

<b>Henry v Gateway 277 Hous. Dev. Fund Corp.</b>
2026 NY Slip Op 31771(U)
April 17, 2026
Supreme Court, Kings County
Docket Number: Index No. 525109/2019
Judge: Richard Velasquez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17<sup>th</sup> day of April, 2026.

P R E S E N T:

HON. RICHARD VELASQUEZ,

Justice.

-----X

MICHAEL HENRY,

Plaintiff,

-against-

Index No. 525109/2019

GATEWAY 277 HOUSING DEVELOPMENT FUND CORPORATION, DUNWELL ELEVATOR ELECTRICAL INDUSTRIES, and GATEWAY HOUSING CORPORATION,

Mot. Seq. Nos. 6-9

Defendants.

-----X<sup>1</sup>

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion, Affirmations, and Exhibits Annexed \_\_\_\_\_

159-173; 176-195; 197-220; 224-235  
248-261; 280-281; 237-242; 262-274;  
282-283; 275

Affirmations in Opposition and Exhibits Annexed \_\_\_\_\_

284; 287-288; 291; 292

Reply Affirmations and Exhibits Annexed \_\_\_\_\_

In this action to recover damages for personal injuries, the following three motions and one cross-motion have been consolidated for disposition and, upon consolidation and after oral argument, are decided as follows (as rearranged by the Court for ease of analysis):

In Seq. No. 8, the joint motion of defendants Gateway 277 Housing Development Fund Corporation (“Gateway-HDFC”) and Gateway Housing Corporation (“Gateway”) for summary judgment dismissing all claims and cross-claims against them is *granted to the*

<sup>1</sup> The caption, as set forth herein, reflects prior stipulated dismissal of claims against former defendant Pratt Area Community Council Inc. (NYSCEF Doc No. 29).

*extent* that all claims and cross-claims against Gateway-HDFC are dismissed with prejudice and without costs/disbursements, and the remainder of their joint motion is denied.

In Seq. No. 7, the motion of defendant Dunwell Elevator Electrical Industries, Inc. (“Dunwell”) for summary judgment dismissing all claims and cross-claims, including Gateway’s cross-claims for indemnification against it, is *granted in its entirety*, and all claims and cross-claims, including Gateway’s cross-claims for indemnification against it, are dismissed with prejudice and without costs/disbursements.

In Seq. No. 6, the motion of plaintiff Michael Henry (“plaintiff”) for partial summary judgment on the issue of liability against Gateway-HDFC, Gateway, and Dunwell is *denied in its entirety*.

In Seq. No. 9, plaintiff’s cross-motion for an order: (1) pursuant to CPLR 3120 and 3126, precluding Gateway from introducing into evidence at trial and in connection with any dispositive motions: (a) the “Cummings Affidavit” and the “Perez Affidavit” (collectively, the “Cummings/Perez Affidavits”); and (b) the “Property Management Agreement,” plaintiff’s “2019 W-2,” “Gateway-HDFC’s 2019 Operating Budget,” “ADP’s Pay Summaries – Rollup Totals,” and “Allianz Worker’s Compensation Policy” (collectively, the “Remaining Unexchanged Documents”); and (2) pursuant to CPLR 3126 and 3211, striking or dismissing Gateway’s workers’ compensation-related affirmative defenses (as numbered 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> in the Verified Answer to the Second Amended Complaint with Cross-Claims, dated May 24, 2021, at NYSCEF Doc No. 32), is *granted to the extent* that the Cummings/Perez Affidavits are precluded, and the remainder of his cross-motion is denied.



repair/replacement obligations “[i]nspections, repairs or renewals of shaftway, guide rails, car frames, platforms and flooring, gates and doors.”

Ian Livingstone (“Livingstone”), an area supervisor for Dunwell’s service department, and Eric Ciquera (“Ciquera”), a Dunwell mechanic, testified as to their respective understanding of Dunwell’s obligations under the Maintenance Agreement.<sup>2</sup> As a general matter, Dunwell provided maintenance records of monthly preventative service which it performed on the elevator from August 2016 through November 2019, pursuant to the Maintenance Agreement (“Dunwell maintenance tickets”).<sup>3</sup> Dunwell also performed certain repairs to the elevator before the incident, which repairs were memorialized in its service tickets (“Dunwell service tickets”).<sup>4</sup> Sometime between July 25, 2019 and August 6, 2019, Dunwell reinstalled a motor with new bearings for the elevator.<sup>5</sup>

As a matter of operating procedure, the elevator-related complaints were routed to the City DOB for investigation and possible remediation. The City DOB, in turn, forwarded the

---

<sup>2</sup> As Livingstone explained, during monthly and quarterly inspections, a mechanic would first check with the building representative if any problems existed before inspecting the “entire equipment” (Livingstone EBT tr at 42, lines 10-14; 55, lines 9-25). He testified that the annual inspections were similar except that the mechanic would do a deeper inspection of the controller to ensure it was protected in the event of overload (*id.* at 57, lines 2-18). Ciquera added that the monthly inspection also includes checking the phone, safety edge if any, the door operator belt and door restrictors, removing grease or oil on the top of the car, and generally ensuring that the mechanical and electrical components of the elevator are “up to par” (Ciquera EBT tr at page 43, line 1 to page 44, line 4).

<sup>3</sup> The last *pre*-incident monthly maintenance visit was performed on July 8, 2019. The first *post*-incident monthly maintenance visit was performed on August 26, 2019.

<sup>4</sup> Livingstone testified that Dunwell repaired the controller for the subject elevator at some point before the incident in August 2019 because of “intermittent problems” (Livingstone EBT tr at page 96, line 2 to page 97, line 11). The Dunwell maintenance tickets reflect that between March 2016 and August 6, 2019, the full or overload limit on the controller had been tripped and reset three times in 2016: on March 11<sup>th</sup>, March 27<sup>th</sup>, and July 10<sup>th</sup>. More recently and closer to the time of the incident, a defective 3-B relay switch for the subject elevator was replaced on May 10, 2019.

<sup>5</sup> Ciquera prepared the July 25, 2019 service ticket for the motor repair (Ciquera EBT tr at 66, lines 2-8; Dunwell service tickets, page 14). Based on his diagnosis of poor motor bearings, Ciquera shut down the elevator (Ciquera EBT tr at page 71, line 18 to page 73, line 22). To repair a motor bearing, the entire motor must be removed and taken out to a specialized repair shop, which disassembles and reassembles the motor with the new parts, and it is then reinstalled (*id.* at page 74, lines 3-9; page 76, lines 1-22). The new motor was 2-3 feet long, 1.5 feet in diameter, and weighed approximately 300 pounds (Livingstone EBT tr at page 173, lines 13-25). Though Ciquera was not involved in the engine repair himself

elevator-related complaints to the building's property manager, non-party Lemle & Wolff ("L&W"). L&W, in turn, would contact Dunwell as the outside vendor responsible for the elevator malfunction. Dunwell would prepare a corresponding work order and service ticket for every repair or service call relating to the elevator.

In the afternoon of August 6, 2019, plaintiff, age 55, was allegedly injured in an elevator-related incident at the building (the "incident"). At the time of the incident, plaintiff was employed by L&W as a superintendent for two *other* Gateway's buildings, one at 409 Grand Avenue in Brooklyn, New York, and the other at 307 East 54<sup>th</sup> Street in Manhattan. In the past, however, plaintiff occasionally worked in the building at issue.

The description of the incident differed depending on whose version of pretrial testimony is credited; either that of plaintiff, or, alternatively, that of the building porter, Timothy Perry ("Perry"). According to plaintiff, he was dispatched on the day of the incident to the building to complete the installation of the air-conditioning brackets with Perry's help in tenants' apartments. On the day of the incident, plaintiff arrived at the building at around 1:50 p.m., and both he and Perry entered the elevator at the first-floor lobby to travel to a sixth-floor apartment. Plaintiff testified that Perry, who was standing closer to the elevator buttons, had pressed the button for the sixth floor. Plaintiff felt the elevator move up at a normal speed past the second, third, and fourth floors. Around the fifth-floor level, however, plaintiff heard something hit the top of the elevator, which, in response, began to drop. According to plaintiff,

---

(Ciquera EBT tr at page 82, lines 5-15), he confirmed that a corresponding invoice showed the repair was completed (*id.* at page 80, lines 12-14, Dunwell Service Tickets, page 15). No one could pinpoint with certainty how soon the work began after Ciquera prepared his July 25<sup>th</sup> ticket calling for the follow-up repair, nor how long the elevator was out of service until the motor with the new bearings was reinstalled.

the elevator came to a hard stop in the basement, causing him to fall to the elevator floor. The fire department pried the elevator doors open to rescue plaintiff and Perry. According to plaintiff, the elevator was not level with the basement floor when he exited it. Plaintiff testified that he had departed from the building and went home, without performing any further work in the building or anywhere else that day.

According to Perry's version of events, the incident did *not* happen on their first trip on the elevator that day, *nor* did it happen when the elevator was on its way up. Perry testified that on the day of the incident, they both entered the elevator at the lobby level and traveled upstairs *without* incident. After finishing their work upstairs, they returned to the lobby level, exited the building, and visited a hardware store to pick up some supplies. On their return to the building between 2:00 p.m. to 3:00 p.m., they both re-entered the elevator at the lobby level, but that time they intended to *descend* to the basement. Perry testified that after he pressed the *basement* button, he felt the elevator move *up* approximately half a floor level (between the first and second floors) before the elevator suddenly crashed *down* to the basement level landing flat on the basement floor. Later that day, after both he and plaintiff had been rescued from the elevator by the fire department, Perry recalled that they both resumed their air-conditioning bracket installation in the building. A Dunwell mechanic who was summoned to the building shortly after the incident prepared a service ticket, stating: "Found[ ] car on safety. Reset car. Left car in service."

On November 18, 2019 (as amended and supplemented on December 6, 2019, and March 15, 2021), plaintiff commenced this action under the theories of *res ipsa loquitur* and common-law negligence. Defendants, in their respective answers, asserted cross-claims

against one another for (among other claims) contribution and indemnification. Each side (plaintiff, Gateway HDFC/Gateway, and Dunwell) retained its own expert in elevator operations, specifications, and maintenance.<sup>6</sup> Additional facts are stated as relevant in the analysis below. The recitation of the well-established standard of review in the summary-judgment context is omitted from this Decision and Order in the interest of brevity.

### **ANALYSIS OF CLAIMS AND DEFENSES**

#### ***1. Plaintiff's Claims Against Gateway-HDFC***

Gateway-HDFC contends that it owes no duty to plaintiff because it is merely the record title holder for the building, whereas Gateway is the beneficial owner.<sup>7</sup> Pursuant to its Nominee Agreement with Gateway, Gateway-HDFC possesses merely a financial interest in the building, whereas Gateway has assumed all responsibilities and liabilities with regard to the building and elevator.

Multiple Dwelling Law (“MDL”) § 78 imposes a non-delegable duty of care on the owner of a multiple dwelling, as defined in § 4 (44),<sup>8</sup> to keep the building “in good repair.”

---

<sup>6</sup> Richard Kennedy, plaintiff’s expert, (NYSCEF Doc No. 172, plaintiff’s motion, exhibit K [“Kennedy Initial Affidavit”]; NYSCEF Doc No. 241, plaintiff’s opposition to Dunwell motion, exhibit D), conducted a site inspection on May 7, 2021, as did Michael Sena, Gateway’s expert (Affirmation in Opposition to plaintiff’s motion at NYSCEF Doc No. 259; Affirmation in Opposition to Dunwell’s motion at NYSCEF Doc No. 273 [“Sena Affidavit”]). Ronald Schloss, Dunwell’s expert, conducted site inspections on January 16, 2020, and again on May 21, 2021 (NYSCEF Doc No. 195, Dunwell Motion, exhibit Q, [“Schloss Affidavit”]).

<sup>7</sup> Gateway-HDFC admitted (in response to plaintiff’s Notice to Admit, dated January 23, 2020) that it was a record title holder for the building. The Court takes judicial notice of Gateway-HDFC’s Certificate of Incorporation, Declaration of Interest and Nominee Agreement, and the transfer of the deed from Gateway-HDFC to Gateway. The Certificate of Incorporation is a certified copy by State of New York Department of State. The Declaration of Interest and Nominee Agreement, dated May 22, 2015, is filed under CRFN2015000194818 in the ACRIS database of the New York City Department of Finance. The deed to Gateway from Gateway-HDFC, dated May 22, 2015, is filed in the same database under CRFN 2015000194817.

<sup>8</sup> MDL § 4 (44) defines owners as including the “owner or owners of the freehold of the premises or lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent, or any other person, firm or corporation, directly or indirectly in control of a dwelling.”

The test for the owner's liability under MDL § 78 is whether "it has completely parted with possession and control of the building" (*Worth Distributors, Inc. v Latham*, 59 NY2d 231, 238 [1983]). In *Suarez v Longwood Housing Dev. Fund Co.* (2021 WL 6334575 [Sup Ct, Bronx County 2021]), a decision on all fours with this case, the motion court found that the defendant therein (also a Housing Development Fund Corporation) with only the record title did *not* owe a duty to plaintiff to be held liable for her injuries. The *Suarez* court explained (at page 3) that:

"[T]he Certificate of Incorporation and Declaration of Interest and Nominee Agreement show that defendant is a not-for-profit corporation and that it was a nominal owner with no rights or responsibilities regarding the ownership, maintenance, or repair of the premises. This is corroborated by the construction agreements, which were signed only by [the Beneficial Owner]. Defendant had no control, obligations, or duties related to the premises, which was exclusively with [the Beneficial Owner]."

Here, the Certificate of Incorporation of Gateway-HDFC, the Nominee Agreement between Gateway-HDFC and Gateway, and the Maintenance Agreement between Gateway and Dunwell, all establish that Gateway-HDFC, a not-for-profit corporation which was created to provide low-income housing, is merely a nominal owner of the building lacking the requisite "ownership, occupancy, control, or special use" so as to owe a duty to plaintiff and be responsible for his injuries. Accordingly, dismissal of all claims and cross-claims Gateway-HDFC is warranted (*see Suarez v Longwood Housing Dev. Fund Co.*, 2021 WL 6334575 [Sup Ct, Bronx County 2021]; *see also Smith v New York City Indus. Dev. Agency*, 265 AD2d 477 [2d Dept 1999]; *Shrenkel v New York State Dorm. Auth.*, 266 AD2d 369, 370 [2d Dept 1999]).

## 2. *Plaintiff's Claims Against Gateway*

### A. *Workers' Compensation Exclusivity Provisions Generally*

As a threshold matter, the Court must determine whether plaintiff was Gateway's special employee at the time of the incident. In support of its position to that effect, Gateway contends that: (1) that its payroll company, nonparty PACC Payroll LLC ("PACC"), was plaintiff's general employer; (2) plaintiff was installing air conditioning brackets on the date of the incident in the building under the supervision of its superintendent; and (3) necessary supplies were stored in the building's basement.

"A special employee is one who is transferred for a limited time of whatever duration to the service of another, and limited liability inures to the benefit of both the general and special employer" (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 359 [2007] [internal quotation marks omitted]). "[A] general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]). For example, an employee of one company that provides payroll services to another is considered a special employee of the latter, and his personal injury claims against the special employer can be precluded under the WCL exclusivity provisions (*see Fajardo v Mainco El. & Elec. Corp.*, 143 AD3d 759, 763 [2d Dept 2016]; *Martinez v Fifty Two W. Seventy Seventh St. Corp.*, 39 AD3d 503, 504 [2d Dept 2007]). Payment of wages alone is insufficient to establish the employer's claim that it was the plaintiff's special employer (*see Thompson*, 78 NY2d at 557-558; *Fajardo*, 143 AD3d at 763-764). Thus, whether a special relationship exists is a factual inquiry (*see*

*Thompson*, 78 NY2d at 557-558; *Rodriguez v 27-11 49<sup>th</sup> Ave. Realty, LLC*, 222 AD3d 1013, 1014 [2d Dept 2023]). Although no one factor determines whether a special employment relationship exists, “a “significant” and “weighty feature” in deciding whether a special employment relationship exists is “who controls and directs the manner, details and ultimate result of the employee’s work” – in other words, who determines “all essential, locational and commonly recognizable components of the [employee's] work relationship” (*Fung*, 9 NY3d at 359 [internal quotation marks omitted]; see *Chiloyan v Chiloyan*, 170 AD3d 943, 945 [2d Dept 2019]; *Ugijanin v 2 W. 45<sup>th</sup> St. Joint Venture*, 43 AD3d 911, 913 [2d Dept 2007]). In addition to the foregoing factors, “the employee must have had knowledge of and consented to a special employment relationship” (*Zupan v Irwin Contr., Inc.*, 145 AD3d 715, 718 [2d Dept 2016]).

The exclusivity provisions of the Workers’ Compensation Law extend to entities which are alter egos of the entity that employs plaintiff (see *Samuel v Fourth Ave. Assocs., LLC*, 75 AD3d 594, 594-595 [2d Dept 2010]). A defendant seeking summary judgment must go beyond a mere showing that the entities are related by showing, prima facie, that one of the entities controls the other, or that the two entities operate as a single integrated enterprise (compare *Crespo v Pucciarelli*, 21 AD3d 1048, 1050 [2d Dept 2005] [prima facie established with evidence that both companies shared same office, employees, vehicles, workers compensation policy, and the same individual was president of both entities and the parent company], with *Mauro v Zorn Realities, Inc.*, 206 AD3d 645, 647 [2d Dept 2022] [shared address and liability insurance policy were insufficient for a prima facie showing of the alter ego status]; *Salcedo v Demon Trucking Inc.*, 146 AD3d 839, 841 [2d Dept 2017] [no prima

facie showing despite some relation and some shared officers, because the entities were formed for different purposes, had separate bank accounts, filed separate taxes, different workers compensation policies]; *Zhiwei Mao v Krantz & Levinson Realty Corp.*, 117 AD3d 944, 945 [2d Dept 2014] [a mere showing that entities were related is insufficient to demonstrate that one controlled the daily operations of the other]).

***B. Admissibility of Evidence on Workers' Compensation Exclusivity Provisions***

In support of its contention that plaintiff was its special employee, Gateway submits two groups of documents, for a total of eight documents, which were not previously exchanged in discovery. The first group of the previously unexchanged documents consists of the Cummings/Perez Affidavits; namely, the Affidavit by Yvonne Cummings, treasurer of Gateway-HDFC and member of the Housing Committee of the Pratt Board of Directors,<sup>9</sup> and the Affidavit by Luz Perez, account supervisor for L&W.<sup>10</sup> The second group of the previously unexchanged documents consists of the "Remaining Unexchanged Documents" (as defined above), meaning, collectively, the Property Management Agreement between Gateway and L&W, plaintiff's 2019 W-2, Gateway's 2019 Operating Budget, 2019 ADP Pay Summaries for plaintiff, and the Allianz Worker's Compensation Policy in effect at the time of plaintiff's incident, which names L&W and PACC (among others) as insureds.

---

<sup>9</sup> The Cummings Affidavit avers that, after HUD sold the property to Gateway in July 2002, Gateway-HDFC was incorporated as a not-for-profit to develop and operate affordable housing there in September 2014. In May 2015, Gateway and Gateway-HDFC entered a nominee agreement pursuant to which Gateway-HDFC became the Legal Owner and Gateway became the Beneficial Owner.

<sup>10</sup> The Perez Affidavit avers that plaintiff was paid for work performed for Gateway with checks issued by PACC, a payroll company that was formed by L&W to issue checks for employees of Gateway, and the ADP would process PACC's checking account. Lastly, the Perez Affidavit notes that plaintiff received workers' compensation benefits from the policy issued to L&W.

As stated, plaintiff seeks preclusion of the Cummings/Perez Affidavits, as well as of the Remaining Unexchanged Documents both at trial and in connection with any dispositive motions. In support of his request for preclusion, plaintiff asserts that Gateway failed to:

- (1) previously disclose both sets of documents until Gateway moved for summary judgment;
- (2) disclose the names of Cummings and Perez as potential witnesses for non-party depositions; and
- (3) provide a reasonable explanation for the non-disclosure in their moving papers.

In this regard, plaintiff points to his discovery demand dated March 24, 2020 for “the names and addresses of any witnesses to the acts or conditions substantiating the alleged affirmative defenses plead in your answer” and his demand for “each and every contract between any of the parties to this action.” Additionally, plaintiff contends that the Preliminary Conference order, dated November 23, 2020 (the “PC Order”), imposed a continuing obligation (in ¶ 5 thereof) on all parties to exchange information the names and addresses of all fact witnesses, to the extent known and in other party’s possession. Gateway, by way of a response, dated August 4, 2021, only produced the name of Perry as an eyewitness to the incident, various Dunwell maintenance and service tickets, the July 26, 2019 invoice for the hoist motor repair, the Maintenance Agreement, and a copy of a June 2012 contract between L&W and Dunwell. Plaintiff contends that Gateway’s failure to disclose those new fact witnesses (*i.e.*, Cummings and Perez) prevented him from deposing them prior to the note of issue and before moving for summary judgment. Plaintiff further contends that he was unable to question any of the deponents about the contents of the aforementioned documents because of Gateway’s failure to exchange them previously.

Gateway opposes plaintiff's preclusion request, arguing that it was not required to disclose the identities of Cummings and Perez because those individuals did not witness the incident. Gateway asserts that plaintiff knew L&W was the property-management company for the building at the time of the incident, based on the depositions of plaintiff and an L&W representative, but that plaintiff declined to depose non-party witnesses in discovery (*see Dune v Ck-HP 1985 Marcus Ave., LLC*, 136 AD3d 860, 861 [2d Dept 2016] [affidavit was properly considered where defendants failed to name the non-party as a witness in response to the discovery demands, but plaintiff had knowledge of the witness's existence]; *Yax v Development Team, Inc.*, 67 AD3d 1003, 1004 [2d Dept 2009] ["Although the defendant failed to name (a particular individual) as a witness in response to the plaintiff's discovery demands, it is evident that the plaintiff had knowledge of (the individual's) existence, since both the plaintiff and the defendant's project superintendent mentioned (the individual) in their deposition testimony. Moreover, the defendant offered an excuse for failing to disclose (the individual) as a witness and there was no evidence that this failure was willful."]).

Gateway further asserts that neither of the Remaining Undisclosed Documents (including the Property Management Agreement between L&W and Dunwell, the Gateway's 2019 Operating Budget, ADP Pay Summaries, and the Allianz Worker's Compensation Policy) fell within the scope of any of plaintiff's document demands.

With respect to orders of preclusion under CPLR 3126, it is noted that "[b]efore a court invokes the drastic remedy of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious" (*Maliah-Dupass v Dupass*, 166 AD3d 873, 875 [2d Dept 2018]). "Willful and contumacious conduct

may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures, or a failure to comply with court-ordered discovery over an extended period of time" (*Bouri v Jackson*, 177 AD3d 947, 949 [2d Dept 2019]). "The nature and degree of the penalty to be imposed pursuant to CPLR 3126 against a party who refuses to comply with court-ordered discovery is a matter within the discretion of the court" (*Smookler v Dicerbo*, 166 AD3d 838, 839 [2d Dept 2018]).

Here, plaintiff has demonstrated, prima facie, that Gateway failed to comply with the March 2020 discovery demands and the PC Order regarding the Cummings/Perez Affidavits. The willful and contumacious nature of Gateway's conduct may be inferred from its obvious failure to previously produce the names of fact witnesses substantiating Gateway's workers' compensation-related affirmative defenses, despite plaintiff's discovery demands and the PC Order directing it to do so, and its failure to offer any reasonable excuse for the non-compliance. Though plaintiff knew that L&W was managing the building, plaintiff was not aware of the existence of Cummings and/or Perez specifically because their names were not mentioned in either plaintiff or the L&W representative's pretrial depositions. As stated, Gateway only provided their names, and their corresponding affidavits, for the first time in support of its own motion for summary judgment. Despite the passage of time since plaintiff's service of his initial discovery demands for the fact witness information in 2020, Gateway failed to allege that their names and addresses were not in its possession, nor did it timely object to the demand. Accordingly, the Court, in its discretion, finds that a preclusion order with respect to the Cummings/Perez Affidavits is warranted.

However, plaintiff is *not* entitled to a preclusion order regarding the Remaining Undisclosed Documents. The court agrees with Gateway, insofar as plaintiff did not serve any discovery demands seeking contracts between Gateway and non-parties with regard to the building, nor Gateway's financial documents; and that none of those documents were required to be exchanged by the PC Order. In any event, the Remaining Undisclosed Documents may *not* be considered at the summary-judgment stage for lack of requisite foundation, as they are not self-authenticating, nor are they authenticated by certification, foundational testimony, or an affidavit by someone with personal knowledge.

***C. Applicability of Workers' Compensation Exclusivity Provisions***

As found, there is no admissible evidence supporting the relationships between Gateway, L&W, and PACC to determine which of them was the general or special employer of plaintiff. The identity of the entity which paid plaintiff's wages is a question of material fact. There is also a factual dispute over who is responsible for furnishing of equipment to plaintiff. Whereas plaintiff testified that he had obtained all the supplies and equipment the previous day, Perry testified that both he and plaintiff went to a hardware store to pick up the missing supplies just before the incident. Moreover, the deposition testimonies are inconclusive on the issue of whether Gateway directed, supervised, and controlled all aspects of plaintiff's work at the building. Therefore, the admissible evidence before the Court is insufficient to show that Gateway controlled and directed the "manner, details, and ultimate result" of plaintiff's work, and that plaintiff was aware of and consented to his special employee status (*see Zupan*, 145 AD3d at 718; *Thompson* at 558-559). Thus, Gateway has

not made a prima facie showing that plaintiff was its *special employee* at the time of the incident.

Nor has Gateway established, prima facie, that it and L&W operated as a *single integrated entity*, or that either company controlled the daily operations of the other, such that it was the alter ego of L&W. However, the record contains no admissible evidence as to whether the two entities had the same officers, corporate purposes, bank accounts; commingled assets or otherwise integrated finances; filed the same tax returns; or shared liability insurance and/or workers' compensation policies. Under the circumstances, Gateway has *not* demonstrated its entitlement to judgment as a matter of law on the grounds that it was an alter ego of L&W and that plaintiff's action was barred by the Workers' Compensation Law.

Since Gateway has failed to sustain its prima facie burden, denial of that branch of its motion which was for summary judgment dismissing the complaint against it based on the exclusivity defense of the Workers' Compensation Law is appropriate without regard to the sufficiency of plaintiff's opposition papers (*see Batts v IBEX Constr., LLC*, 112 AD3d 765, 767 [2d Dept 2013]). By parity of reasoning, Gateway's workers' compensation-related affirmative defenses (13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> affirmative defenses in its answer) remain undismissed and undisturbed.

***D. Merits of Plaintiff's Claims Against Gateway***

The duty of owners to keep their property safe is a nondelegable duty stating that “[a] landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all of the circumstances, including the likelihood of injury to others, the

seriousness of the injury, and the burden of avoiding the risk” (*Basso v Miller*, 40 NY2d 233, 241 [1976] [internal quotation marks omitted]). Liability in a negligence action is generally predicated on a party’s ownership, occupancy, control or special use of the subject property: the existence of one or more of these elements gives rise to a duty of care (*see Zuniga v Smith*, 241 AD3d 1502, 1503 [2d Dept 2025]). “[T]he property owner continues to owe a nondelegable duty to elevator passengers to maintain its buildings’ elevators in a reasonably safe manner” (*Dykes v Starrett City, Inc.*, 74 AD3d 1015, 1016 [2d Dept 2010]; *see Wagner v Grinnell Hous. Dev. Fund Corp.*, 260 AD2d 265, 266 [1st Dept 1999] [“(Owner’s) duty to maintain the premises extends to elevator repair, which remains nondelegable as between the building owner and the injured party, despite any contractual delegation of maintenance obligations by the owner to another party.”] [internal citation omitted], *lv denied* 99 NY2d 502 [2002]). In any event, Gateway does not dispute owing “a nondelegable duty to elevator passengers to maintain its building[’s] [elevator] in a reasonably safe manner” (*Urman v S&S, LLC*, 85 AD3d 897, 898 [2d Dept 2011] [alterations in the original]). Because there is no dispute over the element of duty, the key issue is whether Gateway either created or had actual or constructive notice of any defective condition about the elevator.

As to the notice element, plaintiff must establish that defendants either: (1) created the specific, hazardous condition that caused plaintiff’s incident; (2) had actual or constructive notice of it; (3) failed to use reasonable care to discover and correct it; or (4) in the absence of notice, failed to correct a recurrent malfunction (*see Goodwin v Guardian Life Ins. Co. of Am.*, 156 AD3d 765, 766 [2d Dept 2017]). The Court of Appeals clarified that while an elevator company could be liable for its negligent performance of continued maintenance that

circumstantially caused the incident, the owner's liability "must have been preconditioned on notice, actual or constructive" (*Rogers*, 32 NY2d at 561). Identifying the particular cause of the elevator malfunction is crucial to the issue of notice (*see e.g., Forde*, 89 AD3d at 679-680 [subject elevator stopped because of a blown fuse, defendants established lack of notice of a similar recurring problem]; *Carrasco v Millar Elev. Indus., Inc.*, 305 AD2d 353, 353-354 [2d Dept 2003] [defendant established lack of notice of a defective condition in the subject elevator because there was no indication the elevator had previously stopped between floors, or shook or vibrated prior to this incident; and defendant had not received any complaints for this activity]).

Here, plaintiff has failed to produce evidence of a prior problem with the elevator which would have provided Gateway with some notice of a specific defect that allegedly caused the incident. Though different parts of the elevator had experienced problems leading up to the incident (such as the controller, the 3-B relay, and the motor bearings), it is unclear which part(s) of the equipment, if any, were responsible for the incident. Further, the record, viewed in its totality, reveals numerous disputes of material fact, including the question of which alleged defective and dangerous condition of the elevator caused the incident. Plaintiff testified that tenants in the building would complain about the elevator generally, but he could not identify any specific conditions. Nor does plaintiff's pretrial testimony indicate that he communicated any of the elevator-related complaints to L&W or Gateway. Conversely, Perry was aware of the specific tenant complaints with the elevator not opening, not moving, or jumping, and would direct them to call the management company or the superintendent of the building. Perry also testified that while he experienced the elevator jumping "here and there,"

he did not know if the elevator had dropped before the incident. He further testified that tenants “never” complained to him about the elevator dropping or falling.

In addition, the L&W representative (as the building manager) would physically report to the location for “major” issues, such as elevator malfunctions that could result in physical injury, but not for lightbulbs, graffiti or trash, or the elevator being stuck on a floor. The L&W representative was unaware of any tenant complaints about the elevator dropping. The L&W representative further testified that, since he began working at the building in 2016, he did not experience the elevator drop while riding it. In sum, Gateway was certainly on notice of *some* conditions, but nothing in the record links, as a matter of law, any of prior tenant complaints to the specific malfunction underlying the incident to make a finding of *actual* notice as a matter of law.

Plaintiff’s only argument as to Gateway’s liability is that it had notice based on its failure to modernize and receipt of the NYC DOB violations, but these records are *not* probative of liability. Despite Livingstone’s opinion that the equipment was “obsolete,” since Dunwell began working at the building and had not been modernized, it is a question of fact of whether Gateway’s failure to modernize the elevator resulted in the incident.

Plaintiff also submitted the elevator-inspection history generated on the NYC DOB for the building specifying the date, type, and disposition of each inspection from March 10, 1990 to August 12, 2020. This document does not provide any details on the 13 violations filed during that period, nor include copies of the violations themselves, nor whether the violations were resolved at any point before plaintiff’s incident. When questioned at his deposition, the L&W representative believed that the NYC DOB conducted annual inspections but was not

aware of any NYC DOB-issued violations. Likewise, Livingstone's knowledge was limited to the fact that the NYC DOB conducted periodic elevator inspections, and that Gateway would request repairs from Dunwell to cure any violations. There are no records showing Gateway's communications with Dunwell regarding any NYC DOB violations or work orders generated to rectify those violations. Based on the evidence provided, there remain triable issues of fact as to whether Gateway had *actual* notice of the specific condition which led to plaintiff's incident.

Nor has plaintiff established, as a matter of law, that Gateway had *constructive* notice of the alleged defective condition(s). A defendant has constructive notice of a dangerous condition when the condition is visible and apparent and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 837, 837-838 [1986]; *see also Alkon v Shore Towers Apts. Inc.*, 185 AD3d 765, 766-767 [2d Dept 2020]; *Lezama v 34-15 Parsons Blvd, LLC*, 16 AD3d 560, 560-561 [2d Dept 2005]). There is no evidence in the record of a defect in the elevator, linked to plaintiff's incident, which Gateway should have found out about, or which Gateway failed to use reasonable care to discover.

Given the questions of material fact and the lack of probative evidence regarding: (1) the specific defective condition(s) resulting in plaintiff's incident and (2) whether Gateway had actual or constructive notice of the alleged dangerous condition(s), plaintiff is not entitled to partial summary judgment on liability as against Gateway. Likewise, the branch of Gateway's motion for partial summary judgment dismissing the complaint as against is denied.

### 3. *Plaintiff's Claims and Codefendants' Cross-Claims Against Dunwell*

#### A. *The Doctrine of Res Ipsa Loquitur*

Res ipsa loquitur is not a separate theory of liability, but merely “a common-sense application of the probative value of circumstantial evidence” (*Abbott v Page Airways*, 23 NY2d 502, 512 [1969]). A plaintiff must establish three conditions for the doctrine to apply: “(1) the event must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff” (*Morejon v Rais Const. Co.*, 7 NY3d 203, 209 [2006] [internal quotation marks omitted]). Once the plaintiff satisfies the burden of proof on these three elements, the doctrine of res ipsa loquitur permits the factfinder to infer negligence” (*Bicchetti v Atlantic Toyota*, 217 AD3d 743, 744 [2d Dept 2023]). Summary judgment to plaintiff on his/her res ipsa loquitur theory may be granted only “in the exceptional case in which no facts are left for determination” (*Morejon*, 7 NY3d at 212).<sup>11</sup>

Plaintiff has failed to make a prima facie showing of liability against Dunwell under the doctrine of res ipsa loquitur. A triable issue of fact exists as to whether the sudden drop of an elevator which plaintiff experienced was an occurrence that does not ordinarily occur without negligence, thereby negating the first element of the doctrine (*see Forde v Vornado*

---

<sup>11</sup> An elevator’s rapid descent and abrupt stop implicate res ipsa loquitur, but only where (unlike the case here) there is sufficient, circumstantial evidence to infer liability (*see Fiermonti v Otis El. Co.*, 94 AD3d 691, 692 [2d Dept 2012] [sudden misleveling]; *Devito v Centennial El. Indus., Inc.*, 90 AD3d 595, 596 [2d Dept 2011] [rapid descent, shaking, and abrupt, misaligned stop]; *Gaspard v Barkly Coverage Corp.*, 65 AD3d 1188 [2d Dept 2009] [sudden drop of five stories]; *Fyall v Centennial El. Indus., Inc.*, 43 AD3d 1103, 1104 [2d Dept 2007] [rapid descent and abrupt, misaligned stop]; *Burgess v Otis El. Co.*, 114 AD2d 784, 785 [1st Dept 1985], *affd* 69 NY2d 623 [1986] [misleveled elevator]).

*Realty Trust*, 89 AD3d 678, 679-680 [2d Dept 2011]). Each of the three retained experts disagree as to how and why the incident happened, as more fully set forth in the margin.<sup>12</sup>

Contrary to plaintiff's contention, Gateway (not Dunwell) retained "full and sole responsibility" of the control, management, inspection, and operator of the equipment "except during periods of inspection and work required by the terms of this agreement, when and if [Dunwell]'s employees actually take charge of the equipment" (Maintenance Agreement, ¶ 13). In any event, the question of which defendant(s) had exclusive control of the elevator cannot be answered at summary judgment because the specific cause of the elevator malfunction is a triable issue of fact.

***B. Common-Law Negligence***

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Alpha/Omega Concrete Corp. v Ovation Risk Planners, Inc.*, 197 AD3d 1274, 1282 [2d Dept 2021] [internal quotation marks omitted]). "Further, a party who enters into a contract to render services may be said to have assumed a duty of care – and thus be potentially liable in tort – to third persons where the contracting party has entirely displaced the other party's duty of safe maintenance concerning, for instance, a passenger elevator" (*Barnes v Astoria Fed. Sav. & Loan Assoc.*, 220 AD3d 725, 726 [2d Dept 2023] [internal quotation marks omitted]). An elevator company's contractual obligation, standing alone, does *not* give rise to tort

---

<sup>12</sup> Plaintiff's expert opined that the cause of the incident was Dunwell's "failure to properly maintain, adjust and repair the stopping circuit and slowdown in the down direction" (Kennedy Initial Affidavit ¶ 4.09). In turn, Dunwell's expert opined that there was no clear reason for the incident, but the incident could have occurred due to a mis-operation of the landing and leveling system, and Gateway's failure to modernize the equipment (Schloss Affidavit ¶¶ 12.f, 13.a). Lastly, Gateway's expert, without addressing the cause of the incident, opined that Gateway lacked notice of any issues with the elevator descending rapidly, dropping, or stopping between floors (Sena Affidavit ¶ 18).

liability in favor of a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). Under *Espinal*, an elevator contractor may be liable to a third party (such as an elevator passenger) where, as relevant here, “the contracting party has entirely displaced the other party’s duty to maintain the premises safely” (*Espinal*, 98 NY2d at 140). The scope of the elevator-maintenance contract is crucial in this context (*compare Palka v Servicemaster Mgmt. Servs. Corp.*, 83 NY2d 579, 589 [1994] [when there is an “extensive, exclusive maintenance contract,” a party’s “assumed duty extends to noncontracting individuals reasonably within the zone and contemplation of the intended safety services”], *with Iliawat v PS Marcato El. Co., Inc.*, 178 AD3d 517, 519 [1<sup>st</sup> Dept 2019] [maintenance company’s obligations were “limited . . . to inspecting and maintaining certain components and aspects of the elevator”] and *Kawka v 135-55 35th Realty, LLC*, 139 AD3d 677, 677-678 [2d Dept 2016] [elevator maintenance contract provided that defendant “did not assume possession, management, or control of any part of the equipment” and “no responsibility for certain items”]).

Here, the Court agrees with Dunwell that the latter did not owe plaintiff a duty of care with respect to the maintenance, inspection, and servicing of the elevator, and therefore cannot be held liable to plaintiff under the aforementioned *Espinal* exception. Dunwell’s Maintenance Agreement with Gateway was *not* “the type of [a] ‘comprehensive and exclusive’ property obligation” contemplated in *Palka*, but was rather a more limited contractual undertaking, as was the instance in each of *Espinal*, *Iliawat*, and *Kawka*. Further, the parties’ conduct reflects that Dunwell did not assume a duty to plaintiff (*see Palka*, at 590 [“The defendant’s obligation . . . is circumscribed . . . in light of the duty imposed by law

based on the interrelationship of the parties, as framed by the evidentiary record.”)]. As stated, Dunwell would be notified of certain tenant complaints about the elevator received by the L&W repair desk and the NYC DOB violations received through its electronic system. In the absence of duty of care to plaintiff, the Court need not reach the latter’s additional arguments that Dunwell created or exacerbated any of the alleged elevator defects or was on notice of same.

**C. Codefendants’ Cross-Claims**

As stated, the Court determined that Dunwell owed no duty of care to plaintiff and granted Dunwell summary judgment dismissing plaintiff’s claims against it. Having been dismissed from this action, Dunwell is not liable to Gateway in common-law contribution or indemnification.

\* \* \*

Any relief not expressly granted herein has been considered and is denied.

This constitutes the Decision and Order of the Court.

ENTER FORTHWITH:



HON. RICHARD VELASQUEZ, J.S.C.

Hon. Richard Velasquez, JSC

APR 20 2026

2026 APR 22 A 9:18  
KINGS COUNTY CLERK