

**Escoffier v Amalgamated Bank**

2017 NY Slip Op 32365(U)

November 8, 2017

Supreme Court, New York County

Docket Number: 151487/2014

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 32**

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**DANA ESCOFFIER,**

**Plaintiff,**

**-against-**

**AMALGAMATED BANK,**

**Defendant.**  
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**AMALGAMATED BANK,**

**Third-Party Plaintiff,**

**-against-**

**LINDA BRONSTEIN-DIETCH, also known as,  
LINDA DIETCH,**

**Third-Party Defendant.**  
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The motion by defendant for summary judgment dismissing all claims asserted by plaintiff is granted. The cross-motion for summary judgment by plaintiff is denied.

**Background**

This action arises out of an altercation that took place in May 2011 between plaintiff and third-party defendant Linda Bronstein-Dietch (hereinafter, "Dietch"). Plaintiff claims that he was standing in line at one of defendant's branches, located on 14<sup>th</sup> Street in Manhattan, when the teller called out for the next person in line. Plaintiff contends that the person in front of him (Dietch) was on her cell phone and did not respond. After three calls from the teller, plaintiff

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alleges that he went in front of Dietch.

After completing his transaction, plaintiff got into an argument with Dietch about passing her in line. At some point, the argument became physical— plaintiff and Dietch disagree about who instigated the fight. Dietch says plaintiff smacked her first while plaintiff alleges that Dietch initiated the fight by spitting in plaintiff's face.

Defendant moves for summary judgment on the ground that it could not have foreseen that the alleged incident would occur and had no duty to protect plaintiff. Defendant claims that it cannot be held liable because the bank had never previously had a similar incident. Defendant contends that its employees are trained to deal with robberies, not with fights between customers. Defendant also points out that plaintiff admitted at his deposition that he was the first to initiate physical contact by pushing Dietch away. Defendant further argues that it could not exclude a customer from entering the bank where the customer had no previous history of violence.

In opposition and in support of his cross-motion, plaintiff claims that defendant owed a duty of reasonable care to maintain the property in a safe condition, which included the protection of customers from criminal acts. Plaintiff states that defendant was put on notice of criminal conduct because the bank had previously experienced a robbery. Plaintiff argues in the alternative that even if the bank was not on notice, it had a reasonable opportunity to intervene and prevent Dietch from harassing and menacing plaintiff. Plaintiff complains that the bank's security guard did nothing to break up the fight.

### **Discussion**

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

“While it is well established that a landlord has a duty to exercise reasonable care to maintain his property in safe condition and that one aspect of this duty obligates a landlord to take minimal precautions to protect those upon the premises from the criminal acts of third parties, it is equally well established that a landlord is not an insurer and, accordingly, that a landlord’s duty to offer protection against criminality on his or her premises arises only when the risk of such criminality is foreseeable. Forseeability in this context has generally been equated with the degree to which a landlord has been apprised of the incidence of criminality within a particular building under his or her proprietorship” (*Todorovich v Columbia Univ.*, 245 AD2d 45,

45-46, 665 NYS2d 77 [1st Dept 1997] [internal quotations and citations omitted]).

Here, there is no evidence that the alleged criminal acts of Dietch were foreseeable. Defendant had no reason to believe that Dietch was likely to instigate an altercation and there is no allegation that Dietch should have been denied access to the premises. Put another way, there is no claim that Dietch had a history of getting into altercations with customers at this branch, which might have prompted defendant to ban her from the bank and would have prevented the fight. The fact is that this was an unforeseeable event—two strangers escalating a disagreement about waiting in line to a physical altercation. Defendant had no duty to protect against this fight, which neither plaintiff nor Dietch did anything to avoid or de-escalate.

The fact that a robbery may have previously occurred at this branch does not change the Court's conclusion. That may have put defendant on notice to implement practices and procedures to prevent future robberies, but a prior criminal act does not foretell all subsequent criminal acts. Plaintiff's argument that homeless persons entering the bank without permission put defendant on notice of criminal activity also misses the point— that might put defendant on notice to address the presence of non-customers at the bank (assuming these persons did not have an account). It does not mean that defendant should have known about a future assault involving two customers.

The role of the bank employee also does not change the Court's decision— plaintiff claims this person was a security guard while defendant refers to this employee as a floor person (i.e., to help answer customers' questions). Even if this person was a security guard, the purpose of a security guard at a bank is to protect the bank's property and, possibly, their employees. It is not to intervene when two adults fight over cutting each other in line. The bank did not owe a duty

to plaintiff to have one of its employees put their hands on plaintiff or Dietch to stop the fight (which might give rise to a separate cause of action against defendant).

Obviously, defendant might try to calm customers down or direct that they leave in order to avoid losing business, but this does not mean that defendant had a duty to intervene. To impose such a requirement inherently necessitates accepting plaintiff's claim that Dietch was the aggressor and that defendant should have restrained her. It may be that Dietch's version of events is accurate and that plaintiff was the instigator-- in that case who should defendant have restrained? That type of query establishes that defendant had no duty to plaintiff to intervene.

### **Summary**

The undisputed facts here demonstrate that Dietch and plaintiff got into a disagreement about their places in line. That quarrel began as a verbal confrontation that soon led to a physical altercation. Instead of trying to de-escalate the situation, plaintiff put his hands on Dietch and now tries to blame the bank where the incident occurred. Although plaintiff and Dietch may have acted like toddlers, the bank is not a day care center and employees need not foresee adults acting so immaturely. There is no basis in the record before this Court to suggest that defendant bank should have known that Dietch (or plaintiff) would lack such basic impulse control and escalate this situation, rather than wait thirty seconds for the next available teller.

And the extent to which defendant's employees eventually intervened in this dispute is immaterial. While it may be human nature (for adults) to attempt to calm participants in a physical altercation that erupts without warning (and without reason), that does not mean it is also a legal duty. Here, plaintiff is trying to blame the bank for not protecting him because he cut in front of a customer as immature as he; the Court declines to create such a duty.

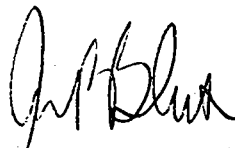
Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted, all claims asserted against defendant are dismissed, and the clerk is directed to enter judgment accordingly, and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied.

This is the Decision and Order of the Court.

**Dated: November 8, 2017**  
**New York, New York**



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**ARLENE P. BLUTH, JSC**