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

RE MOTION TO STRIKE ERRATA CORRECTIONS

Before the Court is Plaintiff Pruco Life Insurance Company's Motion to Strike Eight Errata Corrections to Paul L'Archevesque's Deposition Testimony (Document ("Doc.") #121) ("Motion to Strike" or "Motion"). A hearing was conducted on September 8, 2009.

Background

This is an action to rescind a $15 million dollar life insurance policy (the "Policy"), insuring the life of Paul E. L'Archevesque ("Paul").[1] Plaintiff Pruco Life Insurance Company ("Pruco") alleges that Paul made material misrepresentations in the application for the Policy because he failed to disclose that

[1] There is a related action by The Lincoln National Life Insurance Company to rescind a $5 million dollar life insurance policy which it issued. See Lincoln Nat'l Life Ins. Co. v. Paul E. L'Archevesque, et al., CA 08 74 S. The policies were issued at or about the same time.

he had been treated for memory loss. See Second Amended Complaint (Doc. #71.) ¶¶ 30-33. Pruco further alleges that Paul obtained the Policy with the intent to sell it to a third-party investor in violation of Rhode Island's insurable interest statute, R.I. Gen. Laws ¶ 27-4-27. See id. ¶ 24.

On May 19, 2009, Pruco's counsel conducted a deposition of Paul. Paul's counsel, who also represents Defendant Jay L'Archvesque ("Jay"),[2] requested that Paul be able to "read and sign" his testimony. See Plaintiff Pruco Life Insurance Company's Memorandum of Law in Support of Motion to Strike Eight Errata Corrections to Paul L'Archvesque's Deposition Testimony ("Pruco's Mem.") at 2. On July 1, 2009, Paul certified an Errata Statement containing sixteen corrections to his testimony. See id., Attachment ("Att.") (Certification of Laurie E. Foster ("Foster Cert.")), Exhibit ("Ex.") A (Errata Statement). Pruco challenges eight of these corrections on the ground that they "contradict the clear answers, given under oath, to unambiguous questions without certifying a satisfactory explanation why the testimony should be changed." Motion at 1.

Discussion

Fed. R. Civ. P. 30(e) states:

(e) Review by the Witness; Changes.

(1) Review; Statement of Changes. On request by the

[2] Jay L'Archevesque ("Jay") is Paul L'Archevesque's son.

> deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:
>
> (A) to review the transcript or recording; and
>
> (B) **if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.**

Fed. R. Civ. P. 30(e) (bold added).

For each of the changes contained in the Errata Statement the reason given for the change is expressed in a single word: "Clarity." Foster Cert., Ex. A. Five of the changes concern whether Paul had an intent to sell the Policy at the time he obtained it:

Correction #11: Page 45, line 14

> Q. Did you apply for the policy with the intention of selling it in two years?
>
> A. Yes.
> *Correction: The only intent I had was, I had $20 million of life insurance at the time. I also knew I could sell the Policy at some point if I wanted to. I intended to keep the Policy if I got sick.*

Correction #12: Page 45, line 25

> Q. Did you always plan on selling the policy?
>
> A. Yes.
> *Correction: No.*

Correction #13: Page 46, line 4

Q. Did Jay know that you intended to sell the policy?

A. Yes.

Q. How did Jay know?

A. I told him.
Correction: I told him that I would be covered by $20 million of insurance and in a couple of years we could look into whether we would sell the Policy.

Correction #14: Page 65, line 25

Q. All right. At the time you filled out the application with Mr. Passananti, did you have an intention of having this policy sold?

A. Yes.
Correction: The only intent I had was, I had $20 million of life insurance at the time. I also knew I could sell the Policy at some point if I wanted to. I intended to keep the Policy if I got sick.

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Correction #16: Page 83, line 14

Q. You did, though, have an intention to sell the policies when you applied for them; isn't that right?

A. Yes.
Correction: The only intent I had was, I had $20 million of life insurance at the time. I also knew I could sell the Policy at some point if I wanted to. I intended to keep the Policy if I got sick.

Rule 30(e) permits a deponent to makes changes to the substance of his or her testimony by signing a statement listing

the reasons for the changes. Fed. R. Civ. P. 30(e); see also Bennett v. Kent County Mem'l Hosp., C.A. No. 07-163ML, 2009 WL 101851, at *2 (D.R.I. Jan. 14, 2009)(denying motion to strike changes which contradicted original response where deponent provided legitimate reason for the proposed changes, but granting motion as to a change for which no reason was provided); Reilly v. TXU Corp., 230 F.R.D. 486, 490 (N.D. Tex. 2005)(stating that Rule 30(e) "makes provision for changes in substance that are made for legitimate reasons, such as to correct a misstatement or honest mistake"); Crowe v. Marchand, C.A. No. 05-98 T, 2006 WL 5230014, at *1 (D.R.I. Aug. 17, 2006)(granting motion to strike errata sheet for, among other reasons, failure to include a statement explaining the reasons for making the changes).

Here, Paul seeks to change his answers of "[y]es" to five unambiguous questions (which were clearly intended to elicit a yes or no response) to either "[n]o" or to a multi-sentence response that fails to answer the question being asked or is confusing. The multi-sentence response makes no sense as to Corrections #11, #14, and #16 because at the time Paul applied for the Policy Paul did not have "$20 million of life insurance."[3] Allowing these three corrections would result in the replacement of clear answers (to unambiguous questions) with

[3] Counsel for Jay confirmed this fact at the hearing in response to a question from the Court.

responses that are either non-responsive or confusing. There is nothing unclear about Paul's original responses, and there is no suggestion from the answers to the questions which immediately precede and follow each of the requested corrections that there was any confusion or that Paul intended a different response.[4] Cf. Bennett v. Kent County Mem'l Hosp., 2009 WL 101851, at *2 (finding no bad faith although deponent sought to contradict his original response where it was apparent from deponent's testimony that he contended that something more should have been done in terms of treating his girlfriend). Yet, the stated reason for replacing clear answers with non-responsive or confusing ones is "[c]larity." In such circumstances, the Court is unable to find that the stated reason is legitimate. Accordingly, as to Corrections #11, #14, and #16, the Motion to Strike is granted.

Similarly, as to Correction #12 which seeks to replace the answer "[y]es" with "[n]o," there is nothing unclear about the original response. Yet, again the stated reason for the proposed change is "[c]larity." There is no explanation for the complete reversal of position other than "[c]larity."[5] Given that this

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[4] Later in the deposition Paul's counsel, through a series of leading questions, elicited responses similar to those contained in the proposed corrections. See Dep. Tr. at 78 79. However, when questioned again by Pruco's counsel, Paul reaffirmed that at the time he applied for the policies he had an intent to sell them. See id. at 83.

[5] Jay asserts that "the changes made in the errata corrections do not contradict the deposition transcript." Memorandum of Law in Support of Defendant Jay L'Archevesque's Opposition to Pruco Life

change bears directly on Pruco's claim that Paul obtained the Policy with the intent to sell it to a third-party, the Court is unable to find that the stated reason is legitimate. Accordingly, as to Correction #12, the Motion is granted.

With respect to Correction #13, the proposed change does not directly contradict the original answer. It arguably clarifies the answer by explaining that Paul did not explicitly tell Jay that when he (Paul) applied for the Policy, he intended to sell it. Rather, it explains that Paul only told Jay that "I would be covered by $20 million of insurance and in a couple of years we would look into whether we would sell the Policy" and that this is the basis for Paul's belief that Jay knew he intended to sell the Policy. As to this proposed change, the Court finds that the stated reason of "[c]larity," is a legitimate reason as it clarifies that Paul did not explicitly tell Jay when he purchased the Policy that he intended to sell it but only told him about the Policy and that they would look into selling it in a couple of years. Accordingly, as to Correction #13, the Motion is denied.

The next group of corrections concern questions which address whether Paul knew, prior to his application for life

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Insurance Company's Motion to Strike Eight Errata Corrections to Paul L'Archevesque's Deposition Testimony ("Jay's Mem.") at 2 n.1. The Court rejects this assertion at least as to the five changes concerning whether Paul had an intent to sell the Policy at the time he obtained it.

insurance, of his memory loss problem and had discussed it with his physicians.

Corrections #5 and #6: Page 29, lines 15 & 18

Q. Did you ever visit the doctor to discuss issues with memory loss?

A. Yes.

Q. You have visited doctors for that?

A. Yes.

Q. Okay. Do you recall what doctors you saw?

A. I saw Dr. Zak.
Correction: I saw Dr. Schlaug.

Q. Okay. And you discussed the memory loss with Dr. Zak?

A. Yes.
Correction: No.

Q. Okay. Did he prescribe you any medication for the memory loss?

A. You know, he had, he had me see a doctor down the hall from him.

Q. Okay. Do you recall what doctor he had you see?

A. No.

Jay argues that this correction is warranted because a few pages later in the deposition transcript, when being questioned about the same doctor, Paul "corrected himself to explain that he meant to refer to Dr. Schlaug, not Dr. Zak." Memorandum of Law in Support of Defendant Jay L'Archevesque's Opposition to Pruco

Life Insurance Company's Motion to Strike Eight Errata Corrections to Paul L'Archevesque's Deposition Testimony ("Jay's Mem.") at 2 (citing Deposition Transcript ("Dep. Tr.") at 33). The Court is not persuaded that Paul's correction on page 33 of the transcript also applies to his earlier testimony which is the subject of Corrections #5 and #6. The testimony Jay cites comes after a seven minute break in the deposition and at least three changes in the line of questioning (e.g., whether Paul kept Jay updated on his medical condition, whether Paul still drove, and whether Paul's wife came with him to doctor appointments). See Foster Cert., Ex. B (Dep. Tr.) at 30-33.

Even more significant, however, is the fact that Paul's medical records are consistent with his original testimony and inconsistent with Corrections #5 and #6. Paul saw Dr. Zak on December 19, 2005, and discussed problems with his short term memory. See Foster Cert., Ex. G (Excerpt of Dr. Zak's Deposition) at 28. Dr. Zak referred him to a neurologist. See id. Then, on December 27, 2005, Paul saw Dr. Douglas, a neurologist whose office is down the hall from Dr. Zak's. See id., Ex. H (Dr. Zak's address), Ex. I (Dr. Douglas's address). These visits occurred before Paul applied for the Policy on February 16, 2006.

There is no statement from Paul that he was mistaken when he testified that he discussed memory loss with Dr. Zak and that he

should have stated that he discussed it with Dr. Schlaug. The only proffered reason for this change is "[c]larity" even though the original answer was clear. Given that Paul's original testimony is consistent with the medical records, that the proposed change in testimony affects facts directly material to Pruco's causes of action, and that the only reason given for the change is "[c]larity," the Court is unable to find that the reason for the change is legitimate. Accordingly, as to Corrections #5 and #6, the Motion to Strike is granted.

The third correction concerns whether Paul kept Jay informed of his medical condition.

Correction #8: Page 31, Line 9

Q. Have you always kept your son updated --

A. Yes.

Q. -- with your medical condition? And when I say "son," I mean Jay L'Archevesque.

A. Yes.

Q. Okay. When Jay became a co-owner of Elmwood Dodge were you keeping him informed as to your medical condition.

A. Yes.
Correction: No.

In support of this correction, Jay's counsel cites the fact that Paul acknowledged at his deposition that he (Paul) was not confident about the time frame and sequence of events of things

that happened three years earlier, see Jay's Mem. at 4 n.3 (citing Dep. Tr. at 80), and asserts that Paul "was confused about the dates of when his son became a co-owner of Elmwood Dodge, which led him to change his answer to this question," id. at 4. However, Paul does not indicate in the Errata Statement that he was confused. The sole reason expressed for the correction is "[c]larity." As with other changes already considered by the Court, there is nothing unclear about the answer "[n]o" to a clear and unambiguous question. Furthermore, Pruco contends that:

> [T]he tactical purpose of this change is clear: Jay L'Archvesque signed the Policy representing that, to his knowledge, Paul L'Archvesque's answers to the application for the Policy were accurate. In light of this testimony, that representation would have been false.

Pruco's Mem. at 8.

Given that the correction affects a fact directly material to Pruco's causes of action and that the only reason given for it is "[c]larity," the Court is unable to find that the reason for the change is legitimate.[6] Accordingly, as to Correction #8, the Motion to Strike is granted.

Lastly, Jay raises in his objection to the Motion the contention that Paul was medically impaired at the time of the

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[6] As previously explained, in order for the Court to find that "[c]larity" constitutes a legitimate reason for the change, the Court would have to first determine that there is some lack of clarity in the answer, or the very least, the question at issue. That prerequisite is simply lacking here.

deposition and implies that this should influence whether the corrections sought are allowed. See Jay's Mem. at 5. In support of this argument Jay notes that at the outset of the deposition Paul's counsel stated that "[Paul] may not be competent to testify, based on his medical condition." Dep. Tr. at 7. The Court, however, considers the issue of whether Paul was competent to testify at his deposition to be a separate issue. Indeed, if there is a question about Paul's competency to be deposed, it also raises the question as to his competency to certify the Errata Statement. Accordingly, in ruling on the instant Motion, the Court has made no determination with respect to whether Paul was competent at his deposition.[7]

Conclusion

For the reasons stated above, the Motion to Strike is GRANTED as to Corrections #5, #6, #8, #11, #12, #14, and #16. The Motion is DENIED as to Correction #13.

So ordered.

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[7] Pruco contends that "[Paul] has waived any claim that he is incompetent because implicit in his Errata Statement is the fact that he read his testimony, supposedly recollected certain changes, communicated those to his counsel and signed his certification with an appreciation of the need to tell the truth." Plaintiff Pruco Life Insurance Company's Reply Memorandum of Law in Further Support of Motion to Strike Eight Errata Corrections to Paul L'Archevesque's Deposition Testimony ("Pruco's Reply") at 5 6. The Court expresses no opinion with respect to Pruco's waiver argument.

ENTER:

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
September 15, 2009