

Guidelines on Dealing With Suspected Shoplifters

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Shoplifting is a common and costly problem for retail merchants. In particular, merchants and their attorneys struggle with the question of how to handle an individual suspected of shoplifting. Within the past few years, the media has paid particular attention to merchants' treatment of suspected shoplifters. This comes in the wake of an uptick in so-called "flash mobs" of teenage shoplifters, and of accusations of retail outlets engaging in so-called "consumer racial profiling."¹ Although these are extreme examples, there is undoubtedly some confusion about the rights of a merchant who suspects a customer of shoplifting, and the rights of a consumer who is detained or questioned on such suspicions.

New York has armed shopkeepers with particularly strong defenses by codifying the shopkeepers' privilege in the General Business Law, Section 218, Defense of lawful detention. Moreover, pursuant to the General Obligations Law, Section 11-105, Larceny in mercantile establishments, a shopkeeper has the right to collect damages from an individual who commits larceny in the amount of "the retail price of the merchandise if not recovered in merchantable condition" plus, an additional penalty of five times the retail price of the merchandise.² A merchant has this right regardless of whether the shoplifter has been convicted or pleaded guilty to larceny.³

The shopkeepers' privilege provides retail merchants with a defense to a number of actions, namely, false arrest, false imprisonment, unlawful detention, defamation, assault, trespass or invasion of civil rights, when brought by an individual who is subjected to investigation, questioning or detention on suspicion of shoplifting.⁴ The statute also applies to individuals suspected of fraudulently returning items.⁵ The purpose of the shopkeepers' privilege is "to protect merchants from arrest [related] suits even where the criminal actions are eventually dismissed" and to help "overcome the extreme reluctance with which merchants now attempt to interfere with or apprehend shop-lifters."⁶ Although intended to provide consistency and clarity, the text of the shopkeepers' privilege fails to provide clear guidelines for its application. The rule is primarily governed by principles of reasonableness. For example, the defense only applies where a suspected shoplifter is detained based upon "reasonable grounds," in a "reasonable manner," and "for not more than a reasonable time." This leaves the law open to varying interpretations and uncertainty. This article contains an overview of the shopkeepers' privilege and a discussion of its practical implementation, intended to provide guidance, and shed some light on the court's treatment of the privilege.

Reasonableness

The parameters of the shopkeepers' privilege are difficult to understand due to the law's reliance on the concept of 'reasonableness.' The text of the shopkeepers' privilege does provide some clear guidelines; for example any detention must take place on or in the immediate vicinity of the premises. Further, the privilege does not authorize the taking of a suspect's fingerprints, unless otherwise authorized by the criminal law.⁷ Otherwise, the application of the law relies on the reasonableness of the merchant's actions and suspicions. Two key points in litigation related to this privilege are: whether there are reasonable grounds for suspicion, and whether the suspect's detention was reasonable.⁸

Grounds for Suspicion

With respect to whether a merchant has reasonable grounds to suspect an individual of shoplifting, here too, the law provides some guidelines:

As used in this section, "reasonable grounds" shall include, but not be limited to, knowledge that a person

(i) has concealed possession of unpurchased merchandise of a retail mercantile establishment, or

(ii) has possession of an item designed for the purpose of overcoming detection of security markings attachments placed on merchandise offered for sale at such an establishment,...

Reasonable grounds do not depend on whether a crime has been committed. Rather, reasonable grounds have been equated to probable cause to arrest.¹⁰ The New York courts' application of this standard has been relatively straightforward, and generally

considers witness/employee testimony, surveillance footage, detection by anti-theft equipment and/or the outcome of any related criminal proceedings.¹¹ Shopkeepers should also take note of whether any surveillance footage exists, either of the suspected incident of shoplifting or of the subsequent detention of the suspect. A retail establishment may be subject to spoliation sanctions for failing to retain any surveillance footage.¹²

Grounds for Detention

The trickier aspect of the law is evaluating the reasonableness of any ensuing detention. As the privilege is primarily intended to protect merchants from tort liability arising out of the detention of suspected shoplifters while they await the arrival of the police, courts often consider whether a merchant ultimately called the police, and the amount of time passed before such a call was made.¹³ Notably, the text of the section states that a "reasonable time" may include: "the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise, or possession of such an item or device."¹⁴ This can also include time to review surveillance footage.

Accordingly, a retail merchant must respond quickly when a suspected shoplifter is identified, or risk tort liability arising out of that detention. For example, the reasonableness of an alleged two-hour gap between the time the plaintiffs were initially detained and the time the police were called was called into question.¹⁵ Larger retailers with established procedures and reporting protocols should be especially mindful that these procedures and protocols are being adhered to as they are discoverable and there is risk associated with delay.

Another issue that frequently arises with respect to cases involving suspected shoplifters is whether any degree of physical force is acceptable. Generally, courts do not look kindly upon the use of physical force in these detentions.¹⁶ However, there are instances where courts approve of a merchant's use of force during an initial apprehension. For example, in *Watkins v. Sears Roebuck & Co.*, the Appellate Division, First Department, dismissed plaintiff's assault and battery charges, where the defendant's security guard tackled the plaintiff to the ground, causing him to sustain a broken leg, as he exited the defendant's store with a stolen stereo. The court found this use of non-deadly physical force "reasonable as a matter of law" because "nothing in plaintiff's testimony indicates that he would have heeded a warning to stop, and the guard's use of force admittedly stopped once plaintiff hit the ground."¹⁷

Reasonable Approach

Overall, New York courts take a case-by-case approach to analyzing the actions of a merchant who suspects an individual of shoplifting. Although the shopkeepers' privilege affords merchants the right to question, investigate and/or detain suspected shoplifters, the privilege is far from an

absolute right. In order to avoid potential tort liability, merchants should take extreme care in their investigation and handling of suspected shoplifters.

A mercantile establishment should implement standard procedures in order to ensure that suspects are handled uniformly and expeditiously. Employees and/or security guards should be well versed in the establishment's procedures, including any policies regarding initial confrontations with suspected shoplifters or physical contact with suspects. Finally, an emphasis should be placed on timely contact with local law enforcement and preservation of all potential evidence. By implementing and following a reasonable procedure focused on handling a suspected shoplifter with reasonableness, a merchant can avoid potential tort liability later on.



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Endnotes:

1. J. David Goodman, "Profiling Complaints by Black Shoppers Followed Changes to Stores' Security Policies," *New York Times*, Oct. 30, 2013; Haimy Assefa, "Mob of Teens Overruns Mall in Brooklyn," *CNN*, Dec. 29, 2013, available at <http://www.cnn.com/2013/12/28/us/new-york-mall-mob/>.
 2. General Obligations Law, Article 11, Obligations to Make Compensation or Restitution, §11-105, reads, in pertinent part:
 5. An adult or emancipated minor who commits larceny against the property of a mercantile establishment shall be civilly liable to the operator of such establishment in an amount consisting of:
 - a) The retail price of the merchandise if not recovered in merchantable condition up to an amount not to exceed fifteen hundred dollars; plus
 - b) A penalty not to exceed the greater of five times the retail price of the merchandise or seventy-five dollars; provided, however, that in no event shall such penalty exceed five hundred dollars.
- See also Andrea Elliot, "In Stores, Private Handcuffs for Sticky Fingers," *The New York Times*, June 17, 2003.
3. See G.O.L. §11-105(7).

4. The shopkeepers' privilege applies to retail mercantile establishments and motion picture theaters. For the purposes of this article, the focus will be on the privilege as it pertains to retail merchants. The privilege reads, in pertinent part:

In any action for false arrest, false imprisonment, unlawful detention, defamation of character, assault, trespass, or invasion of civil rights, brought by any person by reason of having been detained on or in the immediate vicinity of the premises of (a) a retail mercantile establishment for the purpose of investigation or questioning as to criminal possession of an anti-security item as defined in section 170.47 of the penal law or as to the ownership of any merchandise...it shall be a defense to such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer acting pursuant to his special duties, police officer or by the owner of the retail mercantile establishment or...his authorized employee or agent, and that such officer, owner, employee or agent had reasonable grounds to believe that the person so detained was guilty of criminal possession of an anti-security item as defined in section 170.47 of the penal law or was committing or attempting to commit larceny on such premises of such merchandise or was engaged in the unauthorized operation of a recording device in a motion picture theater.

G.B.L §218. Notably, this section does not provide a defense to causes of action sounding in negligence, malicious prosecution or negligent hiring, retention, and supervision.

5. *Bell v. Gap*, 735 N.Y.S.2d 708, 189 Misc.2d 719 (Appellate Term 1st Dept. 2001).

6. *Sada v. Kohl's Department Stores*, 906 N.Y.S.2d 783 (Sup. Ct. King's Co. 2010) aff'd 79 A.D.3d 1121 (2d Dept. 2010) (citing *Guion v. Associated Dry Goods*, 56 A.D.2d 798, 798 (1st Dept. 1977); *Jacques v. Sears, Roebuck & Co.*, 30 N.Y.2d 466, 472,(1972)).

7. See G.B.L §218.

8. *Sada*, 906 N.Y.S.2d 783 aff'd 79 A.D.3d 1121 (citing *Neuman v. Century 21 Department Stores*, 57 A.D.3d 329, 329 (1st Dept. 2008); *Muza v. Niketown New York*, 278 A.D.2d 13, 14 (1st Dept. 2000)).

9. See G.B.L. §218. See also N.Y. Penal Law §170.47, which makes it a class B misdemeanor to possess an "item designed for the purpose of overcoming detection of security markings or attachments placed on property offered for sale," such as an item to remove security tags from clothing.

10. *Sbrigato v. JC Penney*, 954 N.Y.S.2d 761 at *4 (Sup. Ct. Kings Co. 2012).

11. *Sada*, 906 N.Y.S.2d 783 aff'd 79 A.D.3d 1121.

12. *Id.*; see also *Lebron v. Rite Aid*, 862 N.Y.S.2d 809 (Appellate Term 1st Dept. 2005).

13. *Sbrigato*, 954 N.Y.S.2d 761 at *3.

14. See G.B.L. §218.

15. *Sbrigato*, 954 N.Y.S.2d 761; *Restrepo v. Home Depot USA*, 958 N.Y.S.2d 648 (Sup. Ct. Queens Co. 2010) aff'd 92 A.D.3d 857 (2d Dept. 2012).

16. *Gardner v. Federated Department Stores*, 907 F.2d 1348 (2d Cir. 1990).

17. 289 A.D.2d 73 (1st Dept. 2001).