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| <b>Buena v Pratt Inst.</b>   |
| 2024 NY Slip Op 34611(U)   |
| December 24, 2024  |
| Supreme Court, Kings County  |
| Docket Number: Index No. 521209/2022   |
| Judge: Devin P. Cohen  |
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Supreme Court of the State of New York  
County of Kings

Index Number 521209/2022  
Seqs. 001

Part LL1M

**DECISION/ORDER**

\_\_\_\_\_  
LUIS RODRIGUEZ BUENAVER,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

**Papers Numbered**

against

|   |               |
|---|---------------|
| Notice of Motion and Affidavits Annexed . . . . .   | <u>1</u>      |
| Order to Show Cause and Affidavits Annexed. . . . . | <u>      </u> |
| Answering Affidavits . . . . .                      | <u>2</u>      |
| Replying Affidavits . . . . .                       | <u>3</u>      |
| Exhibits . . . . .                                  | <u>Var.</u>   |
| Other . . . . .                                     | <u>      </u> |

PRATT INSTITUTE, PRATT INSTITUTE DEVELOPMENT CORPORATION, SJS CONSTRUCTION COMPANY, INC., AND SHR GROUP INC.,

Defendants.

\_\_\_\_\_  
SHR GROUP INC.,

Third-Party Plaintiff,

against

BILLY ENTERPRISES INC.,

Third-Party Defendant.

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 001) is decided as follows:

**Introduction & Factual Background**

Plaintiff commenced this action for damages he claims were caused by a fall from a scaffold on July 9, 2021. It is undisputed that Pratt Institute (Pratt) is the owner of the building at 61 St. James Place, Brooklyn, NY and that SHR Group Inc. (SHR) was the general contractor at the premises. By stipulation of discontinuance, SJS Construction Company Inc. is no longer in the action. Plaintiff was employed by third-party defendant Billy Enterprises, Inc. (Billy). At

the time the instant motion was filed, the plaintiff had been deposed but the defendants had not been. There also had not been a deposition of Billy, which is in default. On September 4, 2024, defendants were awarded a default judgment against Billy. The note of issue is due on March 17, 2025.

The plaintiff testified as follows: On July 6, 2022, three levels of scaffolding had already been erected around the building (Buenaiver EBT at 54–55). Plaintiff's foreman, "Giovanni," directed him to unload material from the truck and then assist in erecting scaffolding (*id.* at 58). After passing materials up during the morning to complete the next four levels of the seven-level scaffolding, plaintiff was instructed to climb to the seventh level to install supports after lunch (*id.* at 70). Plaintiff tied off his harness when he reached the seventh level and began to install supports (*id.* at 70, 89–90). The supports were installed every three sections of scaffold, and the plaintiff would have to untie his harness and walk on the OSHA planks next to the section in order to install the next set of supports (*id.* at 90, 98). Plaintiff's lifeline was not long enough to walk between sections while remaining attached (*id.* at 90, 92). While walking between two sections, an OSHA plank slid out from under the plaintiff and he fell from the seventh level to the sidewalk bridge below (*id.* at 100–101).

### Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

**Labor Law § 240 (1)<sup>1</sup>**

Liability under Labor Law § 240 (1) is “absolute” where the failure or absence of a safety device enumerated by the statute (e.g. a harness, tether, and scaffold) is the proximate cause of the plaintiff’s accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haines v. New York Tel. Co.*, 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]).

Plaintiff testified that he was performing construction work and was not provided with a lifeline that was long enough to allow him to do his work without untethering from the scaffold. Plaintiff also contends that the OSHA board slipped, causing him to lose his balance and fall. Based on this testimony, plaintiff has made out his prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim.

In opposition, defendants contend that plaintiff’s motion is premature because neither defendants nor plaintiff’s employer, Billy, have been deposed. “In order for a motion for summary judgment to be denied as premature, the opposing party must provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party” (*Mogul v Baptiste*, 161 AD3d 847, 848 [2d Dept 2018]). The defendants admit that they have not produced their own representatives for a deposition, undermining those depositions as a basis for denying summary judgment. In any event, the information that would be elicited in those depositions is within the knowledge and control of the defendants and are therefore not a basis to

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<sup>1</sup> Although plaintiff’s papers all seek summary judgment on Labor Law § 240 (2) as well, the memorandum of law in support only makes arguments as to section 240 (1). Therefore, since the plaintiff did not advance any argument as to section 240 (2), the court does not consider that subsection here.

deny plaintiff's motion (*Cedillo v Nautilus Realty Limited Partnership*, 219 AD3d 1300 [2d Dept 2023]).

Defendants also contend that moving prior to the completion of Billy's deposition renders plaintiff's motion premature. This argument is unavailing. First, the note of issue is due in approximately three months and defendants' papers do not indicate any effort to obtain a deposition of Billy, a party that is in default and shows no indicia of seeking to vacate the default. There has not been any request to supplement defendants' papers based on an intervening deposition, or even the scheduling of a deposition, of Billy. Second, defendants do not produce an affidavit outlining defendants' relationship with Billy, Billy's role and responsibility at the site, and what questions of fact might be clarified through a deposition of Billy. Ultimately, "a summary judgment motion is not premature merely because discovery has not been completed" (*Northfield Insurance Company v Golob*, 164 AD3d 682 [2d Dept 2018]) and "mere hope or speculation . . . is insufficient to deny the motion" (*see Pineda v Elias*, 125 AD3d 738 [2d Dept 2015]).

Therefore, plaintiff's motion is granted.

### Conclusion

Plaintiff's motion (Seq. 001) is granted.

This constitutes the decision and order of the court.

December 24, 2024

DATE



DEVIN P. COHEN  
Justice of the Supreme Court