STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

EDUARDO A. DIEGO, As Administrator of the Estate of TOMAS ANDRES AGUIRRE, Deceased,

Plaintiffs,

-against-

CHARLES GALUSHA and JAMIE GALUSHA,

Defendants.

DECISION and ORDER
INDEX NO. 6906-08
RJI NO. 01-08-95342

Supreme Court Albany County All Purpose Term, April 30, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

On September 8, 2006, just after 8:30 pm, Thomas Andres Aguirre (hereinafter "Mr. Aguirre") was struck and killed by a vehicle driven by Charles Galusha and owned by Jamie Galusha.[1] The Administrator of Mr. Aguirre's Estate commenced this action against Defendants, seeking damages due to Mr. Aguirre's wrongful death. Issue was joined by Defendants, the

[1] Charles Galusha and Jamie Galusha are hereinafter collectively referred to as "Defendants"; and the date and time of this incident will be referred to as "time of the accident."

parties have engaged in and completed discovery, a Note of Issue has been filed and a trial date certain has been set. Defendants now move for summary judgment dismissing Plaintiffs' complaint, claiming Mr. Galusha's actions were not negligent and Mr. Aguirre's negligence was the sole proximate cause of his death. Plaintiffs oppose the motion. Because Defendants failed to demonstrate their entitlement to judgment as a matter of law, their motion is denied.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." Napierski v. Finn, 229 AD2d 869, 870 (3rd Dept. 1996).

It is well established that the proponent of a summary judgment motion bears the "threshold burden of tendering evidentiary proof in admissible form establishing entitlement to judgment as a matter of law." (Chiarini ex rel. Chiarini v. County of Ulster, 9 AD3d 769 [3d Dept. 2004], Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; CPLR §3212). A movant's "burden may not be met by pointing to gaps in... proof", rather the movant's obligation on the motion is an affirmative one. (DiBartolomeo v. St. Peter's Hosp. of City of Albany, __ AD3d__ [3d Dept. 2010]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

"In negligence actions, [however] even when facts are conceded by the parties, there will often remain a question of fact whether the party in question acted reasonably under the circumstances... This can rarely be decided as a matter of law." (De Cristofaro v. Joann Enterprises Inc., 250 AD2d 990 [3d Dept. 1998], quoting Andre v. Pomeroy, 35 NY2d 361 [1974][internal quotations omitted]). "Indeed, [i]n all but the most extraordinary instances,

whether a defendant has conformed to the standard of conduct required by law is a question of fact necessitating a trial." (St. Andrew v. O'Brien, 45 AD3d 1024 [2d Dept. 2007], quoting Nandy v Albany Med. Ctr. Hosp., 155 AD2d 833 [3d Dept. 1989][internal quotations omitted]).

On this record, the facts are largely uncontested. At the time of the accident Mr. Galusha was driving to work on Central Avenue in the City of Albany, New York. It was a clear dark night; he was accompanied by a co-worker. Central Avenue, at the accident's location, is a four lane road with two lanes of traffic going both east and west. Mr. Galusha was familiar with this section of Central Avenue, as it was part of his normal route to work. He had previously observed pedestrians crossing Central Avenue, outside of a crosswalk, at the accident's approximate location.

At the time of the accident, Mr. Galusha was traveling east in the curbside lane. His speed was between 40-45 miles per hour (in a 40 mile per hour zone). He was following, only slightly, another eastbound vehicle traveling in the middle lane. It does not appear that there was any westerly traffic. Mr. Aguirre, crossing Central Avenue from North to South outside of a crosswalk, was struck after uneventfully crossing three lanes of traffic. While it appears that Mr. Aguirre was dressed in dark clothing, the driver of the vehicle traveling in the middle lane saw Mr. Aguirre prior to the accident. It appears that the middle lane driver did not need to take any evasive maneuvers to avoid Mr. Aguirre. Mr. Galusha, however, struck Mr. Aguirre when he passed from the middle eastbound lane into the curbside eastbound lane.

Both Mr. Galusha and his passenger submitted sworn testimony alleging that neither saw Mr. Aguirre prior to impact. Mr. Galusha's passenger stated that he did not see Mr. Aguirre before the accident, although he had finished searching for his dropped cell phone just moments

before impact. Likewise, Mr. Galusha claims that he did not see Mr. Aguirre at all, "even for a split second", prior to impact; nor did he slow his vehicle down, before the accident occurred.

Contrary to Defendants' contentions, the above facts fail to demonstrate, as a matter of law, Mr. Galusha's freedom from negligence. Defendants premise their motion on the fact that Mr. Galusha did not see Mr. Aguirre prior to impact. However, such focus is far too narrow. It simply fails to prove that Mr. Galusha could not have seen Mr. Aguirre prior to impact, or that Mr. Galusha acted as a reasonably prudent driver faced with like circumstances. (St. Andrew, supra). Focusing on Mr. Galusha's failure to see Mr. Aguirre is too narrow because it disregards both the amount of roadway Mr. Aguirre had already crossed and the other eastbound driver's observation of Mr. Aguirre prior to impact. "Under the circumstances, the fact that [Mr. Galusha] never saw [Mr. Aguirre] does not excuse [his] conduct." (Larsen v. Spano, 35 AD3d 820 [3d Dept. 2006]). Nor did Defendants demonstrate, as a matter of law, that the other eastbound vehicle prevented Mr. Galusha from seeing Mr. Aguirre. Similarly, Mr. Galusha did not prove that he was undistracted by his passenger's cell phone search, just prior to the accident. Moreover, Defendants failed to demonstrate, as a matter of law, the reasonableness of Mr. Galusha's driving, as informed by his prior observation of pedestrians crossing Central Avenue at the approximate location of the accident. On this record, Mr. Galusha set forth no evasive measures he took to address the possibility of his encountering a pedestrian in his lane of travel. As such, whether Mr. Galusha's driving was "reasonable under the particular circumstances in which []he knowingly proceeded (see Vehicle and Traffic Law § 1180 [a]) is a question for the trier of fact to resolve." (St. Andrew, supra).

Accordingly, Defendants' motion for summary judgment is denied.

This Decision and Order is being returned to the attorneys for the Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: May 18, 2010
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated January 19, 2010, Affirmation of Thomas Sica, dated January 19, 2010, with Exhibits A-I.
2. Affirmation of Kristine Cahill, dated April 23, 2010, with Exhibit 1
3. Affirmation of Thomas Sica, dated April 29, 2010.