

**Messinger v Thomas Maintenance Inc.**

2022 NY Slip Op 30720(U)

March 4, 2022

Supreme Court, New York County

Docket Number: Index No. 151079/2018

Judge: Louis L. Nock

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LOUIS L. NOCK** PART **38M**

*Justice*

-----X

DAVID MESSINGER,

Plaintiff,

- v -

THOMAS MAINTENANCE INC., D.K. SIDEWALK SHED &  
SCAFFOLDING, SHAH GROUP ENTERPRISES INC., KAJ  
NY CONSTRUCTION INC., KAJ NY CONSTRUCTION INC.  
D/B/A D.K. SIDEWALK SHED & SCAFFOLDING, KAJ NY  
CONSTRUCTION INC. D/B/A DK GENERAL  
CONTRACTOR, DK GENERAL CONTRACTOR, 165 EAST  
72ND APARTMENT CORPORATION, HALSTEAD  
MANAGEMENT COMPANY, LLC, 182 EAST 73RD  
STREET LLC, 73RD STREET REALTY ASSOCIATES, LLC,  
182 E. 73RD GARAGE CORP., 165 EAST PARKING  
CORP., and IMPERIAL PARKING SYSTEMS, INC.,

Defendants.

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165 EAST 72ND APARTMENT CORPORATION, HALSTEAD  
MANAGEMENT COMPANY, LLC, 182 EAST 73RD STREET  
LLC, 73RD STREET REALTY ASSOCIATES, LLC, 182 E.  
73RD GARAGE CORP., 165 EAST PARKING CORP., and  
IMPERIAL PARKING SYSTEMS, INC.,

Plaintiffs,

-against-

THOMAS MAINTENANCE, INC.,

Defendant.

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**DECISION + ORDER ON  
MOTION**

INDEX NO. 151079/2018  
MOTION DATE 09/28/2020,  
06/21/2021,  
07/28/2021  
MOTION SEQ. NO. 006 007 008

Third-Party  
Index No. 595386/2018

The following e-filed documents, listed by NYSCEF document number (Motion 006) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 183, 186, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, and 264

were read on this motion for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 007) 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 356, 357, 358, and 359

were read on this motion to

QUASH SUBPOENA, FIX CONDITIONS

The following e-filed documents, listed by NYSCEF document number (Motion 008) 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, and 443

were read on this motion to

CONSOLIDATE/JOIN FOR TRIAL

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that defendant Thomas Maintenance Inc.'s ("TMI") motion for summary judgment (Mot. Seq. No. 006), plaintiff David Messinger's ("plaintiff") motion to quash a subpoena and for a protective order (Mot. Seq. No. 007), and TMI's motion to consolidate for joint trial (Mot. Seq. No. 008) are consolidated for disposition based upon the following memorandum decision.

#### Background

In this personal injury action, plaintiff contends that he was struck in the head from above by one or more sheets of corrugated steel while he was walking under a sidewalk shed between 180 East 73rd Street and 186 East 73rd Street, New York, New York, specifically at 182 East 72nd Street, New York, New York (NYSCEF Doc. No. 47, ¶ 310). He asserts in his complaint two causes of action: negligence, and negligent hiring, training, and supervision. TMI moves for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's second amended complaint against it, as well as all cross claims and third-party claims asserted against it by the various defendants. Defendants 182 East 73rd Street LLC ("182 East"), 182 E. 73rd Garage Corp. ("182 Garage"), and Imperial Parking Systems, Inc. ("IPark"), cross move for summary judgment on their third-party claim against TMI for common-law indemnification.

Separately, TMI also moves to consolidate this action with *Messinger v Lighthouse Properties, LLC et al.* (Index No. 153042/2020), presently pending before the court and

unassigned, and *Messinger v Lerner* (Index No. 154007/2020), presently pending before this court, for joint trial pursuant to CPLR 602. Finally, plaintiff moves, pursuant to CPLR 2304, to quash a subpoena issued by TMI to nonparty IME WatchDog, Inc., and for a protective order pursuant to CPLR 3103 regarding the matter sought by the subpoena.

### Relationships of the Parties

IPark operates garages throughout New York City, and is an umbrella company for the individual companies associated with each garage, including defendants 182 Garage and 165 East Parking Corp. (“165 Parking”) (NYSCEF Doc. No. 177 at 13-16, 24-26, 31). William Lerner, defendant in the *Lerner* action, is the president of both companies, and the sole shareholder of IPark (*id.*).

Defendant 182 East is the owner of the building located at 182 East 73rd Street; Lighthouse Properties, LLC, defendant in the *Lighthouse Properties* action, is the property manager (NYSCEF Doc. No. 233). 182 East leased the garage space to Capital Parking System of New York, Inc., who, in turn, subleased the garage space to 182 Garage (*id.*). Defendant 165 East 72nd Apartment Corporation (“165 East”) is the owner of the building located at 165 East 72nd Street, which also has an address of 186 East 73rd Street. 165 East leased the garage space at that building to 165 Parking.<sup>1</sup>

Carlos Gomez-Coello, who was employed by IPark to manage the garage owned by 182 Garage, informed his supervisor at IPark, John Heras, in May of 2017 that the façade of the garage building needed repairs (NYSCEF Doc. No. 238 at 21-25, 29-33). Heras then informed Tim Mustafaj, Vice President of IPark of the problem; Mustafaj directed Heras to contact defendant TMI to handle the repairs (NYSCEF Doc. No. 239 at 33). After further discussions

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<sup>1</sup> It is unclear from the record what relationship defendants Halstead Management Company, LLC, and 73rd Street Realty Associates, LLC, have to the accident.

between Mustafaj and Michael Palmiotto, TMI's Vice President (NYSCEF Doc. No. 240 at 53), TMI submitted a proposal to IPark for the proposed repair work (NYSCEF Doc. No. 241). Included among the items in the proposal, as well as the items invoiced to IPark, was a "Sidewalk shed" (NYSCEF Doc. Nos. 241, 242).

Rather than install the sidewalk shed itself, TMI purportedly subcontracted the installation to a company it was referred to that it believed was called D.K. Sidewalk Shed & Scaffolding ("D.K. Sidewalk") (NYSCEF Doc. No. 240 at 29-31). Palmiotto states that he spoke to someone either named Mike or Tony who he believed was a supervisor (*id.* at 29, NYSCEF Doc. No. 170). It is undisputed that there was no written agreement between TMI and D.K. Sidewalk. Palmiotto testified that there was no agreement on price, and that he did not ask D.K. Sidewalk for proof of insurance prior to the incident (*id.* at 33-34).

While the record is unclear on this point, it appears as though D.K. Sidewalk is a trade name for defendant Kaj NY Construction Inc. ("Kaj Construction"), which also does business as DK General Contractor; Bikramjit Ghotra, Kaj Construction's manager, testified that when the company installed sidewalk sheds, they would hang signs with the name D.K. Sidewalk on the shed itself (NYSCEF Doc. No. 243 at 17, 23-26). Kaj Construction, however, denies installing the sidewalk shed, obtaining the permit for the installation from the New York City Department of Buildings ("DOB") or having any involvement with the accident at all (*id.* at 43, 96-97). Indeed, Ghotra claimed never to have heard of TMI prior to receiving the complaint in this action (*id.* at 40-41). Instead, he testified that on the day before the accident, he had loaned Kaj Construction's truck to defendant Shah Group Enterprises Inc. ("Shah Group"), whose principals he knew socially (*id.* at 44-45, 55-61). He stated that the truck contained D.K. Sidewalk, which

he believes explains how the D.K. Sidewalk signage came to be at the site of the accident (*id.* at 57-59, 65-66, 74-75, 146-47).

Lawkhinder Singh, Shah Group's principal, tells a different story. He denies that Shah Group installed the sidewalk shed or performed any work anywhere near the site of the accident (*id.* at 40-41). Instead, he states that at Kaj Construction's request, Shah Group obtained the DOB permit for the sidewalk shed installation because Kaj Construction lacked the requisite insurance coverage at the time (*id.* at 48-50). A DOB permit was issued to Shah Group (NYSCEF Doc. No. 216).

### **The Accident**

In the late afternoon on June 1, 2017, plaintiff was walking west on 73rd Street between Third Avenue and Lexington Avenue (NYSCEF Doc. No. 219; NYSCEF Doc. No. 222 at 44-45). As he passed the under the sidewalk shed, which was then being assembled, he was struck in the head by one or more sheets of corrugated steel dropped from above by the workers assembling the shed and lost consciousness (NYSCEF Doc. No. 222 at 44-45). When he regained consciousness, he observed two sheets of corrugated steel on the ground (*id.* at 46-47). Elizabeth Mattern, who was walking behind plaintiff when he was struck and observed the accident, testified that she did not see any cones, barricades or flagmen at or near the sidewalk shed to warn passersby, nor any alternative pathway diverting pedestrians around the sidewalk shed (NYSCEF Doc. No. 225 at 23-25).

John Murphy, an inspector for the DOB, arrived at the site of the accident shortly thereafter. He found multiple safety violations at the site, including the failure to adequately protect pedestrians by using barriers or flagmen, blocking off the street entirely, or installing the sidewalk shed at night when there is less pedestrian traffic (NYSCEF Doc. No. 226 at 30-31, 33-

35, 44, 92). Violations were issued to both Shah Group and 182 East (NYSCEF Doc. Nos. 228-229). The violations against Shah Group were later upheld at an administrative hearing (NYSCEF Doc. No. 231).

The operative complaint in this action, plaintiff's second amended complaint, was filed on January 25, 2019 (NYSCEF Doc. No. 47). Defendants separately filed answers to the second amended complaint (NYSCEF Doc. Nos. 51, 53-54, 84). Before the note of issue was filed, TMI and plaintiff made the instant motions for summary judgment, to quash a subpoena, and for consolidation.

### **Motion and Cross-Motion for Summary Judgment (Mot. Seq. No. 006)**

#### **Standard of Review**

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores, Ltd.*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

#### **Discussion**

As an initial matter, TMI, though it moves for summary judgment dismissing the complaint in its entirety, fails to address plaintiff's second cause of action for negligent hiring, training, and supervision in its moving papers. While it belatedly does so in its reply briefing, arguments raised for the first time in reply are generally not considered (*e.g. JPMorgan Chase*

*Bank, N.A. v Luxor Capital, LLC*, 101 AD3d 575, 576 [1st Dept 2012]). Accordingly, insofar as TMI seeks summary judgment on that claim, it is denied. Further, TMI's continuing potential liability on this cause of action precludes summary judgment dismissing co-defendants/third-party plaintiffs' claims for indemnification and contribution, as summary judgment would require a finding that TMI was itself free from negligence (*Callan v Structure Tone, Inc.*, 52 AD3d 334, 335-36 [1st Dept 2008]). Moreover, as set forth further below, significant questions of fact remain as to TMI's potential direct negligence in causing plaintiff's injuries.

Quite simply, the record before the court is rife with disputed issues of fact. So far as the court can discern, the only genuinely undisputed issues are that TMI proposed to do certain repair work for IPark at the 182 East 73rd Street Garage, including the construction of a sidewalk shed, protection, and scaffolding, and that TMI had no written agreement with whatever entity it claims to have subcontracted the installation of the sidewalk shed to. Palmiotto, TMI's Vice President, believed that Shah Group and Kaj Construction were the same entity, but both entities dispute that they were responsible for the work, or that they employed the man that Palmiotto spoke to. Indeed, as Palmiotto and his purported subcontractor did not agree on a price term, it is questionable whether they ever had an enforceable agreement (*e.g. Cooper Sq. Realty, Inc. v A.R.S. Mgt., Ltd.*, 181 AD2d 551 [1st Dept 1992] ["As price is an essential ingredient of every contract for the rendering of services, an agreement must be definite as to compensation"]). Moreover, though the court's task on this motion is to find, rather than weigh, the issues (*e.g. Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]), the court notes that multiple witnesses testified as to the lack of safety measures taken to protect the public, and that DOB violations were issued to Shah Group and 182 East. Without a contract, TMI cannot establish a

prima facie case that it had no responsibility to either erect the sidewalk shed or ensure the safety of pedestrians while it was being installed.

“Generally, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property” (*Russo v Frankels Garden City Realty Co.*, 93 AD3d 708, 710 [2d Dept 2012]). TMI argues that, as a contractor, it only owes a duty to plaintiff under certain well-settled exceptions (*Laronga v Atlas-Suffolk Corp.*, 164 AD3d 893, 895 [2d Dept 2018]). As first set forth by the Court of Appeals, they are as follows:

“(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, “launche[s] a force or instrument of harm,” (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely”

(*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002].) The falling sheets would constitute a “force or instrument of harm.” Moreover, the construction of a sidewalk shed is for the purposes of protecting pedestrians walking near or under the worksite (NY City Building Code [Administrative Code of City of NY, tit 28, ch 7] § BC 3307.6). The New York City Building Code further provides that “[s]idewalk sheds shall be maintained and used by the general contractor (*id.*, § BC 3307.6.5.3). Accordingly, plaintiff potentially relied to his detriment on TMI’s failure to either install the shed correctly or ensure that proper safety measures were in place during the installation. Moreover, in agreeing to erect a sidewalk shed, protection, and scaffolding, TMI arguably displaced 182 East’s duty to maintain a safe sidewalk in the specific area of the sidewalk shed (*e.g. Abramson v Eden Farm, Inc.*, 70 AD3d 514 (1st Dept 2010)). There is not enough evidence in the record on this motion to show that TMI subcontracted away responsibility in these areas to Kaj Construction, Shah Group, or anyone else, such that it would satisfy its burden on the motion.

Turning to the cross-motion, 182 East, 182 Garage, and IPark seek common-law indemnification against TMI. “Common-law indemnification is generally available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer” (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011] [internal quotation marks and citation omitted]). “A party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part” (*id.* at 377-378). Further, “if a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common-law indemnification claim will not lie against that party on the basis of its contractual authority alone” (*id.* at 378).

Here, it is undisputed that 182 East, 182 Garage, and IPark would only be vicariously liable to plaintiff, if at all, as none of them performed or supervised the installation of the sidewalk shed that caused plaintiff’s injuries. However, as set forth above, there are many issues of fact remaining as to who was ultimately responsible for installing the sidewalk shed, and it may be that after trial of this action TMI is only found liable based on its contract with IPark, in which case it would not necessarily be required to indemnify 182 East, 182 Garage, and IPark pursuant to *McCarthy*. Accordingly, the cross-motion is denied.

#### **Motion to Quash Subpoena (Mot. Seq. No. 007)**

#### **Standard of Review**

“A motion to quash is limited in scope, challenging only the validity of the subpoena or the jurisdiction of the issuing authority” (*Santangelo v People*, 38 NY2d 536, 539 [1976]). The burden of establishing that a subpoena seeks protected material lies with the party asserting privilege or other grounds for a protective order (*Markel v Pure Power Boot Camp, Inc.*, 171

AD3d 28, 31 [1st Dept 2019]). If the party seeking to quash establishes that the materials sought were prepared for trial (CPLR 3101[d][2]), the party seeking records must establish “a substantial need for them in the preparation of the case and that without undue hardship the requesting party is unable to obtain the substantial equivalent by other means (*id.* at 31).

### Discussion

Plaintiff moves to quash a subpoena issued by TMI to IME Watchdog, who plaintiff’s counsel retained to accompany plaintiff to his independent medical examinations (“IME”). The subpoena duces tecum seeks “all notes, photographs and correspondence recorded by Chris Darling[] during the independent medical examination of plaintiff by Dr. Gregory Montalbano, M.D. on March 2, 2021” (NYSCEF Doc. No. 272). While the motion was pending, TMI issued further subpoenas for Mr. Darling’s records relating to an observed IME before Dr. Kai-Ming Fu, M.D. on March 11, 2021, and before Dr. Roger A. Bonomo, M.D. on March 17, 2021 (NYSCEF Doc. No. 358). TMI argues that plaintiff both lacks standing to quash a subpoena not issued to it, and further, that the subpoena should not be quashed because IME Watchdog is adversarial to IME doctors and may have interfered with the examination.

The Appellate Division, First Department, recently addressed this exact dispute in *Markel v Pure Power Boot Camp, Inc.*, cited above. The plaintiff sued the defendant gym for knee injuries sustained while participating in exercise drills at the gym (*Markel*, 171 AD3d at 29). The defendants requested that the plaintiff submit to an IME, at which she was accompanied by an employee of IME Watchdog (*id.*). Six months after the IME, the defendants issued a subpoena to the employee of IME Watchdog seeking similar categories of documents as sought by TMI herein (*id.*). The plaintiff moved to quash the subpoena. The court held that the IME observer was an agent of plaintiff’s counsel, and any notes or other materials prepared by them

“constitute materials prepared for trial, bringing them within the conditional or qualified privilege protections of CPLR 3101(d)(2)” (*id.* at 31). Further, the defendants failed to show any “substantial need” for the requested records or that they could not obtain a substantial equivalent thereof without undue hardship (*id.* at 32 [“In general, under these circumstances, defendants’ access to their own doctor will seriously undermine any argument that there is a substantial need for the IME observer’s materials because the information contained therein is not otherwise available without undue hardship”]). Ultimately, the court quashed the subpoena and issued a protective order against disclosure of the requested materials (*id.*).

Here, plaintiff clearly has standing based on *Markel* to bring this motion. Further, Mr. Darling’s notes and materials are protected by the trial preparation privilege, and TMI has failed to demonstrate substantial need or undue hardship in obtaining substantially equivalent material from their own doctor (*id.* at 31-32). TMI’s unsubstantiated assertion that Mr. Darling may have interfered with the IME can easily be determined by discussing the matter with its own IME doctors. Further, TMI spends much of its brief describing IME Watchdog as adversarial and dangerous to the reputation of IME doctors, yet any potential danger could again be discerned simply by discussing the IMEs with the doctors who conducted them. Indeed, plaintiff represents that it has no plans to call Mr. Darling as a witness in its case in chief (NYSCEF Doc. No. 356, ¶ 7). Whatever IME Watchdog’s motivations and actions in other cases are or have been, they have no bearing on whether TMI has satisfied its burden in opposing the motion. TMI’s other attempts to distinguish *Markel* are unavailing.

Accordingly, the subpoena dated June 1, 2021, issued to IME Watchdog shall be quashed and a protective order will issue pursuant to CPLR 3103 forbidding disclosure of the materials sought therein. Additionally, on the court’s own authority (CPLR 3103[a]), the protective order

will extend to the material sought by the subsequent subpoenas described above, and any future requests for similar records from IME Watchdog with respect to this case, or any proposed deposition of Mr. Darling or other employee of IME Watchdog who assisted plaintiff in preparing for trial of this matter.

**Motion to Consolidate (Mot. Seq. No. 008)**

**Standard of Review**

“When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay” (CPLR 602). A motion to consolidate is addressed to the discretion of the Court (*Cromwell v CRP 482 Riverdale Ave., LLC*, 163 AD3d 626, 627 [2d Dept 2018]). Factors counseling against consolidation or joint trial include limited commonalities between the actions to be joined, disparate legal theories, different procedural stages of the separate cases, potential prejudice to opposing parties, and potential juror confusion or unwieldy litigation (*id.* at 628; *Abrams v Port Auth. Trans-Hudson Corp.*, 1 AD3d 118, 119 [1st Dept 2003] [“Even where there are common questions of law or fact, consolidation is properly denied if the actions are at markedly different procedural stages and consolidation would result in undue delay in the resolution of either matter”]). “[T]here is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right” (*Matter of Progressive Ins. Co. v Countrywide Ins. Co.*, 10 AD3d 518, 519 [1st Dept 2004]).

### Discussion

Subsequent to commencing the action, plaintiff commenced two other actions arising out of the accident. In *Messinger v Lighthouse Properties, et al.* (Index No. 153042/2020), plaintiff sued three companies allegedly doing business as DK Sidewalk, Central Parking System, Central Parking Corporation, and Lighthouse Properties, LLC, all allegedly connected with the garage located at 182 East 73rd Street (NYSCEF Doc. No. 417). In *Messinger v Lerner* (Index No. 154007/2020), plaintiff sued William Lerner, president and sole shareholder of IPark (NYSCEF Doc. No. 4, Index No. 154007/2020). TMI, who is named as a defendant in only this action, now seeks to consolidate all three actions for joint trial.

As to the *Lerner* action, consolidation for joint trial is premature, as there is a dispositive motion pending in that matter (*Weistrop v Necchi Sewing Mach. Sales Corp.*, 3 AD2d 743, 743, *lv and rearg denied* 3 AD2d 906 [1<sup>st</sup> Dept 1957]). As to the *Lighthouse Properties* action, however, the Court finds that joint trial would be proper. The actions arise from the same accident, and the various parties will likely have similar legal arguments as to their responsibility or lack thereof. The evidentiary issues in this matter are not complex, and “there is no reason to believe that relevant documents exist other than those that have already been ordered to be produced” (*Matter of Progressive*, 10 AD3d at 519). Moreover, Lighthouse Properties, LLC, who submitted an opposition to this motion, does not allege sufficient prejudice to bar consolidation for joint trial. To the extent that any prejudice may be attributable to the differing procedural postures between the two matters, the court may remedy the same by providing defendants in the *Lighthouse Properties* action “an opportunity to complete disclosure on an expedited basis” (*id.*). Accordingly, TMI’s motion to consolidate is granted to the extent of

consolidating the instant action and the *Lighthouse Properties* action for purposes of joint trial and is otherwise denied.

Accordingly, it is hereby

ORDERED that defendant Thomas Maintenance, Inc.'s ("TMI") motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it, as well as all cross claims/third-party claims asserted against it, is denied; and it is further

ORDERED that defendants/third-party plaintiffs 182 East 73rd Street LLC, 182 E. 73rd Garage Corp., and Imperial Parking Systems, Inc.'s cross-motion for summary judgment on their claim for common-law indemnification is denied; and it is further

ORDERED that plaintiff David Messinger's motion to quash the subpoena dated June 1, 2021, issued to nonparty IME Watchdog, Inc. is granted – the materials sought therein and in subsequent subpoenas dated June 29, 2021, described above, being protected by the trial preparation privilege; and it is further

ORDERED that the materials sought in the above-described subpoenas may not be produced, as protected by privilege, and defendant TMI may not seek them or similar materials prepared for trial of this action from nonparty IME Watchdog, Inc.; nor may it take the deposition of Christopher Darling or any other employee of IME Watchdog who assisted plaintiff in preparing for trial of this action; and it is further

ORDERED that defendant TMI's motion for joint trial is granted to the extent set forth herein, and the above-captioned action shall be jointly tried with *David Messinger v Lighthouse Properties, LLC, et al.*, Index No. 153042/2020, pending in this court; and it is further

ORDERED that, within 30 days from the filing hereof, counsel for plaintiff in *David Messinger v Lighthouse Properties, LLC, et al.*, Index No. 153042/2020, shall file with the General

Clerk’s Office (60 Centre Street, Room 119) a copy of this order with notice of entry, together with, if a Request for Judicial Intervention (“RJI”) has not yet been filed in that action, an RJI, and shall pay the fee therefor, and the Clerk of the General Clerk’s Office shall assign said action to the undersigned or reassign such action to the undersigned, as the case may be; and it is further

ORDERED that, upon payment of the appropriate calendar fees and the filing of notes of issue and certificates of readiness with the General Clerk’s Office in each of the above actions, the Clerk of the General Clerk’s Office shall place the aforesaid actions upon the trial calendar for a joint trial before the undersigned or other Justice of this court; and it is further

ORDERED that in both actions, such filing with the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further.

ORDERED that the parties in the consolidated actions shall appear for a virtual status conference via Microsoft Teams on April 20, 2022 at 10:00 AM.

This constitutes the Decision and Order of the Court.

ENTER:

*Louis L. Nock*

<u>3/4/2022</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION		
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER		
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	