

No.
In The
Supreme Court of the United States

Dana Escoffier,

Petitioner,

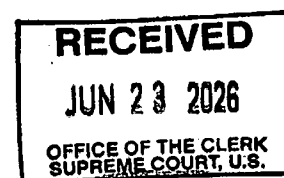
v.

Whole Foods Market Group, Inc.,

Respondent.

APPENDIX

Dana Escoffier *Pro Se*
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Appendix A	Opinion and Order of USDC So. Dist. N.Y.
Appendix B	Order of U.S.D.C. So. Dist. N.Y.
Appendix C	Order U.S. Court of Appeal 2nd circuit Order U.S. Court of Appeals 2nd Circuit
Appendix D	Granted Extension of Time to file Writ

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANA ESCOFFIER,

Plaintiff,

-against-

WHOLE FOODS MARKET GROUP, INC.,

Defendant.

22-cv-6588 (AS)

OPINION AND ORDER

ARUN SUBRAMANIAN, United States District Judge:

BACKGROUND

The scene is a typical New York City grocery store: relatively narrow aisles, somewhat crowded. Dkt. 64-13 at 0:16. A man stands to the left of a woman; both are looking at some items on display. *Id.* He takes something from the shelf and puts it in his cart. *Id.* at 0:20. As he then tries to cross to her right, his cart bumps into hers. *Id.* at 0:21–0:25. It's unclear who says something first, but the conversation soon escalates as they exchange a series of increasingly aggressive hand gestures. *Id.* at 0:25–0:38. The man then steps toward the woman, and she raises her hand. *Id.* at 0:39–0:41. It's unclear whether she strikes him at that point (though the man says she did). *Compare id.*, with Dkt. 75 at 18–19. In any event, he grabs her hand and immediately smacks her across the face. Dkt. 64-13 at 0:42.

At that point, it's on. The woman delivers a few punches as the man tries to grab her. *Id.* at 0:42–0:45. As soon as this fight starts, the store's security guard is trying to break it up. *Id.*; see Dkt. 66 at 1. He successfully does so after about five seconds and those few punches. Dkt. 64-13 at 0:42–0:45. Once the fight is broken up, the guard takes the man to one side of the store while someone else stands with the woman on the other side. *See id.* at 0:45–0:53. In the process of breaking up the fight and moving the man to one side of the store, the guard appears to put one or both of his arms around the man to restrain him. *See id.* at 0:50–0:57. The man and woman briefly continue their heated exchange (now of words) from across the store. *See id.* at 0:55–1:29. The man paces from side to side while the guard stays in front of him and keeps a hand on him to keep him back. *See id.* After that, the fighters retreat fully to their respective corners of the store, not to interact again. *See id.* at 1:30–11:59.

This fight took place in a New York City Whole Foods and was captured on the store's security camera.¹ The man is Plaintiff Dana Escoffier. (The Court hasn't learned the woman's name.) Escoffier, proceeding pro se, has sued Whole Foods. He most clearly claims negligence, negligent

¹ Escoffier says the video has been altered. Admittedly, it seems that the footage is slightly sped up; movements appear more natural when the video is played at three-quarter speed. But that minor difference is likely a default of the security camera, and any split-second distinctions don't make or break this motion.

Escoffier also seems to argue that Whole Foods was negligent in failing to "sweep debris from [the] floor." Dkt. 75 at 11. This is his story:

[A] Black female employed by [Whole Foods], as an agent or serving as an "extension" of [Whole Foods], is depicted in time lapse video surveillance as having a duty to sweep debris from floor. This agent of [Whole Foods] approached a bag in the pathway of pedestrian traffic, stepped around the bag on the floor, engaged with the female customer in conversation, that was not brief, all while the bag remained in the aisle on the floor in line of pedestrian traffic. The agent for [Whole Foods] continued speaking with woman when plaintiff was finally able to proceed and passed-by these two females (female customer and woman sweeper) after having waited for clearance to pass as the bag caused other customers to veer into oncoming traffic in the opposite direction. When plaintiff saw an opportunity to pass by the obstruction on the floor, plaintiff proceeded past the obstructing bag on the floor. After having moved a short distance away from the [Whole Foods] agent and female customer, the female customer screamed and shouted to the plaintiff. The agent of [Whole Foods], female sweeper, walked away hurriedly, but never moved the bag that sat on the floor unattended and which remained in place causing an obstruction to pedestrian traffic. Female sweeper never asked who owned the bag or took possession of the bag to move it from aisle. As a sweeper and agent of [Whole Foods] to keep floor, as her actions demonstrated, and to keep floor free of objects/obstructions, she did not. [Whole Foods], through its agent, failed in this capacitance and was contributorily negligent; [Whole Foods'] agent did not remove obstruction, which would have been mitigating of the prevailing obstruction.

Dkt. 75 at 11-12. * *

The video shows none of this. It never shows the woman talking to any employee before the fight. In fact, the video shows that the woman and the bag are not alongside Escoffier until just before the confrontation. See Dkt. 64-13 at 0:03-0:21. Nor is the bag an "obstruction" or "debris" that should have been cleared out of his way. Though Escoffier makes it sound like a plastic grocery bag, the bag is a roller bag that the woman is using as her cart. See *id.* at 0:03. And even if there was a Whole Foods employee who was negligent in failing to move a bag out of Escoffier's path, that wouldn't be enough. That negligence might make a fall foreseeable, but not fisticuffs. *

Although Escoffier focuses on negligence, his argument also hints at a battery claim. "Battery is the unjustified touching of another person, without that person's consent, with the intent to cause a bodily contact that a reasonable person would find offensive[.]" *Rivera v. State*, 142 N.E.3d 641, 644-45 (N.Y. 2019). It is Escoffier's burden to show that the contact was "wrongful under all the circumstances." *Hines v. Westchester County*, 170 N.Y.S.3d 483, 484 (2d Dep't 2022); see also N.Y. Prac., N.Y. Law of Torts § 1:12 (2023) ("[I]t is necessary to demonstrate that the intentional contact itself was offensive, i.e., wrong under the circumstances."); *Oakley v. MSG Networks*, 2021 WL 5180229, at *5 (S.D.N.Y. Nov. 8, 2021), vacated and remanded on other grounds *sub nom. Oakley v. Dolan*, 2023 WL 3263618.

The contact here was reasonable, so a battery claim would fail. Escoffier's battery argument is that, in breaking up the fight, the security guard "restrain[ed] [him] with a 'bear hug' ... tightly." Dkt. 75 at 24. The video reveals that the security guard did seem to briefly hold Escoffier, though it would be a stretch to call it a bear hug, let alone a tight one. See Dkt. 64-13 at 0:50-0:57. And after that, the security guard continues to keep a hand on Escoffier to keep him away from the woman. *Id.* at 0:55-1:29. This physical contact was reasonable given that the security guard was breaking up a fight and keeping it from restarting. See N.Y. Prac., N.Y. Law of Torts § 1:21 ("[O]ne who voluntarily intervenes to break up a fight or other disturbance is generally immune from assault and battery claims."); cf. *Watkins v. Sears Roebuck & Co.*, 735 N.Y.S.2d 75, 75 (1st Dep't 2001) (holding that tackling a shoplifter was justified and thus not a battery).

court
interprets
this

Relatedly, Escoffier says restraining him placed him in a "more vulnerable position." Dkt. 75 at 32. He seems to be referring to the point at which the security guard was trying to get in the middle of the fight. But the guard is not restraining him at that time, and no punch was landed within that brief window. See Dkt. 64-13 at 0:42-0:48. So Escoffier's claim that he was "being hit a 3rd, 4th and 5th time ... while [he] was being restrained by" the security guard is simply contradicted by hard evidence. Dkt. 1-1 ¶ 41.

II. Negligent hiring and related claims

For a claim of negligent hiring, training, supervision, or retention, Escoffier must show the elements of negligence and that "(1) the tort-feasor and the defendant were in an employee-employer relationship, (2) the employer knew or should have known of the employee's propensity for the conduct which caused the injury prior to the injury's occurrence, and (3) that the tort was committed on the employer's premises or with the employer's chattels." *Rich v. Fox News Network, LLC*, 939 F.3d 112, 129 (2d Cir. 2019) (citation omitted). "But the employee also must not be acting within the scope of his or her employment; for in that situation the employer would only be liable vicariously under the theory of respondeat superior, and not for negligent supervision or retention." *Id.* at 129-30 (cleaned up).

Escoffier's claim here is unclear. His argument might be based on the security guard's "bear hug," but that act was clearly within the scope of the guard's employment. See *Norwood v. Simon Prop. Grp., Inc.*, 159 N.Y.S.3d 482, 486 (2d Dep't 2021).

There is also an allegation in the complaint (which is not repeated in his summary-judgment papers) that the security guard followed Escoffier out of the store and assaulted him on the "public sidewalk." Dkt. 1-1 ¶ 18. Assuming that happened, it might well be outside the scope of the security guard's employment. But the claim still fails for at least three reasons. First, Escoffier hasn't shown that Whole Foods and the security guard were in an employee-employer relationship. There is no record on this question here, and many security guards are independent contractors rather than employees. See *Capak v. Epps*, 2020 WL 3073210, at *8 (S.D.N.Y. June 10, 2020) (collecting cases). Second, there's no evidence that Whole Foods knew or should've known that the security guard had a "propensity" for assaulting customers or anything similar. Third, the security guard used neither Whole Foods' premises nor its other property to assault Escoffier.

saying they would be kept anonymous); *Conklin v. Laxen*, 118 N.Y.S.3d 893, 897 (4th Dep't 2020) (ruining plaintiff's professional standing by falsely accusing her of euthanizing healthy cats).

And for both intentional and negligent infliction, Escoffier hasn't shown the requisite emotional harm. "Severe emotional distress" requires that "the distress inflicted is so severe that no reasonable man could be expected to endure it." Restatement (Second) of Torts § 46 cmt. j (1965). "The intensity and the duration of the distress are factors to be considered in determining its severity." *Id.* Here, Escoffier says he was harassed for "about thirty minutes" as he waited "for police to arrive," and then he left after they didn't show up within that time. Dkt. 75 at 41. Thirty minutes of moderate embarrassment, without more, is not enough—and that is especially clear here given that Escoffier could have left at any time but chose to stay. *forced to wait*

Similarly, for negligent infliction, Escoffier has shown no "guarantee of the genuineness of the harm." "Often the 'index of reliability' of the mental suffering is in the form of 'contemporaneous or consequential physical harm.'" *In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.*, 528 F. Supp. 2d 303, 310 (S.D.N.Y. 2007) (quoting *Johnson v. State*, 334 N.E.2d 590, 592 (N.Y. 1975)). In a limited set of "exceptions," plaintiffs may recover without "some objective evidence of distress suffered, because they involve special circumstances guaranteeing that the plaintiffs' distress was genuine." *Id.* at 310–11. These exceptions include family-related harms and "the plaintiff being unreasonably placed in fear of physical harm." N.Y. Prac., N.Y. Law of Torts § 6:25; see also *In re MTBE Prod. Liab. Litig.*, 528 F. Supp. 2d at 310–11. Escoffier's situation fits none of these exceptions. Nor has he shown any physical consequences of the emotional distress. So this claim also fails. *AD*

CONCLUSION

For these reasons, Defendant's motion for summary judgment is GRANTED. The Clerk of Court is directed to close Dkt. 63, enter judgment for Defendant, and close this case.

SO ORDERED.

Dated: June 13, 2024
New York, New York



ARUN SUBRAMANIAN
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANA ESCOFFIER,

Plaintiff,

-against-

WHOLE FOODS MARKET GROUP, INC.,
Defendant.

22-cv-6588 (AS)

ORDER

ARUN SUBRAMANIAN, United States District Judge:

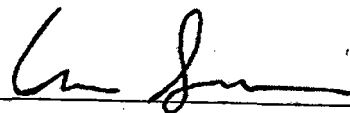
On June 13, 2024, this Court granted summary judgment for Defendant. Dkt. 76. Plaintiff filed a notice of appeal on June 28, 2024. Dkt. 79. On July 2, 2024, Plaintiff filed a motion for leave to appeal *in forma pauperis*. Dkt. 80. Plaintiff did not proceed *in forma pauperis* in this Court, so his application is governed by Federal Rule of Appellate Procedure 24(a)(1). Under that Rule, Plaintiff “must attach an affidavit that: (A) shows...the party’s inability to pay ...; (B) claims an entitlement to redress; and (C) states the issues that the party intends to present on appeal.” In the form that Plaintiff filled out and attached to his motion, there is a specific section header, “My issues on appeal are: [sic] (required):” followed by a blank space for the applicant to write. Dkt. 80 at 2 (emphasis in original). Plaintiff left the area blank, so his motion is deficient.

The Court denies the motion without prejudice to renewal by July 15, 2024. The Clerk of Court is directed to close Dkt. 80.

SO ORDERED.

Dated: July 2, 2024

New York, New York



ARUN SUBRAMANIAN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of November, two thousand twenty-five.

Dana Escoffier,

Plaintiff - Appellant,

v.

Whole Foods Market Group, Inc.,

Defendant - Appellee.

ORDER

Docket No: 24-1790

Appellant Dana Escoffier filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

Catherine O'Hagan Wolfe

