

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PRUCO LIFE INSURANCE COMPANY, :
Plaintiff, :
v. : CA 08-69 S
WILMINGTON TRUST COMPANY, :
Trustee under the Paul E. :
L'Archevesque Special Revocable :
Trust - 2006; JAY L'ARCHEVESQUE, :
Co-Trustee under the Paul E. :
L'Archevesque Special Revocable :
Trust - 2006, :
Defendants. :

MEMORANDUM AND ORDER

Before the Court is Plaintiff Pruco Life Insurance Company's Motion for Protective Order (Document ("Doc.") #103) ("Motion for Protective Order" or "Motion"). Plaintiff Pruco Life Insurance Company ("Plaintiff" or "Pruco") seeks a protective order declaring Jay L'Archevesque's Rule 30(b)(6) Notice of Deposition of Pruco invalid pursuant to Fed. R. Civ. P. 30(a)(2)(A)(ii) for failure to seek leave of court because Pruco has already been deposed in this action. Alternatively, Pruco asks that, if the Court finds that the notice is valid, it be quashed as unreasonably cumulative, duplicative, and irrelevant to the issues in the case.

Defendant Jay L'Archevesque ("Jay L'Archevesque" or "Jay") has filed an opposition to the Motion. See Opposition of Defendant Jay L'Archevesque to Plaintiff Pruco Life Insurance

Company's Motion for Protective Order (Doc. #109) ("Jay's Opp."). In his opposition, Jay requests that, if the Court concludes that the deposition of Pruco requires leave of court, his opposition be treated as a request for such leave. See Defendant Jay L'Archevesque's Memorandum of Law in Opposition to Plaintiff Pruco Life Insurance Company's Motion for Protective Order and in Support of His Motion to Compel ("Jay's Mem.") at 7. Both Pruco and Jay seek attorneys' fees in connection with the Motion.

A hearing was held on July 14, 2009. For the reasons stated herein, the Court rules as follows: the Motion is granted, Jay's request for leave is denied, and the requests of both Pruco and Jay for attorneys' fees are denied.

Facts

This is an action to rescind a fifteen million dollar policy of life insurance insuring the life of Paul E. L'Archevesque ("Paul L'Archevesque" or "Paul"). See Plaintiff Pruco Life Insurance Company's Memorandum of Law in Support of Motion for Protective Order (Doc. #104) ("Pruco Mem.") at 1. In its initial Complaint (Doc. #1), Pruco sought rescission of the policy because Paul had allegedly made material misrepresentations in the application for the policy. See Complaint ¶ 1. The defendants named in the Complaint were the Wilmington Trust Company ("Wilmington"), as Trustee under the Paul E. L'Archevesque Special Revocable Trust - 2006 (the "Revocable

Trust”), and Paul L’Archevesque. See id. ¶¶ 4-5.

On June 10, 2008, Pruco filed a First Amended Complaint adding additional causes of action for mutual rescission and lack of insurable interest. See First Amended Complaint (Doc. #23). Attorney Robert M. Duffy (“Attorney Duffy”) filed an answer to this pleading on behalf of Paul. See Answer of Paul E. L’Archevesque to Plaintiff’s First Amended Complaint (Doc. #26).

Paul L’Archevesque and Wilmington were also named as defendants in a related case, Lincoln National Life Insurance Co. v. Paul E. L’Archevesque, et al., CA 08-74 S (the “Lincoln case”). See Pruco’s Mem. at 2. In the Lincoln case, Lincoln National Insurance Co. (“Lincoln”) seeks a declaration that a five million dollar insurance policy it issued on the life of Paul L’Archevesque and also owned by the Revocable Trust is void as a result of material misrepresentations in the application. See id. The Lincoln case also challenges whether there existed an insurable interest at the time its policy was issued. See id. Although the two cases are not consolidated, because of the overlap of witnesses and issues, discovery in the two cases is being coordinated pursuant to Court order. See id. Attorney Duffy entered his appearance in the Lincoln case for Paul L’Archevesque on April 3, 2008. See Lincoln case, Entry of Appearance of Robert M. Duffy.

Through discovery, Pruco and Lincoln learned that Jay

L'Archevesque, Paul L'Archevesque's son, was a Co-Trustee of the Revocable Trust. See Pruco's Mem. at 2-3. On December 11, 2008, Jay, although not yet formally a party in either action, attended a settlement conference with Attorney Duffy as the client representative in both actions. See id. at 3. Paul did not attend the settlement conference. See id.

On December 22, 2008, Lincoln moved to file an amended complaint to add Jay L'Archevesque, as Co-Trustee of the Revocable Trust, as a defendant. See Lincoln case, The Lincoln National Life Insurance Company's Motion for Leave to Amend Complaint and Join Jay L'Archevesque as an Additional Defendant. There was no objection to the motion, and on January 10, 2009, Lincoln filed its Amended Complaint. See Lincoln case, Docket.

On January 9 and 10, 2009, Attorney Duffy, on behalf of Paul L'Archevesque, conducted a Rule 30(b)(6) deposition of Pruco at which Pruco produced two witnesses to testify regarding twelve noticed topics. See Pruco's Mem. at 3. On May 14, 2009, Paul noticed a second deposition of Pruco pursuant to Rule 30(b)(6) which identified three topics of examination. See Declaration of Robert C. Shindell ("Shindell Decl."), Exhibit ("Ex.") B (Second Amended Notice of Deposition), Attachment ("Att."). Pruco objected to the Rule 30(b)(6) deposition on the ground that the notice was invalid under Rule 30(a)(2) because Pruco had already been deposed and the Court had not granted Paul leave to notice a

second deposition. See id., Ex. D (Plaintiff's Objections to Paul E. L'Archevesque's Second Amended Notice of Deposition). Pruco also objected to the notice on the ground that Paul L'Archevesque had been dismissed from the action on May 18, 2009, and that he was no longer a party. Id. Attorney Duffy's law firm then withdrew the notice of deposition which had been issued on behalf of Paul and renoticed it on behalf of Jay.¹ Id., Ex. E (Letter from Tracey to Shindell of 5/22/09); Ex. F (Notice of Deposition). In response, Pruco filed the instant Motion for Protective Order on June 2, 2009. See Docket.

Discussion

Burden

Jay appears to argue that Pruco bears the burden of demonstrating that the noticed deposition should not go forward. See Jay's Mem. at 4 (citing case law holding, among other things, that a party seeking a protective order to limit discovery must demonstrate particular and specific facts to establish good cause for the order and that the party seeking the order has a heavy burden). Pruco counters that it is simply seeking to require Jay to comply with the limits of discovery established by Rule 30. See Plaintiff Pruco Life Insurance Company's Reply Memorandum of

¹ Jay had been added to this action by Pruco's filing of its Second Amended Complaint (Doc. #71) on February 2, 2009. Attorney Duffy filed an answer to this pleading on February 27, 2009. See Answer of Jay L'Archevesque to Plaintiff's Second Amended Complaint (Doc. #92).

Law in Support of Motion for Protective Order (Doc. #114) ("Pruco's Reply") at 1-2. The Court agrees with Pruco that the question presented by the Motion is whether Jay L'Archevesque requires leave from the Court to conduct the noticed deposition. As there is no dispute that Pruco has already been deposed once in the case, the burden is on Jay to demonstrate that leave is not required for the deposition which he has noticed.²

Applicability of Rule 30(a)(2)(A)(ii)

Jay argues that, as a new party who has not yet deposed Pruco, he is not required to seek leave of the Court prior to noticing the deposition of Pruco under Rule 30(b)(6). See Jay's Mem. at 5. He also points out that courts have reached different conclusions as to whether witnesses deposed pursuant to Rule 30(b)(6) should be treated differently than individually named deponents with respect to the requirement for leave stated in Rule 30(a)(2)(A)(ii). See id. In addition, Jay notes that Pruco did not add him as a party to this action until February 2009,

² The Court, however, has no difficulty finding alternatively that the plain language of Rule 30(a)(2)(A)(ii) constitutes "good cause" for the Motion and that Pruco has met its burden of showing that the information sought by the deposition is either not sufficiently relevant to warrant subjecting Pruco to another 30(b)(6) deposition or the information is otherwise duplicative or cumulative. Prozina Shipping Co. v. Thirty Four Autos., 179 F.R.D. 41, 48 (D. Mass. 1998) (stating that "[a] party seeking a protective order must demonstrate particular and specific facts to establish 'good cause' for the order") (quoting Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986)); id. ("The moving party has a heavy burden of showing extraordinary circumstances based on specific facts that would justify such an order.") (internal quotation marks omitted).

despite its earlier knowledge that he was a proper party. See id. at 6-7. Responding to Pruco's contention, Jay claims that he cannot be accused of seeking a second bite at the apple because "he never had an opportunity to depose Pruco at all." Id. at 7.

Magistrate Judge Jeffrey Cole has observed that "the fact that a party may ultimately be able to persuade a judge to allow successive depositions has absolutely nothing to do with the obligation to seek leave in the first instance a court's permission to take a deposition of a 'person' who has once been deposed." In re Sulfuric Acid Antitrust Litig., No. 03 C 4576, 2005 WL 1994105, at *2 (N.D. Ill. Aug. 19, 2005). The Court agrees with this observation. However, the Court need not decide whether a new party to an action must always seek leave prior to noticing the deposition of a party who has already been deposed in the action. This is because here the mantle of "new party" does not comfortably fit Jay. Both Jay and his attorney were aware of this litigation and that Jay was going to be brought into it prior to the Rule 30(b)(6) deposition of Pruco in January 2009. Jay's attendance at the December 11, 2008, settlement conference is conclusive evidence of his knowledge of the litigation. His attorney's receipt also in December 2008 of Lincoln's proposed amended complaint, adding Jay as a defendant because of his status as co-trustee, made it highly foreseeable that Pruco would similarly amend its pleading in the instant

action. Thus, to the extent that Jay contends that the requirement for leave stated in Rule 30(a)(2)(A)(ii) does not apply to him because he is a new party, such argument is rejected because he is a "new party" only nominally.

To the extent that Jay contends that Rule 30(b)(6) depositions should be treated differently than individual deponents depositions with respect to the requirement for leave, the Court concludes that the circumstances presented by the instant case (described above) do not warrant dispensing with the requirement for leave. Accordingly, the Court finds that Jay L'Archevesque's Notice of Deposition dated May 22, 2009, constitutes a second deposition for which leave is required.

Request for Leave

In his memorandum, Jay requests that, if the Court concludes leave is necessary, his memorandum be treated as a request for such leave and that Pruco be required to produce a witness in response to his notice. See Jay's Mem. at 7. Although Pruco objects to this request, the Court agrees with Jay that in the interest of judicial efficiency and the avoidance of unnecessary motion practice such request should be granted.³ Accordingly, the Court treats Jay's memorandum as a request for leave.

³ The Court cautions, however, that normally a request for leave (or a request for any action by the Court) should be contained in a motion and not within a memorandum. The fact the Court has in this instance granted Jay's request should not be viewed as establishing a precedent.

The first topic for which Jay L'Archevesque seeks a Rule 30(b) (6) witness is:

1. Pruco's policy and practice with regard to premium financed policies including communications with its producers and provisions in its life insurance policies relating thereto, from January 2006 to the present.

Shindell Decl., Ex. F (Notice of Deposition), Att.

Pruco contends that its policies regarding premium financed life insurance policies are not at issue in this case and that the discovery sought with respect to topic 1 is irrelevant. See Pruco's Mem. at 7. Pruco notes that the Second Amended Complaint contains three causes of action (misrepresentation, mutual rescission, and lack of insurable interest) and asserts that premium financing is not relevant to any of these causes of action. See id. In further support of this argument, Pruco states:

None of the allegations in the Second Amended Complaint allege[s] that Pruco is seeking to rescind the Policy because the premiums were financed. Further, nothing in Pruco's letter rescinding the Policy suggests that Pruco rescinded the Policy because the premiums were financed. Finally, [Jay] has not identified any defense to Pruco's claims that relate to Pruco's policies on premium financing.

Id. at 7-8 (citation omitted).

Jay offers two reasons why the first topic is relevant to claims or defenses in this case. See Jay's Mem. at 7. First, he points to the fact that during the deposition of Coventry Capital Inc. ("Coventry"), a third-party agent for LaSalle Bank, which

provided the premium financing for the Policy, Pruco's counsel questioned Coventry about premium financing. See id. at 7-8. When Jay's counsel objected, Pruco's counsel stated: "My questions were directed to determining the relationship between the premium finance program and sales in the secondary market, and the latter is certainly part of the Complaint in this action." Jay's Mem., Ex. C (Coventry deposition excerpt) at 3. The Court is unable to determine what this statement means. Taken literally, Pruco's counsel was asserting that "sales in the secondary market," id., are part of this case, a proposition which the Court finds mystifying.

Pruco claims that the purpose of the questioning was "to probe whether that financing was related to Paul E. L'Archevesque's and Defendants' alleged [Stranger Owned Life Insurance ("STOLI")] transaction." Pruco's Reply at 5 n.2. Pruco argues that its "own policies on premium financing are irrelevant to the allegation that Defendants have engaged in a STOLI transaction and Jay L'Archevesque has not identified how Pruco's policies on premium financing are relevant to any defense." Id. At the hearing, counsel for Jay L'Archevesque, responding to a question from the Court regarding relevancy, appeared to suggest that discovery on topic 1 is sought because of Pruco's interest in premium financing and Jay's concern that Pruco will somehow use information relating to premium financing

in support of its lack of insurable interest claim. The Court finds this explanation unpersuasive.

Jay's second reason for allowing Rule 30(b)(6) discovery on topic 1 is that Pruco's own 30(b)(6) witness testified that its agent's failure to disclose to Pruco that the premiums were financed was a violation of its own policy. See Jay's Mem. at 8. However, this argument proves too much as it highlights the fact that Jay's counsel has already had one opportunity to question Pruco regarding such matters. In sum, the Court is unpersuaded that topic 1 has sufficient relevance to warrant granting leave for a second Rule 30(b)(6) deposition of Pruco.

The second and third topics noticed for the deposition are:

2. All the facts concerning Pruco's claim in this litigation that the Policy insuring the life of Paul L'Archevesque (Policy No. V1207727) ("L'Archevesque Policy") was a Stranger Owned Life Insurance Transaction.

3. Any investigation undertaken by Pruco to determine the insurable interest of L'Archevesque in connection with the Policy.

Shindell Decl., Ex. F, Att.

As to the second topic, there is no reason why it could not have been included as a topic for the first Rule 30(b)(6) deposition of Pruco. The STOLI count was added to the case in June 2008, and Paul L'Archevesque's 30(b)(6) notice was served in October 2008. Given the closeness of the relationship between Paul and Jay (father and son), Attorney Duffy's representation of both of them, and the fact that Wilmington, the other co-trustee,

participated in the January 30(b)(6) deposition of Pruco (and whose interests would seem to be aligned with those of Jay), the Court is unpersuaded that Jay's formal addition as a named defendant to this action justifies subjecting Pruco to another Rule 30(b)(6) deposition to explore the second topic.⁴

With regard to the third topic, the Court concludes that it is within the scope of one of the topics on which Pruco has already been deposed. See Shindell Decl., Ex. A (Amended Notice of Deposition), Att. Specifically, Attorney Duffy, representing Paul L'Archevesque, has already deposed Pruco on the topic of "[a]ny investigation undertaken by Pruco concerning the Subject Policy and/or L'Archevesque on or after March 6, 2006." Id. Another Rule 30(b)(6) deposition on the third topic would be duplicative.

In sum, the Court is unpersuaded that Jay L'Archevesque's request for leave to depose Pruco on the three topics sought

⁴ It has been noted that taking serial depositions of a single corporation can be as costly and burdensome, if not more so, as serial depositions of an individual. State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc., 254 F.R.D. 227, 235 (E.D. Pa. 2008).

In both cases, each new deposition requires the deponent to spend time preparing for the deposition, traveling to the deposition, and providing testimony. In addition, allowing for serial depositions, whether of an individual or organization, provides the deposing party with an unfair strategic advantage, offering it multiple bites at the apple, each time with better information than the last.

Id.

should be granted. Accordingly, the request for leave is denied.⁵

Attorneys' Fees

As Jay is not the prevailing party with respect to the instant Motion, his request for attorneys' fees is denied. With respect to Pruco's request for attorneys' fees, the Court declines to grant such request because there is at least some case law supportive of Jay's position that leave to conduct a second deposition is not necessary where a new party has been added to the case or amended pleading filed. See Quality Aero Tech., Inc. v. Telemetrie Elektronik, GMBH, 212 F.R.D. 313, 319 (E.D.N.C. 2002) (declining to read Ameristar Jet Charter, Inc. v. Signal Composites, Inc., 244 F.3d 189 (1st Cir. 2001), "for the proposition that leave of court is necessary every time a second 30(b)(6) deposition is sought") (footnote omitted);⁶ see also

⁵ Although the Court has determined that Pruco should not be subjected to another Rule 30(b)(6) regarding the topics noticed in Jay's May 22, 2009, Notice of Deposition, the Court expresses no view as to whether information concerning such topics is discoverable by other means.

⁶ The Quality Aero Technology, Inc. v. Telemetrie Elektronik, GMBH, court reasoned that:

Rule 30(b)(6) depositions are different from depositions of individuals. That difference is confirmed by the Advisory Committee Notes to the 1993 amendments to the Federal Rules, which expressly state that for purposes of calculating the number of [] depositions in a case, a 30(b)(6) deposition is separately counted as a single deposition, regardless of the number of witnesses designated. Further, there is no aspect of the Rules which either restricts a party to a single 30(b)(6) deposition or restricts the allotted time for taking

Balivi Chem. Corp. v. JMC Ventilation Refrigeration, LLC, Civ. Nos. 07-0353-S-BLW, 07-0354-S-BLW, 2009 WL 800209, at *1 (D. Idaho Mar. 24, 2009) (“While individuals may only be deposed once without leave of court, corporate representatives designated under Rule 30(b)(6) have been treated differently by some courts.”) (citing Quality Aero Tech., Inc.) (internal citation omitted); Christy v. Pennsylvania Turnpike Comm’n, 160 F.R.D. 51, 53 (E.D. Pa. 1995) (denying plaintiff’s motion for protective order to prevent a second deposition after amended complaint had been filed adding several new parties and new allegations); id. (“newly added defendant has right to take deposition of plaintiff”) (citing Perry v. Kelly-Springfield Tire Co., 117 F.R.D. 425, 426 (N.D. Ind. 1987)).

Although Pruco argues that Ameristar Jet Charter is “direct and controlling law in this Circuit . . .,” Pruco’s Reply at 3, the Quality Aero Technology, Inc. court’s reading of the First Circuit’s opinion is not unreasonable. Jay’s possible reliance upon this reading weighs against the award of attorneys’ fees.

The Court also finds the dispute between counsel as to whether Pruco adequately complied with the requirement to meet and confer prior to filing the instant Motion troubling. See

a 30(b)(6) deposition.

Quality Aero Tech., Inc. v. Telemetrie Elektronik, GMBH, 212 F.R.D. 313, 319 (E.D.N.C. 2002).

Fed. R. Civ. 37(a). The fact that the Motion itself lacks the certification required by Rule 37(a) tips the scales against Pruco with respect to its request for attorneys' fees.⁷ Accordingly, Pruco's request for such fees is denied.

Conclusion

In summary, the Motion for Protective Order is granted. Jay L'Archevesque's Rule 30(b)(6) Notice of Deposition of Pruco is ruled invalid. His request for leave to conduct a second deposition of Pruco is denied. The requests of both Pruco and Jay for attorneys' fees are denied.

So ordered.

ENTER:

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
July 20, 2009

⁷ Although Pruco states in its memorandum that its counsel met and conferred with Jay's counsel, see Pruco Mem. at 4, Rule 37(a)(1) requires that "[t]he **motion must include a certification** that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action," Fed. R. Civ. P. 37(a)(1) (bold added).