

**Branis v Wruble**

2017 NY Slip Op 31754(U)

August 16, 2017

Supreme Court, New York County

Docket Number: 805659/15

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

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CONSTANTINA BRANIS,

INDEX NO. 805659/15

Plaintiff,

-against-

NATHAN D. WRUBLE and STEINWAY  
DIAGNOSTIC IMAGING, P.C.,

Defendants.

-----X  
JOAN A. MADDEN, J.:

In this action for medical malpractice based on the failure to timely diagnose breast cancer and lack of informed consent, defendants move for an order pursuant to CPLR 3124 compelling plaintiff to return her original mammogram films to defendant Dr. Wruble (motion seq. no. 001). Plaintiff moves for a protective order pursuant to CPLR 3103, declaring that she is entitled to retain the original mammogram films, and shall make those films available to defendants at their convenience and upon reasonable notice for inspection (motion seq. no. 002). The motions are consolidated for determination herein.

It is undisputed that on April 16, 2014, plaintiff went to Dr. Wruble's office for a mammogram.<sup>1</sup> On May 21, 2014, plaintiff returned to Dr. Wruble's office to obtain her original mammogram films, and signed a form acknowledging as follows: "I Tina Branis understand that I am being given original films and there are no copies of these films in the office of N.D. Wruble, M.D. These films must be returned by the time of your next appointment."

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<sup>1</sup>The record shows that Dr. Wruble performed a "digital mammography and sonogram examination."

Plaintiff did not return to Dr. Wruble's office and the original mammogram films are still in her possession. Plaintiff's counsel states that they have provided defendants with duplicate copies of the original films in both disk and hard-copy form, and they have also agreed to make the originals available to defendants for inspection at a neutral location to be agreed upon within 30 days, and to produce the original films at the depositions of the parties. Defendants assert that the copies provided by plaintiff are "not readable," and have demanded the return of the original films. In the meantime, Dr. Wruble has refused to appear for his deposition until the original films are returned.

A patient's right to her original mammogram films is governed by both the New York State Public Health Law and federal regulation. Public Health Law §17 provides in relevant part as follows: "Upon written request of any competent patient . . . an examining, consulting or treating physician or hospital must release and deliver, exclusive of personal notes of the said physician or hospital, copies of x-rays, medical records and test records including all laboratory tests regarding that patient to any other designated physician or hospital . . . provided . . . that original mammograms, rather than copies thereof, shall be released and delivered." Public Health Law §18(2)(d) provides that "[s]ubject to the provisions of subdivision three of this section, upon the written request of any qualified person, a health care provider shall furnish to such person, within a reasonable time, a copy of any patient information requested, and original mammograms requested, which the person is authorized to inspect pursuant to this subdivision." Section 18(1)(g) defines "qualified person" as "any properly identified subject," and section 18(1)(h) defines "subject" as "an individual concerning whom patient information is maintained or possessed by a health care provider."

Federal Regulation 21 CFR §900.12(c)(4)(ii) provides in relevant part as follows:

“Recordkeeping. Each facility that performs mammograms . . . [s]hall upon request by, or on behalf of, the patient, permanently or temporarily transfer the original mammograms and copies of the patient’s report to a medical institution, or to a physician or health care provider of the patient, or to the patient directly.”

In support of their motion to compel plaintiff to return the original mammogram films, defendants argue that Public Health Law §§17 and 18 are not applicable as plaintiff failed to make a “written request” for the films. Defendants also argue that the language in the form that plaintiff signed at Dr. Wruble’s office, stating that “the films must be returned by the time of your next appointment,” establishes that Dr. Wruble intended merely to loan the original films to plaintiff and did not intend to “relinquish ownership.”

In support of her motion to retain the original mammogram films, plaintiff argues that Public Health Law §§17 and 18, and the federal regulation impose a mandatory obligation on defendants to provide her with the original films, and give her the right to secure and retain the original films. She also argues that she satisfied the requirement in the Public Health Law for a “written request” based on the form she signed at Dr. Wruble’s office acknowledging her verbal request.

Under the circumstances presented, the Court finds that plaintiff is entitled to retain the original mammogram films. Although the Public Health Law requires a written request, the federal regulation simply requires a “request” without specifying that it be in writing. Moreover, the record neither shows nor suggests that Dr. Wruble objected to plaintiff’s verbal request. To the contrary, he complied with plaintiff’s request and provided her with the original mammogram

films, in accordance with state and federal requirements. In any event, the Court deems both the form plaintiff signed in Dr. Wruble's office, acknowledging receipt of the original films, and plaintiff's instant motion for a protective order, as satisfying the requirement under Public Health Law §§17 and 18 for a written request.

Defendants also argue that the form signed by plaintiff in Dr. Wruble's office shows that Dr. Wruble merely intended to "loan" the original films to plaintiff until she returned for her next appointment. Defendants' argument ignores the fact that Dr. Wruble never scheduled a next appointment for plaintiff, so any obligation on her part to return the films was not triggered. Defendants' rely on Dr. Wruble's April 25, 2014 letter to plaintiff, but that letter simply advised plaintiff that "in six months, you should have a follow-up breast sonogram to confirm that this area has not changed." Notably, the federal regulation would have permitted Dr. Wruble to transfer the original films either "permanently or temporarily," but the form plaintiff signed did not clearly make that distinction and, at best, was ambiguous. In Chervonskaya v. Bentley, 55 AD2d 650 (2<sup>nd</sup> Dept 2008), the Second Department held that the "medical release forms signed by plaintiffs indicated that the defendant loaned the original mammogram films to the plaintiffs and they were required to return the films to the defendant as soon as possible." Here, however, the form signed by plaintiff did not require her to return the original films until her next appointment, which indicated that Dr. Wruble would need the originals for comparison and diagnosis purposes only in the event he saw her in the future for another mammogram.

Plaintiff submits an uncontroverted affidavit that Dr. Wruble understood that her visit to his office was a one time occurrence. She states that in April 2014, she was living in Queens, and noticed a lump in her right breast and did not want to wait until her upcoming appointment

in Greece, where she had been receiving all of her gynecological treatment. She states that she “walked into the office of Steinway Diagnostic Imaging, P.C. requesting that breast imaging studies be performed and the reports be sent to my treating gynecologist in Greece” and “they agreed.” On or about May 21, 2014, “I appeared at Dr. Wruble’s office and at my request was given my imaging studies” and “advised that I would continue my gynecological care and treatment in Greece.” She states that Dr. Wruble subsequently “sent his written report of his findings to my doctor in Greece,” and that Dr. Wruble “knew that my visit to him was a singular one in order to evaluate the recent lump I had discovered.” Plaintiff states that “[a]t the time I was given my films by Dr. Wruble it was our understanding that I would keep the films for my use and treatment elsewhere . . . so that I can have them reviewed for comparison or otherwise by my treating physicians in Greece as well as by other medical providers.” She states it was “my understanding that these studies were mine to keep only unless I were to return to Dr. Wruble’s office for a further appointment,” and “I never returned to Dr. Wruble’s office for another appointment.”

Defendants have not submitted an affidavit from Dr. Wruble. Thus, plaintiff’s affidavit is uncontroverted. The record also includes correspondence from Dr. Wruble’s office responding to the request by plaintiff’s counsel for plaintiff’s medical records. On May 7, 2015, Dr. Wruble’s office wrote: “Pursuant to your request, attached please find final medical records for your above referenced client. Ms. Branis was seen in our office on 4/16/14. Ms. Branis returned to our office on 5/21/14 to pick up her films. She was advised she was being given original films and there are no copies. A copy of her signed statement in [sic] attached for your records.” A fax cover sheet dated April 28, 2015, from Dr. Wruble’s office states: “Please be advised your

client has the original films for services rendered on 4/16/14. They were picked up on 5/21/14. The patient was told she was taking original films and there are no copies.” Significantly, in neither the letter nor the fax cover sheet, did Dr. Wruble object to plaintiff’s possession of the original films, demand that she return them to him, or indicate that they belonged to him.

Based on the foregoing, plaintiff is entitled to retain the original mammogram films, as she has made a sufficient showing that Dr. Wruble permanently transferred the original films to her pursuant to 21 CFR 900.12(c)(4)(ii). See Regensdorfer v Orange Regional Medical Center, 21 AD3d 359 (2<sup>nd</sup> Dept 2005). And, as determined above, the Court deems both the form plaintiff signed in Dr. Wruble’s office and her instant motion for a protective order, as satisfying the written request requirement of Public Health Law §§17 and 18.

However, since there is no dispute that the original mammogram films are crucial to the defense of this action, plaintiff’s counsel shall forthwith make them available to defendants’ counsel for copying, and upon adequate notice, plaintiff’s counsel shall provide the original films to defendants’ counsel for review by defendants’ experts and preparation for defendants’ depositions. See Olexa v. Jacobs, 36 AD3d 776 (2<sup>nd</sup> Dept 2007). The Court notes that in the exercise of caution, it is advisable for plaintiff and defendants to each make their own readable and legible copies of the original mammogram films.

Accordingly, it is

ORDERED that defendants’ motion to compel plaintiff to return the original mammogram films is denied (motion seq. no. 001); and it is further


ORDERED that plaintiff’s motion is granted (motion seq. no. 002) and plaintiff is entitled to retain the original mammogram films on condition that plaintiff’s counsel shall

forthwith make them available to defendants' counsel for copying, and upon adequate notice, plaintiff's counsel shall provide the original films to defendants' counsel for review by defendants' experts and preparation for defendants' depositions; and it is further

ORDERED that the parties shall appear for a status conference on September 14, 2017 at 9:30 a.m., Part 11, Room 351, 60 Centre Street.

DATED: August *16*, 2017

ENTER:

  
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HON. JOAN A. MADDEN  
J.S.C.