SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 113762/2010
MARTIN, JONATHAN
vs.
FARRELL BUILDING COMPANY
SEQUENCE NUMBER : 009
SUMMRY JUDGMENT

INDEX NO. _____

MOTION DATE 12/10/14

MOTION SEQ. NO. 009

The following papers, numbered 1 to 18, were read on this motion to/for SJ motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-11

Answering Affidavits — Exhibits _____ | No(s). 12-18

Replying Affidavits _____ | No(s). 19

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: April 2, 2014

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

----------X

JONATHAN MARTIN,

Plaintiff,

-against-

FARRELL BUILDING COMPANY INC., 195 GEORGIA ROAD LLC, SOIL, INC., DEROSA LAND MANAGEMENT, WAINSCOTT SAND AND GRAVEL CORP., RISE & SHINE CONCRETE CORP., BUTCH PAYNE INC., BUTCH PAYNE LANDSCAPING INC., LIBERTY LANDSCAPING INC., PEAT & SON CORP., POOL CARE INC., WOLF RIVER JUNCTION CORP., CEDAR DESIGN INC., BRICKHOUSE MASONRY LLC, THE IRRIGATION MAN INC., EASTSIDE FASCIA INC., GARY PUMMILLO FINE PAINTING, D.Q.G. INC.,

Defendants.

----------X

DECISION & ORDER
Index No. 113762/10
Motion Sequence Numbers
009, 010, & 011

JOAN M. KENNEY, J.S.C.:

Motion sequence numbers 009, 010, and 011 are consolidated for disposition.

In this personal injury action, plaintiff Jonathan Martin alleges that he was injured on October 20, 2007 when he was struck by a falling oak tree from the adjoining property while standing outside on his property located at 191 Georgica Road in East Hampton, New York. Plaintiff alleges that his accident was caused by extensive excavation during construction work on the adjoining property, 195 Georgica Road.

In motion sequence number 009, defendant Butch Payne Landscaping Inc. s/h/a Butch Payne Inc. and Butch Payne Landscaping Inc. (hereinafter, Butch Payne) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

In motion sequence number 010, defendant Brickhouse Masonry, LLC (Brickhouse) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross

claims against it.

In motion sequence number 011, defendant Farrell Building Company, Inc. (Farrell) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

Defendant The Irrigation Man, Inc. (Irrigation Man) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing all cross claims against it.

BACKGROUND

The complaint alleges that defendants were negligent in their ownership, operation, maintenance, and control of the premises (complaint, ¶¶ 431-436). More specifically, plaintiff's verified bill of particulars alleges that defendants were negligent "[i]n creating a dangerous condition by conducting extensive excavation on the premises thereby destroying and undermining tree roots, proximately causing a tree to [fall] on plaintiff's person; fail[ing] to properly assess all risks inherent in excavation operations . . ." (verified bill of particulars, ¶ 5). Plaintiff alleges that Farrell was the owner of 195 Georgica Road at the time of the accident. It is undisputed that Farrell was hired as a construction manager to construct a new house located at 195 Georgica Road. Farrell, in turn, hired Butch Payne, Brickhouse, and Irrigation Man as subcontractors to perform work on the project.

Plaintiff testified at his deposition that, on the morning of October 20, 2007, he was looking at shrubs and trees near his swimming pool when he was struck by a falling tree from the adjoining property (Plaintiff tr at 38, 42, 46). Plaintiff testified that the weather was "pleasant" at the time of the accident; however, plaintiff later changed his answer to "windy" in an errata sheet (*id.* at 39; Maher affirmation in support, exhibit H-1). Plaintiff stated that he was knocked to the

ground and lost consciousness as a result and that when he woke up he was under a tree (*id.* at 44). According to plaintiff, he did not know what caused the tree to fall (*id.* at 96). Plaintiff estimated the height of the tree as approximately 40 feet (*id.* at 132). Plaintiff stated that the roots of the tree were "pretty much on the dividing line" of the property (*id.* at 137). Plaintiff testified that he was told by someone from a company called "Tree People" prior to the accident that the roots from some of the trees on the adjoining property had been cut to make room for the tennis court (*id.* at 31-32).

George Kamper, Farrell's project manager, testified that he "believe[d]" that Farrell owned the property before it was sold and hired the subcontractors (Kamper tr at 8, 12, 13). Kamper testified that the tree that struck plaintiff was located in the upper right-hand corner of an aerial photograph of the adjoining premises, above the "stacking stone wall" at the top of the photograph (*id.* at 49-50; Feehan affirmation in support, exhibit E). Kamper did not have any employees performing work at 195 Georgica Road; rather, all of the work was performed by subcontractors (Kamper tr at 13). Kamper testified that Butch Payne excavated the tennis court and retaining walls, and backfilled the "stacking stone wall" (*id.* at 53, 54, 58). Rise & Shine did the footings and foundation for the house, garage, tennis court, pool house slab and retaining walls (*id.* at 62). Pool Care, Inc. excavated for the pool (*id.* at 64). Liberty Landscaping (Liberty) planted evergreens and cypress trees along the property lines, including the rear property line which abuts 191 Georgica Road, plaintiff's property (*id.* at 60, 61, 64, 65). Brickhouse excavated for the brick ledge work around the tennis court and installed the patios for the pool and around the back of the house (*id.* at 65). According to Kamper, the closest work that Brickhouse performed was the staircase at the top of the tennis court (*id.* at 87). Kamper

testified that "[t]here's a bill that says [that] Liberty installed trees 10 to 12 foot high along that back perimeter property line, so that's who I would think had to do the excavation, the person that installed the trees" (*id.* at 98). Kamper stated that the "root ball" of the tree that fell was located eight to ten feet from the stacking stone wall (*id.* at 96). Kamper recalled that there were strong winds that day, and that he had to close all the windows on other jobs for a storm that was coming (*id.* at 43-44).

Paulo Ribeiro, the owner of Brickhouse, testified that Brickhouse was a masonry contractor hired by Farrell (Ribeiro tr at 10, 11). Ribeiro installed chimneys in the house and a bluestone patio, terrace, brick veneer on the tennis court, and decorative "Pennsylvania" stone wall[1] outside (*id.* at 12, 13). When shown the aerial photograph of the adjoining premises, Ribeiro testified that the wall ran parallel to the tennis court toward the top of the photograph and down the right side (*id.* at 19). According to Ribeiro, the ground had already been cleared and graded before he came to do his work (*id.* at 21, 22). Ribeiro testified that the Pennsylvania stone wall was a decorative wall that did not require footings so none were dug (*id.* at 27). Brickhouse only used hand tools to construct the wall, including a shovel, trowel, and hammer to chip the stones (*id.* at 35, 36).

Charles "Butch" Payne testified that his company Butch Payne was hired by Farrell (Payne tr at 12). Butch Payne's role consisted of demolishing the existing house, and digging the foundation for the new house, septic system, dry wells, driveway, tennis court and grading (*id.* at 9-10). The backyard above the wall was untouched so it could remain in its natural state (*id.* at

---

[1]It appears that the "stone stacking wall" described by Kamper is the same wall as the Pennsylvania stone wall.

34). Butch Payne did not perform any excavation above the stacking stone wall; "we did not excavate on top of the wall, from the wall to the property line, anywhere above. We didn't have machines up there" (*id.* at 16). In contrast with the "retaining wall" on the left-hand side of the lot, the stacking stone wall was installed by hand and without the use of an excavator (*id.* at 16-19). Payne testified that he recalled that there were high winds in excess of 50 miles per hour on the date of the accident; "it wasn't a normal – it was a windy day, extremely windy" (*id.* at 42).

Plaintiff's tree expert and arborist, Conrad Decker IV, opines to a reasonable degree of certainty in the field of arboriculture, that defendants were negligent and violated proper tree safety procedures during the excavation of the backyard area and construction of the stone retaining wall at the rear of the property at 195 Georgica Road (Decker aff, ¶¶ 1, 3). Specifically, Decker states that defendants' negligence consisted of cutting the roots of the subject black oak tree during the course of excavation work (*id.*, ¶ 3). Based upon photographs of the oak tree, Decker claims that the straight edge of the "root ball" of the tree clearly demonstrates that the tree roots were severed during excavation of the backyard area of the property and installation of the rear retaining wall (*id.*, ¶ 5; Ragland affirmation in opposition, exhibit B). According to Decker, the tree was a black oak having a minimum diameter at breast height (DBH) of 20 inches, and the critical root zone of a black oak tree has a critical root zone (CRZ) that is three times the DBH (Decker aff, ¶ 6). Therefore, the CRZ of the tree was at least 60 inches (*id.*). Decker asserts that the photographs of the incident location show: 1) that the rear "retaining wall" was installed approximately 12 to 18 inches from the trunk of the tree; and 2) that the excavation of the backyard was done within 12 to 18 inches of the trunk of the tree (*id.*). Decker states that the evidence clearly demonstrates that the collapse of the tree was not entirely caused

by high wind conditions on the date of the accident, since the photographs do not show any asymmetrical root shearing or fibrous roots emanating from the root ball (*id.*, ¶ 7). Moreover, according to Decker, an experienced excavator should have been aware that damaging or severing the roots within the CRZ of a black oak tree would create a hazardous condition and would greatly increase the likelihood of root failure and collapse (*id.*, ¶ 8). Decker opines that excavation and construction should not have been permitted within five feet of the subject oak tree so as to avoid the risk of cutting or otherwise compromising the tree roots and consequential tree root failure (*id.*).

Plaintiff also submits uncertified weather records indicating that the maximum recorded wind speed on the date of the accident in East Hampton was 17 miles per hour (Ragland affirmation in opposition, exhibit F).

Plaintiff discontinued his claims against Irrigation Man (Gorton affirmation in support, exhibit A).

DISCUSSION

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). The court's function on a motion for summary judgment is "'issue-finding, rather than issue determination'" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]

[citation omitted]). When deciding a motion for summary judgment, "'facts must be viewed in the light most favorable to the non-moving party . . .'" (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012], quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). Nevertheless, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Butch Payne's Motion for Summary Judgment (Motion Sequence Number 009)

Butch Payne moves for summary judgment, arguing that there is no evidence that it cut or disturbed the tree roots during excavation. According to Butch Payne, it performed no work above the stone stacking wall near the rear of the property.

Plaintiff argues that Butch Payne has failed to meet its burden on summary judgment. In addition, plaintiff contends, relying on the affidavit from his expert arborist and the photographs of the tree, that there are issues of fact as to whether Butch Payne negligently and carelessly severed the roots of the subject black oak tree. Plaintiff points out that Butch Payne admitted that it performed excavation, grading, and installation work at the rear of the property at 195 Georgica Road. Furthermore, plaintiff maintains that Butch Payne has not offered any evidence that the sole cause of the tree collapse was a severe wind storm.

"The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court" (*Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997]). Generally, a contractual obligation, standing alone, does not give rise to tort liability in favor of a third party (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]). However, an exception to the general rule exists "'where the promisor, while

engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk'" (*Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 65 [1st Dept 2006], quoting *Church*, 99 NY2d at 111).

Butch Payne has made a prima facie showing that it did not owe plaintiff a duty of care. Butch Payne's owner testified that it dug the foundation for the new house, septic system, dry wells, driveway, tennis court, and grading for 195 Georgica Road (Payne tr at 9-10). Nevertheless, Butch Payne did not perform any excavation work above the "stacking stone wall" as shown in the aerial photograph of 195 Georgica Road (*id.* at 15, 16; Feehan affirmation in support, exhibit E). Plaintiff testified that the roots of the tree were "pretty much on the dividing line" of the property (Plaintiff tr at 137). Additionally, Farrell's project manager testified that Liberty planted evergreens on the property lines, including cypress trees around the perimeter (Kamper tr at 60-61, 64). He also stated that "[t]here's a bill there that says Liberty installed 10 to 12 foot high along the back perimeter property line, so that's who I would think had to do the excavation, the person that installed the trees" (*id.* at 98).

Decker states, based upon his review of photographs of the oak tree, that "[d]efendants' negligence consisted of cutting the roots of the subject black oak tree located on the perimeter of the 195 Georgica Road property during the course of the aforementioned excavation work," and that "[d]efendants' negligence in cutting the tree roots thereby compromised the root system of the black oak tree, thus rendering the tree more likely to collapse and fall to the ground onto the adjoining property" (Decker aff, ¶ 3). Decker also claims that the tree was located within 12 to 18 inches of the rear "retaining wall" (*id.*, ¶ 6). However, it is well settled that an expert's opinion "'must be based on facts in the record or personally known to the witness'" (*Hambsch v*

New York City Tr. Auth., 63 NY2d 723, 725 [1984], quoting *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959], *rearg denied* 6 NY2d 882 [1959]). "An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*Rosato v 2550 Corp.*, 70 AD3d 803, 805 [2d Dept 2010]; *see also Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 714-715 [1st Dept 2005]). "In the absence of record support, an expert's opinion is without probative force" (*Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 49 [1st Dept 2008]). Decker's opinion that Butch Payne may have cut the tree roots is not based on any facts in the record or within his personal knowledge. Rather, the evidence indicates that Butch Payne did not perform any work above the "stacking stone wall" (Payne tr at 15, 16). Therefore, plaintiff has failed to raise an issue of fact as to whether Butch Payne created the alleged dangerous condition. "In the absence of duty, there is no breach and without a breach there is no liability" (*Pulka v Edelman*, 40 NY2d 781, 782 [1976], *rearg denied* 41 NY2d 901 [1977]).

Accordingly, Butch Payne is entitled to summary judgment dismissing the complaint and all cross claims against it.

Brickhouse's Motion for Summary Judgment (Motion Sequence Number 010)

Brickhouse contends that there is no evidence that it cut the tree roots. Brickhouse asserts that it did not perform any excavation work in the area of the decorative Pennsylvania wall and did not work above the wall.

In response, plaintiff argues that Brickhouse has failed to meet its burden on summary judgment. Plaintiff further contends, pointing to the affidavit from his expert arborist and the photographs of the tree, that there are issues of fact as to whether Brickhouse severed the roots of

the oak tree during excavation work, since it admitted that it performed excavation, grading, and installation work at the rear of the property at 195 Georgica Road. Additionally, plaintiff maintains that Brickhouse has not offered any evidence that the tree collapse was solely caused by a severe wind storm.

Here, Brickhouse has made a prima facie showing that it did not create or exacerbate a dangerous condition (*see Jackson*, 30 AD3d at 65). Plaintiff testified that the roots of the tree were "pretty much on the dividing line" of the property (Plaintiff tr at 137). Brickhouse's owner testified that Brickhouse installed a decorative Pennsylvania stone wall at 195 Georgica Road (Ribeiro tr at 27). However, Brickhouse used only hand tools to construct the wall, including a shovel, trowel, and hammer to chip the stones (*id.* at 35-36). The whole rear of the property had already been cleared and graded before he came in to do his work (*id.* at 21, 22). The tree was located beyond the Pennsylvania stone wall (Kamper tr at 49-50, 96; DeBernandis affirmation in support, exhibit E).

Although Decker states that "[d]efendants' negligence consisted of cutting the roots of the subject black oak tree located on the perimeter of the 195 Georgica Road property during the course of the aforementioned excavation work" (Decker aff, ¶ 3), his opinion is speculative and unsupported by facts in the record as to whether Brickhouse cut the tree roots (*see Rosato*, 70 AD3d at 805).

Therefore, Brickhouse is entitled to summary judgment dismissing the complaint and all cross claims asserted against it.

Farrell's Motion for Summary Judgment (Motion Sequence Number 011)

Farrell argues that it is entitled to summary judgment because: (1) it owed no duty of care to plaintiff because it was not the owner of 195 Georgica Road and, as a construction manager, it assumed no duty of care to plaintiff; (2) even if it did owe plaintiff a duty of care, it did not create or have actual or constructive notice of the alleged dangerous condition; and (3) there is no non-speculative evidence that would support a negligence claim against it.

In opposition, plaintiff argues that Farrell has failed to make a prima facie showing of entitlement to summary judgment, and that there are issues of fact as to whether Farrell, as owner of 195 Georgica Road, created a dangerous condition. In addition, plaintiff contends that Farrell did not offer any evidence that the tree collapse was solely caused by a severe wind storm.

In support of its argument that it was not the owner of 195 Georgica Road, Farrell submits evidence that, in November 2008 (over a year after the accident), an entity known as 195 Georgica Road, LLC was the owner of 195 Georgica Road (Maher affirmation in support, exhibit R). Nevertheless, Farrell does not submit an affidavit or any other evidence indicating that Farrell did not own 195 Georgica Road on the date of the accident in October 2007. In any case, plaintiff points out that Farrell's project manager testified that he "believe[d]" that Farrell owned the property until it was sold (Kamper tr at 12-13).

It is well established that owners must keep premises in a "reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003] [citation and internal quotation marks omitted]). Furthermore, "it is established that no liability attaches to a landowner whose tree falls outside of his premises and injures another unless there exists actual or constructive knowledge of the defective condition of the tree" (*Ivancic v*

Olmstead, 66 NY2d 349, 350-351 [1985], *rearg denied* 66 NY2d 1036 [1985], 67 NY2d 754 [1986], *cert denied* 476 US 1117 [1986]; *see also Harris v Village of E. Hills*, 41 NY2d 446, 450 [1977]).

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). "At least as to adjoining landowners, the concept of constructive notice with respect to liability for falling trees is that there is no duty to consistently and constantly check all trees for nonvisible decay" (*Ivancic*, 66 NY2d at 351). However, "[c]onstructive notice may be imputed [to a landlord] if the record establishes that a reasonable inspection would have revealed the alleged dangerous or defective condition of the tree" (*Michaels v Park Shore Realty Corp.*, 55 AD3d 802 [2d Dept 2008]). "'In cases involving liability for fallen trees, a manifestation of nonvisible decay must be readily observable in order to give rise to a duty to prevent harm'" (*Figueroa-Corser v Town of Cortlandt*, 107 AD3d 755, 757 [2d Dept 2013], *lv dismissed* 22 NY3d 1083 [2014], quoting *Ferrigno v County of Suffolk*, 60 AD3d 726, 727 [2d Dept 2009]).

In this case, Farrell has made a prima facie showing that it did not create or have knowledge of the alleged dangerous condition. There is no evidence that Farrell created the condition by severing the roots of the tree. Farrell's project manager testified that it did not perform any work on the site; all of the work was performed by subcontractors (Kamper tr at 13). Moreover, there is no evidence that Farrell had any actual notice that the roots of the tree were severed during excavation. Indeed, Farrell's project manager testified that he did not know whether the tree roots were cut during excavation (*id.* at 100). Farrell asserts that it had no

constructive notice that the roots were cut because they would have been concealed under the soil.

The burden thus shifts to plaintiff to raise an issue of fact. As previously indicated, there is no evidence that Farrell created the dangerous condition (Kamper tr at 13). Although plaintiff submits an affidavit from an expert arborist, he does not indicate that a reasonable inspection would have revealed that the roots had been severed. In addition, plaintiff testified that he did not know why the tree fell (Plaintiff tr at 53, 96). While plaintiff testified that he was told that the roots of some of the trees were cut in order to make room for the tennis court (*id.* at 31-32), the tennis court was located about 30 to 40 feet away from the tree in question (Payne tr at 55; *see also* Ragland affirmation in opposition, exhibit D). Plaintiff testified that the roots of the tree were "pretty much on the dividing line" of the property (Plaintiff tr at 137). Therefore, plaintiff has failed to raise an issue of fact as to whether Farrell created or had actual or constructive notice that the roots were severed during excavation (*see Pulgarin v Demonteverde*, 63 AD3d 1026, 1027 [2d Dept 2009] [plaintiff failed to raise an "issue of fact as to whether there were readily-observable manifestations of decay"]; *Simet v Coleman Co., Inc.*, 42 AD3d 925, 927 [4th Dept 2007] [plaintiff's expert arborist failed to raise issue of fact as to constructive notice where arborist "opined that, regardless of whether the tree appeared to be healthy, the [owners] would have been advised by an arborist to secure the limb if they had retained an arborist to inspect their trees"]; *Quog v Town of Brookhaven*, 273 AD2d 287, 288-289 [2d Dept 2000] [county did not have constructive notice of allegedly inadequate root system of tree beside road, "where there [was] no evidence that the tree showed any visible, outward signs of decay prior to the accident"]; *Lahowin v Ganley*, 265 AD2d 530 [2d Dept 1999] [expert affidavit based on

speculation and surmise was insufficient to raise a triable issue of fact]; *cf. Ferrigno*, 60 AD3d at 728 [plaintiff raised a triable issue of fact as to whether there was a manifestation of nonvisible decay, in light of expert arborist's affidavit indicating that tree exhibited "staghorn effect"]; *Hilliard v Town of Greenburgh*, 301 AD2d 572, 573 [2d Dept 2003] [issue of fact as to whether town had constructive notice of decayed condition of tree located on its property adjacent to a roadway where plaintiff submitted evidence that an inspection "would have revealed that [the tree] was likely to fall, and that diseased condition existed for at least several years before the accident"]).

Therefore, Farrell is also entitled to summary judgment dismissing the complaint and all cross claims against it.

Irrigation Man's Cross Motion for Summary Judgment

Irrigation Man cross-moves for summary judgment dismissing the cross claims asserted against it. In support of its position, Irrigation Man asserts that it worked on a different area of the adjoining property and that it only placed a watering system on the adjoining property. In addition, Irrigation Man asserts that it did not agree to indemnify any of the parties in this action. There is no opposition to Irrigation Man's cross motion.

"Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]). "The critical requirement for apportionment by contribution under CPLR article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Raquet v Braun*, 90 NY2d 177, 183 [1997] [internal

quotation marks and citation omitted]).

Here, Irrigation Man has established that it was not negligent. Kamper testified that Irrigation Man installed sprinkler heads around plant material that just sat on top of the ground (Kamper tr at 67). Moreover, none of the parties has come forward with any evidence that Irrigation Man had any indemnification obligation. Therefore, Irrigation Man is entitled to dismissal of all cross claims against it.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 009) of defendant Butch Payne Landscaping Inc. s/h/a Butch Payne Inc. and Butch Payne Landscaping Inc. for summary judgment is granted and the complaint and all cross claims against it are dismissed with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion (sequence number 010) of defendant Brickhouse Masonry, LLC for summary judgment is granted and the complaint and all cross claims against it are dismissed with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion (sequence number 011) of defendant Farrell Building Company, Inc. for summary judgment is granted and the complaint and all cross claims against it are dismissed with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion of defendant The Irrigation Man, Inc. for summary

judgment is granted and all cross claims against it are dismissed with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued as against the remaining defendants who shall proceed to mediation/trial forthwith.

Dated: April 2, 2014

ENTER:

JOAN M. KENNEY J.S.C.

J.S.C.

FILED

APR 07 2014

COUNTY CLERK'S OFFICE
NEW YORK