary judgment dismissing Plaintiff's Complaint.

## II. Discussion

### A. Standard

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce

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<sup>1</sup> The Premises is a school known as P.S. 173.

evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

### **B. Plaintiff's Motion**

Given Plaintiff's heavy burden and viewing the facts in the light most favorable to the non-movants, the Court denies Plaintiff's motion for summary judgment on his Labor Law § 240(1) claim. Specifically, there is an issue of fact as to whether Plaintiff's alleged injury falls within the ambit of Labor Law § 240(1). According to Plaintiff, a wooden plank fell on him from above. But according to other witnesses present, including the witness holding the wooden plank, the plank never fell, but rather hit Plaintiff because of manually maneuvering a large wooden plank on a tight scaffold. There is a further dispute as to the size and weight of the plank, as well as the height differential between Plaintiff and the plank, with numerous non-party witnesses testifying the height differential between Plaintiff and the plank was less than two feet. As stated by the First Department in *Peters v. Structure Tone, Inc.*, 204 A.D.3d 522, 523 (1st Dept 2022):

“taking into account the elevation differential, the [object]'s weight, and the amount of force it could generate...and whether his injury was a direct consequence of defendants' failure to provide adequate protection against a risk arising from a physically significant elevation differential...[t]he trier of fact could find that the elevation differential between plaintiff and the level from which the [object] fell was de minimis, that the [object]'s weight was inconsequential, or that the [object] could not have generated any meaningful amount of force, and determine that plaintiff's injuries were the result of [a] usual and ordinary danger[] at a construction site” (internal quotation marks and citations omitted).

Thus, given the numerous issues of fact, including whether the plank fell, the conflicting information as to the weight of the plank that hit Plaintiff and the height differential between Plaintiff and the plank, Plaintiff's motion for summary judgment on his Labor Law § 240(1) claim is denied (*see also Erby v 36 LLC*, 193 AD3d 412 [1st Dept 2021]; *D'Antonio v Manhattan Contracting Corp.*, 93 AD3d 443, 444 [1st Dept 2012]).

**C. Defendants' Motion**

Defendants' motion for summary judgment is granted in part and denied in part. Plaintiff states he does not oppose Defendants' motion to dismiss Plaintiff's Labor Law §§ 200 and 241(6) claims, therefore these claims are dismissed as abandoned.

However, for the same reason issues of fact preclude granting Plaintiff summary judgment on his Labor Law § 240(1) claim, so too do issues of fact preclude granting Defendants' motion for summary judgment dismissing Plaintiff's Labor Law § 240(1) claim. It will be for the trier of fact to evaluate the credibility of the various witnesses and determine whether the plank was of such a size and weight, fell from such a height, and struck Plaintiff with such force such that the incident falls within the extraordinary protections of Labor Law § 240(1).

Accordingly, it is hereby,

ORDERED that Plaintiff's motion for summary judgment on his Labor Law § 240(1) claim is denied; and it is further

ORDERED that Defendants' motion for summary judgment dismissing Plaintiff's Complaint is granted solely to the extent that Plaintiff's Labor Law §§ 241(6) and 200 claims are dismissed without opposition, and the remainder of Defendants' motion is denied; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

9/19/2025  
DATE

*Mary V Rosado, JSC*  
HON. MARY V. ROSADO, U.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE