

48 A.D.3d 716, 854 N.Y.S.2d 143, Prod.Liab.Rep. (CCH) P 17,929, 2008 N.Y. Slip Op. 01686  
(Cite as: 48 A.D.3d 716, 854 N.Y.S.2d 143)



Supreme Court, Appellate Division, Second Department, New York.  
Ronald ABERBACH, respondent,  
v.  
BIOMEDICAL TISSUE SERVICES, LTD., et al.,  
defendants,  
Medtronic, Inc., et al., appellants.  
Feb. 26, 2008.

**Background:** Patient who underwent allograft procedures brought action against distributor of bone and other tissue implanted in his body alleging battery, negligence, negligent infliction of emotional distress, breach of express warranty, and breach of implied warranty. The Supreme Court, Kings County, F. Rivera, J., denied defendant's motion to dismiss. Defendants appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

- (1) patient failed to allege that distributor intentionally touched his body, as required to support battery claim;
- (2) patient failed to allege that he was actually, or even probably, exposed to HIV;
- (3) patient failed to allege a sale; and
- (4) patient failed to allege any injury.

Reversed.

#### West Headnotes

#### [1] Pretrial Procedure 307A ↻624

307A Pretrial Procedure  
307AIII Dismissal  
307AIII(B) Involuntary Dismissal  
307AIII(B)4 Pleading, Defects In, in General  
307Ak623 Clear and Certain Nature of Insufficiency  
307Ak624 k. Availability of Relief Under Any State of Facts Provable. Most Cited

#### Cases

#### Pretrial Procedure 307A ↻679

307A Pretrial Procedure  
307AIII Dismissal  
307AIII(B) Involuntary Dismissal  
307AIII(B)6 Proceedings and Effect  
307Ak679 k. Construction of Pleadings. Most Cited Cases

In considering a motion to dismiss for failure to state a claim, the court should accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. McKinney's CPLR 3211(a)(7).

#### [2] Pretrial Procedure 307A ↻622

307A Pretrial Procedure  
307AIII Dismissal  
307AIII(B) Involuntary Dismissal  
307AIII(B)4 Pleading, Defects In, in General  
307Ak622 k. Insufficiency in General.

#### Most Cited Cases

Whether the plaintiff can ultimately establish the allegations is not part of the calculus in considering a motion to dismiss for failure to state a claim. McKinney's CPLR 3211(a)(7).

#### [3] Assault and Battery 37 ↻2

37 Assault and Battery  
37I Civil Liability  
37I(A) Acts Constituting Assault or Battery and Liability Therefor  
37k1 Nature and Elements of Assault and Battery

#### 37k2 k. In General. Most Cited Cases

Patient who had bone and other tissue implanted into his body failed to allege that distributor of bone and tissue intentionally touched his body, either personally or by means of an instrumentality, as re-

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quired to state a claim for battery against distributor.

[4] Assault and Battery 37 ↪2

37 Assault and Battery

37I Civil Liability

37I(A) Acts Constituting Assault or Battery and Liability Therefor

37k1 Nature and Elements of Assault and Battery

37k2 k. In General. Most Cited Cases

A valid claim for battery exists where a person intentionally touches another without that person's consent.

[5] Damages 115 ↪57.34

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.30 Fear of Developing Disease

115k57.34 k. Aids/Hiv. Most Cited

Cases

Patient who had bone and other tissue implanted into his body failed to allege that he was actually, or even probably, exposed to HIV, as required to state a claim for negligent infliction of emotional distress against distributor of bone and tissue.

[6] Sales 343 ↪3.1

343 Sales

343I Requisites and Validity of Contract

343k3 Sale Distinguished from Other Transactions

343k3.1 k. In General. Most Cited Cases

Patient who had bone and other tissue implanted into his body failed to allege a sale, as required to state a claim against distributor of bone and tissue for breach of express and implied warranties.

[7] Products Liability 313A ↪231

313A Products Liability

313AIII Particular Products

313Ak223 Health Care and Medical Products

313Ak231 k. Blood and Blood Products.

Most Cited Cases

(Formerly 313Ak46.1)

Patient who had bone and other tissue implanted into his body failed to allege any injury, as required to state a negligence claim against distributor of bone and tissue.

**\*\*144** Quirk and Bakalor, P.C., New York, N.Y. (Richard H. Bakalor, Liza R. Fleissig, and Pepper Hamilton, LLP, of counsel), for appellants.

Bartels & Feureisen, LLP, White Plains, N.Y. (Michael Fahey and Justina L. Kingen of counsel), for respondent.

DAVID S. RITTER, J.P., FRED T. SANTUCCI, JOSEPH COVELLO and EDWARD D. CARNI, JJ.

**\*717** In an action, inter alia, to recover damages for battery, negligence, negligent infliction of emotional distress, breach of express warranty, and breach of implied warranty, and based on strict products liability, the defendants Medtronic, Inc., and Medtronic Sofamor Danek USA, Inc., appeal from an order of the Supreme Court, Kings County (F. Rivera, J.), dated March 2, 2007, which, inter alia, denied their motion to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211 (a)(7).

ORDERED that the order is reversed, on the law, with costs, and the motion of the defendants Medtronic, Inc., and Medtronic Sofamor Danek USA, Inc., to dismiss the complaint insofar as asserted against them is granted.

According to the complaint, on May 19, 2005, the plaintiff underwent a surgical procedure. During that procedure, bone, bone paste, and other tissue, which were distributed by the defendants Medtronic, Inc., and Medtronic Sofamor Danek USA, Inc. (hereinafter appellants), for allograft procedures,

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were implanted in the plaintiff's body. However, the plaintiff alleged only that those materials were "potentially" contaminated with HIV and other infectious diseases. In his complaint, the plaintiff alleged that, approximately seven months after the surgery, he was advised about such a possibility. He then underwent certain tests to determine whether he contracted one of those diseases. No allegation\*\*145 is made in the complaint that he became infected with any disease.

In May 2006, the plaintiff commenced the instant action against the appellants and other defendants, seeking to recover damages for injuries that he allegedly sustained as a result of their allegedly wrongful conduct. The appellants moved to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(7). The Supreme Court denied the motion. We reverse.

[1][2] In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court should "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511). Whether the plaintiff can ultimately \*718 establish the allegations "is not part of the calculus" (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26).

[3][4] The branch of the appellants' motion which was to dismiss the cause of action to recover damages for battery, insofar as asserted against them, should have been granted (*see* CPLR 3211[a][7]; *Leon v. Martinez*, 84 N.Y.2d at 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511). A "valid claim for battery exists where a person intentionally touches another without that person's consent" (*Wende C. v. United Methodist Church, N.Y.W. Area*, 4 N.Y.3d 293, 298, 794 N.Y.S.2d 282, 827 N.E.2d 265, *cert. denied* 546 U.S. 818, 126 S.Ct. 346, 163 L.Ed.2d 57; *see* *Jeffreys v. Griffin*, 1 N.Y.3d 34, 41 n. 2, 769 N.Y.S.2d 184, 801 N.E.2d 404). Here, the com-

plaint contains no allegation that the appellants intentionally touched the plaintiff's body, either personally or by means of an instrumentality.

[5] The branch of the appellants' motion which was to dismiss the cause of action to recover damages for negligent infliction of emotional distress, insofar as asserted against them, also should have been granted (*see* CPLR 3211 [a][7]; *Leon v. Martinez*, 84 N.Y.2d at 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511). In this regard, the plaintiff did not allege that he was actually, or even probably, exposed to HIV (*cf. Schott v. Saint Charles Hosp.*, 250 A.D.2d 587, 588, 672 N.Y.S.2d 393; *Lombardo v. New York Univ. Med. Ctr.*, 243 A.D.2d 688, 689, 663 N.Y.S.2d 295; *Blair v. Elwood Union Free Pub. Schools*, 238 A.D.2d 295, 296, 656 N.Y.S.2d 52; *Montalbano v. Tri-Mac Enters. of Port Jefferson*, 236 A.D.2d 374, 652 N.Y.S.2d 780; *Brown v. New York City Health & Hosps. Corp.*, 225 A.D.2d 36, 47, 648 N.Y.S.2d 880), or any other infectious disease (*cf. Daluise v. Sottile*, 40 A.D.3d 801, 803-804, 837 N.Y.S.2d 175; *E.B. v. Liberation Pubs.*, 7 A.D.3d 566, 567, 777 N.Y.S.2d 133; *Hecht v. Kaplan*, 221 A.D.2d 100, 105, 645 N.Y.S.2d 51).

[6] In addition, those branches of the appellants' motion which were to dismiss the causes of action to recover damages for breach of express and implied warranties, and based on strict products liability, insofar as asserted against them, should have been granted (*see* CPLR 3211[a][7]; *Leon v. Martinez*, 84 N.Y.2d at 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511). No "sale," which is required to support a cause of action to recover damages for breach of warranty or based on strict products liability, is alleged here (*see* *Betro v. GAC Intl.*, 158 A.D.2d 498, 499, 551 N.Y.S.2d 72; *Goldfarb v. Teitelbaum*, 149 A.D.2d 566, 567, 540 N.Y.S.2d 263).

[7] Furthermore, that branch of the appellants' motion which was to dismiss \*\*146 the cause of action to recover damages for negligence, insofar as asserted against them, should have been granted as well

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(see CPLR 3211[a] [7]; *Leon v. Martinez*, 84 N.Y.2d at 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511). Indeed, the complaint fails to allege a cognizable injury suffered as a result of the appellants' alleged negligence (see *Boothe v. Weiss*, 107 A.D.2d 730, 731, 484 N.Y.S.2d 598).

Finally, the cause of action asserting a purported right to recover\*719 punitive damages should have been dismissed insofar as asserted against the appellants (see *Alexander v. Scott*, 286 A.D.2d 692, 693, 730 N.Y.S.2d 254; *Oakfield Group v. Bell Atl. Corp.*, 277 A.D.2d 365, 716 N.Y.S.2d 336).

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