Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	
	)	
Continental Capital Investment Services, Inc., and Continental Capital Securities, Inc.,	)	Bankruptcy Adv. Pro. No. 03-3370 SIPA Liquidation
	)	
Debtors.	)	
	)	Hon. Mary Ann Whipple
Securities Investor Protection Corporation,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
Continental Capital Investment Services, Inc., et al.,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION REGARDING MOTION FOR SUMMARY JUDGMENT

The matter before the court in this broker-dealer liquidation proceeding involves claims filed by George R. Trombley ("Trombley"). The specific issue raised by the motion for summary judgment filed by the Securities Investor Protection Corporation ("SIPC") and the liquidating trustee is whether Trombley has a customer claim protected under the Securities Investor Protection Act, 15 U.S.C. § 78aaa, *et seq.* ("SIPA"), and is, therefore, entitled to share in the distribution of "customer property" in Debtors' liquidation proceeding and to advances on account of his claim from SIPC.

The court has jurisdiction over this proceeding under 15 U.S.C. § 78eee(b)(4). For the reasons that follow, the court will grant the motion for summary judgment filed by SIPC and the liquidating trustee.

PROCEDURAL BACKGROUND

On September 29, 2003, upon a Complaint and Application filed by SIPC against Continental Capital Investment Services, Inc., ("CCIS") and Continental Capital Securities, Inc., ("CCS") (collectively, "Debtors"), the United States District Court for the Northern District of Ohio entered an order finding that Debtors' customers are in need of the protections afforded under SIPA and appointing a trustee for Debtors' liquidation, thus commencing the liquidation proceeding of Debtors. Thomas S. Zaremba was appointed as the liquidation trustee ("Trustee"). The district court ordered that the case be removed to bankruptcy court for further proceedings in accordance with § 78eee(b)(4).

Under SIPA, all customer claims against Debtors must be filed with the Trustee. 15 U.S.C. § 78fff-2(a)(2). This court entered an order on November 20, 2003, directing the Trustee to provide notice to Debtors' customers and other creditors on or before December 5, 2003, of the procedure for filing claims in this case and notice in accordance with the provisions of 15 U.S.C. § 78fff-2(a)(3) that no claim will be allowed unless filed and received within six months from the date of the notice, that is, by June 5, 2004. [Doc. # 35 (Amended Notice), 36, p. 2 (Nov. 20 order); *see also* Doc. # 65, p. 2 (Status Report indicating that the required notice was mailed by December 5, 2003)]. The November 20, 2003, order also set forth, among other things, procedures for the resolution of claims. [Doc. # 36, p.6-7]. If the Trustee determines that a claim is not allowed, in whole or in part, he is required to notify the claimant in writing of such determination. [Doc. # 36, p.6]. Thereafter, the claimant is required within thirty days to file with the court an objection to the Trustee's determination. [*Id.* at 7].

Trombley timely filed with the Trustee a claim for cash in the amount of $200,000 that has been designated as claim number 259. [Doc. # 1005, Zaremba Aff., Ex. A]. On or about March 17, 2007, Trombley filed a second claim for securities consisting of twenty shares of stock in Continental Capital Corporation. [*Id.*, Ex. B]. By letter dated June 4, 2007, the Trustee notified Trombley that his claims were being denied. [*Id.*, Ex. C]. The Trustee concluded as to claim number 259 that the claim is for money loaned to Continental Capital Corporation, which is not a debtor in this proceeding, and that SIPA does not protect losses resulting from loans. [*Id.*, Ex. C, p. 1-2]. As to the March 17, 2007, claim, the Trustee denied the claim because it was received after the deadline for receipt of claims in this proceeding. [*Id.* p. 2]. Trombley filed with the court a timely objection to the Trustee's determination. [Doc. # 779]. The claims are now before the court on the motion for summary judgment filed by SIPC and the Trustee [Doc. # 1004], Trombley's opposition [Doc. # 1062], and SIPC's and the Trustee's reply [Doc. # 1090].

FACTUAL BACKGROUND

Debtors were subsidiaries of Continental Capital Corporation ("CCC"). [Doc. # 1005, Zaremba Aff., ¶ 3]. CCC is a separately incorporated entity and is not a debtor in this proceeding. [*See* Doc. # 746, Zaremba Aff., Ex. C].

Trombley's claim number 259 is based on what he describes in the proof of claim as a "cash loan" in the amount of $200,000 "as stated in the attached note." [Doc. # 1005, Zaremba Aff., Ex. A, p. C259-0002]. The promissory note attached to the claim is dated December 27, 2001, and is executed by William Davis as chairman and CEO of CCC. [*Id.* at C259-0007]. Also attached to the claim is a security agreement stating that CCC, "with respect to a loan made" by Trombley, grants Trombley a security interest in CCC's property. [*Id.* at C259-0008]. According to Trombley, he was approached by Davis in connection with the December 2001 transaction "for the purpose of providing funds to invest in an opportunity whereby Continental Capital would purchase Sky Financial," and Trombley then "would receive within a short period of time either the return of [his] investment with interest or an ownership interest, i.e. stock, [in] an entity to be formed which would own Continental Capital and Sky Investments." [Doc. # 1062, Trombley Aff. ¶ 4]. Trombley received neither. [*Id.*].

In connection with this transaction, Trombley delivered a check to William Faulkner who served at various times in executive capacities both with CCC and the Debtor entities. [*Id.* at ¶ 10; Adv. Proceeding No. 05-3318, Doc. # 29, Answer, ¶ 18].[1] The check was made payable at Davis' direction to CCC in the amount of $200,000. [Doc. # 1062, Trombley Aff. ¶¶ 10-11]. Trombley and his wife maintained a joint account with Debtor CCS through its clearing broker. [*See Id.* at ¶ 12; Doc. # 1091, Zaremba Suppl. Aff., ¶2]. According to Trombley, it was his "understanding" that Faulkner would deposit the check in that account "and then move the funds accordingly." [Trombley Aff. ¶ 12]. However, statements for the joint account for the quarters ending December 31, 2001, and March 31, 2002, show an account balance for the entire period of one cent. [Zaremba Suppl. Aff. ¶ 2 & attachments]. And neither the proof of claim nor the documentation attached thereto refer to Debtors or to any account at Debtors or at First Clearing Corporation, the clearing broker utilized by Debtors. [Zaremba Aff. ¶ 4-5 & Ex. A].

Trombley's March 2007 claim is based on an earlier transaction on October 8, 2001. On that date, he provided Davis a check made payable to CCC in the amount of $50,000 for the purchase of shares in

[1] The court takes judicial notice of the contents of its case docket. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990); *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1171-72 (6th Cir. 1979) (stating that judicial notice is particularly applicable to the court's own records of litigation closely related to the case before it).

CCC. Thereafter, he received a stock certificate evidencing his ownership of those shares. [*Id.* at ¶ 16; Zaremba Aff., Ex. B, p. 6].

LAW AND ANALYSIS

I. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, "and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). With respect to issues on which the nonmoving party bears the burden of proof, the burden on the moving party may be discharged by pointing out to the court that there is an absence of evidence to support the nonmoving party's case. *Id.* at 325. Where the moving party has met its initial burden, the adverse party "may not rest upon the mere allegations or denials of his pleading but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.*

II. Trombley Is Not A Customer Entitled To SIPA Protection

SIPA was enacted after a wave of brokerage house failures in the late 1960s in order to protect the assets of investors that are held by securities broker-dealers who become insolvent. *Sec. Investor Prot. Corp. v. Pepperdine Univ. (In re Brentwood Sec., Inc.)*, 925 F.2d 325, 326 (9th Cir. 1991). As explained by the Supreme Court:

> Customers of failed firms found their cash and securities on deposit either dissipated or tied up in lengthy bankruptcy proceedings. In addition to its disastrous effects on customer assets and investor confidence, this situation also threatened a 'domino effect' involving otherwise solvent brokers that had substantial open transactions with firms that failed. Congress enacted the SIPA to arrest this process, restore investor confidence in the capital markets, and upgrade the financial responsibility requirements for registered brokers and dealers.

Sec. Investor Prot. Corp. v. Barbour, 421 U.S. 412, 415 (1975).

SIPA affords limited financial protection to "customers" of an insolvent securities broker-dealer by,

among other things, giving said customers preference over general creditors in the distribution of a separate fund of customer property. *In re Bell & Beckwith,* 66 B.R. 703, 705 (N.D. Ohio 1986). In addition, SIPC, a non-profit private membership corporation created under SIPA,15 U.S.C. § 78ccc, maintains a reserve fund, 15 U.S.C. § 78ddd, from which it will advance funds, within certain limits, to pay allowable customer claims where an insolvent brokerage firm's customer property is insufficient to satisfy customer net equity claims, 15 U.S.C. § 78fff-3(a); *see In re New Times Sec. Servs., Inc.*, 371 F.3d 68, 72-73 (2d Cir. 2004). Not all investor losses qualify for SIPC protection. The fund administered by SIPC may not be used for payment of claims against the broker that do not fall within the narrow statutory scope of a "customer claim," with "customer" defined by SIPA as follows:

> any person . . . who has a claim on account of securities received, acquired, or held by the debtor in the ordinary course of its business as a broker or dealer from or for the securities accounts of such person for safekeeping, with a view to sale, to cover consummated sales, pursuant to purchases, as collateral security, or for purposes of effecting transfer. The term "customer" includes any person who has a claim against the debtor arising out of sales or conversions of such securities, and any person who has deposited cash with the debtor for the purpose of purchasing securities. . . .

15 U.S.C. 78lll(2). Claimants not entitled to customer status are relegated to sharing in the separate general estate with other general creditors of the defunct firm. 15 U.S.C. § 78fff-2(c)(1).

Courts have uniformly applied the definition of customer narrowly in order to carry out the clear legislative intent to protect those who invest in securities. *See, e.g., Stafford v. Giddens (In re New Times Sec. Servs., Inc.),* 463 F.3d 125, 127 (2d Cir. 2006); *Sec. Investor Prot. Corp. v. Wise* (*In re Stalvey & Assocs., Inc.*), 750 F.2d 464, 472 (5th Cir. 1985); *In re A.R. Baron,* 226 B.R. 790, 795 (Bankr. S.D.N.Y. 1995); *In re Klein, Maus & Shire, Inc.*, 301 B.R. 408, 418 (Bankr. S.D.N.Y. 2003)(collecting cases). Thus, "customers" include those who have entrusted securities to the brokerage in the ordinary course of its business and those who have deposited cash with the brokerage for the purpose of purchasing securities. *Focht v. Heebner (In re Old Naples Sec., Inc.*), 223 F.3d 1296, 1300 (11th Cir. 2000); *In re Brentwood Sec., Inc.*, 925 F.2d at 327. So long as such property is owed to the investor on the SIPA filing date, the investor has a "customer" claim. *Klein, Maus & Shire, Inc.*, 301 B.R. at 419. However, "SIPA does not protect customer claims based on fraud or breach of contract. The Act is designed to remedy situations where the loss arises directly from the insolvency of the broker-dealer." *In re Bell & Beckwith,* 124 B.R. 35, 36 (Bankr. N.D. Ohio 1990); *see also Stafford,* 463 F.3d at 127; *In re John Dawson & Assoc., Inc.*, 289 B.R. 654, 661 (Bankr. N.D. Ill. 2003); *Sec. Investor Prot. Corp. v. Oberweis Sec., Inc. (In re Oberweis Sec., Inc.),* 135 B.R. 842, 846 (Bankr. N.D. Ill 1991) (claims based on fraud or breach of contract are not considered part of a customer's protected net equity claim since damage would have occurred even if debtor had not

become insolvent).

Customer status is determined as of the filing date of a debtor's liquidation proceeding. *Stafford*, 463 F.3d at 127. "Claimants seeking 'customer' status under SIPA bear the burden of proving they fit within the statutory definition." *Ahammed v. Sec. Investor Prot. Corp. (In re Primeline Sec. Corp*.), 295 F.3d 1100, 1107 (10th Cir. 2002) (citing *Sec. Investor Prot. Corp. v. Wise (In re Stalvey & Assocs.)*, 750 F.2d 464, 472 (5th Cir.1985)); *see* 15 U.S.C. § 78fff-2(b) (requiring that the SIPC trustee "promptly discharge . . . all obligations of the debtor to a customer . . . insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee").

A. Claim No. 259 - December 2001 Transaction

Trombley claims customer status with respect to the December 2001 transaction based on his contention that he entrusted $200,000 to Debtor CCS for the purpose of purchasing securities. He attempts to defeat the Trustee's motion by arguing that CCC was not separate and distinct from the Debtor corporations and that the principals of the companies intended that CCC and Debtors appear to be one and the same. He further argues that it was his "understanding" that the $200,000 check, made payable to CCC at Davis' direction, would be deposited in his account with CCS "and then transferred per the terms of the agreement with cash or securities eventually to be placed within the account." [Doc. # 1062, p. 4]. In support, Trombley points to the fact that he delivered the check to Faulkner, an agent of Debtors. The court nevertheless finds his argument flawed in several respects.

First, while it may be true that CCC and Debtors shared similar names, each including "Continental Capital" as part of the name, and had at least some common management, it is undisputed that CCC is a separately incorporated, non-debtor entity. Moreover, Trombley had prior dealings with both CCC and CCS, having purchased stock in CCC, having received a stock certificate evidencing his ownership, and having opened an account with CCS. The Trustee has presented account statements for Trombley's CCS account showing no transactions contemporaneous to the $200,000 loan to CCC. In any event, Trombley's "understanding" as to where the funds would be deposited is not determinative of his "customer" status, and insufficient to create any genuine issue of material fact that he deposited funds with Debtors.

The facts in this case are similar to those in *In re Brentwood Securities, Inc.* In that case, investors were approached by an officer of Comstock with an investment opportunity to purchase stock in the company. The Comstock officer was also an officer of the broker-dealer at which the investors had accounts. The investors brought checks made payable to Comstock to the broker's office for the purchase of shares of Comstock but never clarified whether they were dealing with the individual in his capacity as an officer of Comstock or as a broker for the purchases. *In re Brentwood Sec., Inc.*, 925 F.2d at 327-28.

Although the investors assumed the transactions were conducted through their brokerage accounts, the court found that the broker had no role in the transaction and that the investors were not "customers" under SIPA. *Id.* at 328. The court explained:

> A straightforward application of the statutory definition of customer leads to the conclusion that [the investors] do not have legitimate claims against the SIPC trust fund. To recover they must establish that they entrusted either cash or securities to Brentwood prior to its insolvency; they did neither. Brentwood was not holding their securities because Comstock never issued any securities for Brentwood to hold. Nor was Brentwood holding their cash at the time of insolvency, or at any other time, for the simple reason that [the investors] made their checks out directly to Comstock. Comstock endorsed and deposited the checks; Brentwood never held the funds. In short, as far as the record discloses, Brentwood was not involved in the transactions at all.

Id.

In this case, Trombley has failed to present any evidence from which the court could find that Debtors were involved in the December 2001 transaction. There is no evidence that any funds were deposited into the account maintained by Trombley and his wife with CCS during the relevant time period. The account statements for the relevant time periods for that account show a balance of one cent for the entire period. The mere fact that he had an account with CCS is not determinative of his customer status without a showing that these particular funds were deposited into that account. *See In re Stalvey & Assoc., Inc.*, 750 F.2d at 471 (explaining that "customer status in the course of some dealings with a broker will not confer that status upon other dealings . . . unless those other dealings also fall within the ambit of the statute"); *Stafford*, 463 F.3d at 130. Both Trombley's proof of claim and the documentation submitted in support of his claim state that the $200,000 was a loan to CCC. And Trombley made the check payable to CCC, which is not a debtor in this proceeding. *See In re Brentwood Sec., Inc.,* 925 F.2d at 328 (finding that the debtor was not holding the claimants' cash at any time since they made their checks out directly to the issuer of the stock purchased).

The court recognizes that whether a claimant "deposited cash with the debtor" does not depend solely on to whom the check was made payable or to whom it was delivered. *See Focht v. Heebner (In re Old Naples Sec. Inc.),* 223 F.3d 1296, 1302 (11th Cir. 2000). Rather, the relevant inquiry is whether the debtor brokerage firm actually received, acquired or possessed the claimant's property. *Id.* at 1302, 1303-04 (finding the debtor brokerage acquired control over all of the claimants' funds where the claimants' checks were made payable to a related entity and not the debtor but where the funds were used by or for the debtor to pay its expenses). Here, the checks were not made payable to CCS, and there is no evidence that Debtors ever deposited the $200,000 check in an account over which Debtors had any control or that they ever even

had the ability to do so.

Second, Trombley's argument acknowledges that even if the $200,000 was deposited in his CCS account, he anticipated that it would be transferred out of the account under the terms of his agreement with CCC. He does not identify any factual basis for his articulated belief that CCS still owes him $200,000 as of the date of the SIPA liquidation filing. As the Trustee correctly argues, if Trombley deposited the funds in order to acquire a promissory note from CCC, then he got what he paid for in 2001, regardless of where the money was deposited. Even when a debtor entity is involved as the borrower, "[a] loan transaction that is unrelated to trading activities in the securities market does not qualify for SIPA protection." *Stafford,* 463 F.3d at 128. Non-debtor CCC's default in repayment of the promissory note simply resulted in a breach of contract and, based on Trombley's affidavit, the subsequent breach of another alleged oral contract as to how his loan to CCC would otherwise be repaid. Losses due to bad deals, fraud and breach of contract are not protected customer claims. *In re Bell & Beckwith*, 124 B.R. at 36; *see also Stafford,* 463 F.3d at 127; *In re John Dawson & Assoc., Inc.*, 289 B.R. at 661; *In re Oberweis Sec., Inc.*, 135 B.R. at 846 (claims based on fraud or breach of contract are not considered part of a customer's protected net equity claim since damage would have occurred even if debtor had not become insolvent); *In re Brentwood Securities*, Inc., 925 F.2d at 330.

Finally, to the extent that Trombley's argument is that, by representations of Davis and/or Faulkner, he was fraudulently induced to deliver the $200,000 check, such a claim is likewise not entitled to SIPA protection and he must look to the general estate of Debtors for any recovery. *See In re Bell & Beckwith*, 124 B.R. at 36.

Trombley has failed to set forth facts showing that there is a genuine issue for trial as to whether cash was deposited with CCS so as to confer customer status on him within the meaning of § 78lll(2). As such, and because the parties have not adequately addressed the issue, the court does not separately address the Trustee's argument that the promissory note purchased by Trombley is not a "security" within the meaning of SIPA. *See Reeves v. Ernst & Young*, 494 U.S. 56, 65-67 (1990) (stating that a note is presumed to be a "security" and setting forth the "family resemblance" test to determine whether that presumption is rebutted); *Bass v. Janney Montgomery Scott, Inc.*, 210 F.3d 577, 584-85 (6th Cir. 2000) (applying the family resemblance test in determining that the promissory notes were not securities).

B. Stock Purchase Transaction on October 8, 2001

On October 8, 2001, Trombley provided a check made payable to CCC in the amount of $50,000 for the purchase of shares of CCC stock. Although he submitted a claim stating that Debtors owe him twenty shares of CCC stock, he concedes that he has in fact received the stock certificate evidencing his

ownership of those shares. The fact that these shares are now worthless results in an unprotected market loss. *See Sec. and Exchange Comm'n v. Albert & Maguire*, 560 F.2d 569, 572 (3d Cir. 1977) (explaining that SIPA was enacted for the protection of brokerage customers against a broker's insolvency, but "not against the vagaries of the market"). In any event, Trombley's claim for the stock was not submitted until March 17, 2007. The bar date for filing customer claims in this proceeding was June 5, 2004. Thus, the Trustee properly denied this claim as untimely. *See In re Blinder Robinson & Co., Inc*., 124 F.3d 1238, 1243 (10th Cir. 1997)('six month time-bar contained in §78fff-2(a)(3) of SIPA is mandatory and absolute").

CONCLUSION

SIPC and the Trustee having pointed out the absence of evidence in the record to support Trombley's claims to customer status under SIPA and Trombley having failed to show the existence of evidence from which the court could find in his favor at and creating a genuine for trial, the court will grant the motion for summary judgment filed by SIPC and the Trustee. The court will enter a separate order in accordance with this memorandum of decision.