
Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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

**MEMORANDUM OF DECISION AND ORDER REGARDING MOTION FOR RULE 2004 EXAMINATION**

This case is a liquidation of broker-dealers Continental Capital Investment Services, Inc. ("CCIS") and Continental Capital Securities, Inc. ("CCS") (collectively "Debtors") under the Securities Investor Protection Act , 15 U.S.C. § 78aaa, *et seq.* ("SIPA"). The matter before the court is a motion under Rule 2004(a) of the Federal Rules of Bankruptcy Procedure ("Motion")

[Doc. # 1226] filed by SIPA trustee Thomas S. Zaremba ("Trustee"), seeking an order authorizing him to serve a subpoena requiring the production of documents on law firm Shumaker, Loop & Kendrick ("SLK"), SLK's opposition [Doc. # 1233], and the Trustee's reply [Doc. # 1253].

The court has jurisdiction over this SIPA liquidation proceeding under 15 U.S.C. § 78eee(b)(4). For the reasons that follow, the Trustee's motion will be granted in part and denied in part.

## BACKGROUND

Before commencement of this liquidation proceeding, SLK served as legal counsel for Debtors, Debtors' non-debtor parent company Continental Capital Corporation ("CCC"), and certain non-debtor related entities, including Continental Capital Advisors, Inc. ("CCA"), Continental Capital Merchant Bank ("CCMB") (collectively "the CCCompanies"), Americus,[1] Active Leisure, and Interactive Video Education System ("IVES"). During the course of SLK's representation of these companies, William Davis ("Davis"), the former President, Chairman and CEO of CCC and an investment advisor with Debtors, engaged in a Ponzi scheme that included mail fraud, bank fraud and theft and that resulted in the loss of millions of dollars for customers of Debtors and, eventually, Debtors' liquidation under SIPA. Davis was convicted on multiple counts of an indictment, including sixteen counts of mail fraud that the indictment alleges he engaged in from as early as 1996 to March 2003. [*See United States v. Davis*, Case No. 05CR744 (N.D. Ohio 2007) (Amended Judgment [Doc. # 83] and Indictment [Doc. # 1])].

In 2006, the Trustee served three Rule 2004 subpoenas on SLK,[2] seeking all documents that relate or refer to CCC, CCA or CCMB, and billing and payment records for the CCCompanies and various other entities, including Americus, Active Leisure, and IVES. SLK, in turn, produced some documents but declined to produce others, principally on the grounds of attorney-client privilege and because the Trustee has sued SLK in an adversary proceeding ("the SLK adversary"). In the adversary complaint in that proceeding, the Trustee alleges not only that hundreds of payments received on account of invoices it sent to various entities were constructively fraudulent transfers but also that the transfers were made with the actual intent to hinder, delay or defraud creditors of

[1] The court's reference to "Americus" refers, as does the Trustee's proposed Rule 2004 subpoena, to any client of SLK related in any way to William Davis whose name includes "Americus" or "Americus Communications." [*See* Doc. # 1226, Attachment A to Ex.A].

[2] The Trustee served these subpoenas without filing a motion under Rule 2004(a) requesting an order authorizing him to do so.

Debtors. [Adv. Pro. No. 06-3505, Doc. # 1, ¶¶ 28-48]. He also alleges various wrongdoings by Davis and others acting with him or at his direction, including investing customer funds in unsuitable and/or illegal securities of CCC affiliates and portfolio companies in which Davis and others had an interest and developing a scheme calculated to make the illegal investments appear legitimate, [*Id.* at ¶¶ 15-18], and that "SLK attorneys whose identities are currently unknown . . . committed wrongful acts and omissions that arise out of the same conduct, transactions or occurrences asserted herein," that SLK provided legal advice relating to the scheme to make illegal investments appear legitimate, issued an opinion on the "legality of investing Customer Funds in promissory note transactions," provided legal services regarding "how to handle and/or to defend Clients against Customers demanding the return of their investments," supervised the gathering of information responsive to an investigation by the National Association of Securities Dealers and prepared the written response thereto. [*Id.* at ¶¶ 19-22].

On June 27, 2008, the court denied a motion filed by the Trustee to compel production of the documents requested under the three 2004 subpoenas. [*See* Doc. # 1106]. In doing so, the court applied the "pending proceeding" rule, which prevents a party from using Rule 2004 to circumvent the procedural safeguards of the discovery process provided in the Federal Rules of Civil Procedure as applicable in an adversary proceeding or contested matter. [*See Id.* at 6]. The court noted that this limitation on the use of Rule 2004 applies only to discovery regarding issues raised in the related adversary proceeding. [*Id.*]. The court, at that time, found no meaningful way to differentiate whether and to what extent documents requested in the three subpoenas would not relate to the allegations in the SLK adversary complaint and, therefore, denied the motion "without prejudice to a subsequent motion or motions seeking authorization under Rule 2004 for investigatory activities appropriate in time and scope given the status of the SLK adversary proceeding." [*Id.* at 8-9]. In the June 27 decision, the court also made certain rulings regarding waivers of the attorney-client privilege for the companies to which the requested discovery related. SLK has appealed to the District Court from that portion of the court's decision regarding the burden of proving the effectiveness of privilege waivers signed by Davis, which includes waivers with respect to Americus, Active Leisure and IVES. That appeal is pending.

After entry of the court's June 27 decision, the Trustee served on SLK his first set of requests for production of documents in the adversary proceeding, requesting all of the documents that he sought in the three earlier Rule 2004 subpoenas. [*See* Doc. # 1233, Ex. A]. SLK objected that the

requests were overbroad and not tailored to seek information relevant to the Trustee's complaint. Nevertheless, with the exception of documents withheld based on a work-product objection, SLK has produced CCC, CCA and CCMB documents limited in time from June 1, 1999, through August 25, 2003, apparently based on a statute of limitations defense. [*See* Doc. # 1233, Ex. C, pp. 25-26 and Ex. H]. In a second set of requests for production of documents, the Trustee requests all client files relating to Americus, Active Leisure and IVES.

The Trustee now seeks pursuant to the Rule 2004 subpoena that is the subject of the instant motion essentially all of the documents sought in the SLK adversary that have not yet been produced, specifically, (1) all documents that relate or refer to Continental Capital Corporation ("CCC"), Continental Capital Advisors ("CCA") and Continental Capital Merchant Bank ("CCMB") that have not already been produced, and (2) the contents of all files "generated during or related to" SLK representation of Americus, Active Leisure, and IVES. The Trustee's request with respect to all of the documents is without regard to any time period.

**LAW AND ANALYSIS**

In moving for an order authorizing the Rule 2004 subpoena, the Trustee argues that the requested discovery is necessary to fulfill his statutory duties under SIPA and, in particular, to investigate any potential fraud claims against SLK. Acknowledging that he is pursuing discovery that parallels the discovery sought in the adversary proceeding against SLK, the Trustee contends that, to the extent the documents are not relevant to the adversary complaint, he is entitled to obtain production of them in this liquidation proceeding.

SLK, for its part, argues that the court's June 27, 2008, order denying the Trustee's motion to compel forecloses Rule 2004 as an avenue for seeking discovery from SLK. It contends that the Trustee's Rule 2004 discovery seeks to end-run SLK's objections to discovery under the Federal Rules of Civil Procedure applicable in the SLK adversary proceeding and that discovery should be on a level playing field – the Trustee should not provide discovery under one set of rules and obtain it under another. SLK also objects to the Trustee's document request for *all* documents regardless of any time period as being overly broad and unduly burdensome. Finally, SLK argues that the court's decision regarding the Trustee's request for documents relating to Americus, Active Leisure and IVES should await resolution of the attorney-client privilege issues on appeal.

Initially, the court rejects SLK's argument that the court's previous order denying the Trustee's motion to compel forecloses any discovery from it under Rule 2004 in this proceeding.

The court's order denying the motion without prejudice to a subsequent motion seeking authorization under Rule 2004 for investigatory activities was based on application of the "pending proceeding" rule and its finding that, *at that time*, there was no meaningful way to determine whether the requested documents were related to the SLK adversary complaint. The court noted, however, that "Rule 2004 discovery regarding *unrelated* issues is not procedurally improper simply because there is an adversary proceeding pending." [Doc. # 1106, p. 6 (citing *In re Bennett Funding Group, Inc.*, 203 B.R. 24, 29 (Bankr. N.D.N.Y. 1996)]. Since that time, the Trustee has conducted discovery in the SLK adversary seeking the same documents and SLK has objected to the production of at least some of the requested documents on relevancy grounds. To the extent that the documents are not relevant to the SLK adversary, the "pending proceeding" rule does not preclude their discovery in this liquidation proceeding through Rule 2004.

The court also rejects SLK's argument that authorization for the Trustee's requested document production be denied in order to maintain discovery on a level playing field. The Trustee wears a different hat in a related adversary proceeding as compared to the SIPA liquidation proceeding. In the former, he is a plaintiff pursuing specific claims on behalf of the debtor's estate. In the latter, the Trustee must, among other things, investigate any possible causes of action available to the estate. *See* 15 U.S.C. § 78fff-1(d). Thus, while the discovery rules under the Federal Rules of Civil Procedure must direct discovery in the SLK adversary, as discussed below, SIPA imposes statutory duties on the Trustee and must govern the Trustee's investigatory activities to the extent that they do not relate to the SLK adversary. SLK's ability to defend against the claims in the SLK adversary is not impaired under this scheme, and the Trustee gains no advantage in prosecuting those claims. This scenario stands in contrast to cases cited by SLK where the parties seeking discovery under Rule 2004 were attempting to use such discovery solely to circumvent the discovery rules applicable in a related proceeding and not for the purpose of asserting their rights as parties in interest in the underlying bankruptcy case. *See In re Enron Corp.*, 281 B.R. 836, 840-45 (Bankr. S.D.N.Y. 2002); *2436 Plainfield Ave., Inc. v. Twp. of Scotch Plains (In re 2435 Plainfield Ave., Inc.)*, 223 B.R. 440, 456 (Bankr. D.N.J. 1998).

Nevertheless, while Rule 2004 examinations "are broad and unfettered" and can legitimately be conducted in the nature of fishing expeditions, *see In re Enron Corp.*, 281 B.R. at 840, they are not without any limits. Rule 2004(a) states, "[o]n motion of any party in interest, the court may order the examination of any entity." The scope of such examination must relate "to the acts,

conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate. . . ." Fed. R. Bankr. P. 2004(b); *see* 15 U.S.C. § 78fff(b) (providing that to the extent consistent with SIPA, "a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under chapter 1, 3, and 5 and subchapter I and II of chapter 7 of Title 11"). Similarly, a SIPA trustee is required by statute to –

> (1) as soon as practicable, investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business, and any other matter, *to the extent relevant to the liquidation proceeding*, and report thereon to the court;
>
> (2) examine, by deposition or otherwise, the directors and officers of the debtor and any other witnesses concerning any of the matters referred to in paragraph (1);
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> (3) report to the court any facts ascertained by the trustee with respect to fraud, misconduct, mismanagement, and irregularities, and to any causes of action available to the estate; and
>
> (4) as soon as practicable, prepare and submit, to SIPC and such other persons as the court designates and in such form and manner as the court directs, a statement of his investigation of matters referred to in paragraph (1).

15 U.S.C. § 78fff-1(d) (emphasis added).

The court interprets these provisions as imposing a requirement limiting the Trustee's investigatory power to matters "to the extent relevant to the liquidation proceeding." Moreover, as the permissive language of Rule 2004(a) suggests, the court may exercise discretion in granting a request for a 2004 examination. *See In re Enron*, 281 B.R. at 840.

In this case, the Trustee seeks all documents relating to the named companies without regard to any particular time period. The requested documents date as far back as 1984. In connection with discovery relating to the SLK adversary, SLK has, with the exception of documents withheld based on a work-product objection, produced documents relating to CCC, CCA and CCMB limited in time from June 1, 1999, through August 25, 2003. The Trustee argues that he needs all of the documents requested, regardless of time, in order to assess the Ponzi scheme devised by Davis that resulted in Debtors' financial demise, to fulfill his statutory duties under SIPA and, in particular, to investigate any potential fraud claims against SLK. *In re Enron*, 281 B.R. at 840 (party in interest may use Rule 2004 to ascertain whether wrongdoing has occurred). However, he has not demonstrated how review of documents as old as 1984 will have any relevancy to this liquidation proceeding.

According to the indictment filed in Davis's criminal case, he devised his scheme to defraud

in or about 1996. Based on the indictment, the court finds 1995, which is "in or about 1996" in the court's view, to be a reasonable time from which the Trustee might expect to obtain documents relevant to this liquidation proceeding. In light of SLK's objection to production of these documents in the context of the SLK adversary based on relevancy, the court will authorize the Trustee to serve on SLK the requested Rule 2004 subpoena with respect to non-debtors CCC, CCA and CCMB documents but will limit the relevant time period to dates from January 1, 1995, forward. Requiring SLK to produce documents from earlier than 1995, and to undertake the privilege and work product review of those documents necessary before their production, will impose a burden that has not been justified as being relevant to this proceeding. *See In re Fearn*, 96 B.R. 135, 138 (Bankr. S.D. Ohio 1989) (finding that a Rule 2004 examination "should not be so broad as to be more disruptive and costly to the party sought to be examined than beneficial to the party seeking discovery.").

With respect to documents relating to Americus, Active Leisure and IVES, which documents are also sought in the SLK adversary, the court agrees that such discovery should await resolution of the privilege issues relating to those documents. Specifically, it should await a determination of the validity of the Davis waivers of attorney-client privilege with respect to those companies, the burden of proof of which is the subject of an appeal pending in the District Court. Until that time, it is not clear to what extent the documents are protected by such privilege.

**THEREFORE,** for the foregoing reasons, good cause appearing,

**IT IS ORDERED** that the Trustee's Motion [Doc. # 1226] be, and hereby is, **GRANTED** to the extent it seeks authorization to serve a Rule 2004 subpoena on Shumaker, Loop & Kendrick, LLP, requiring the production of all documents that relate or refer to Continental Capital Corporation, Continental Capital Advisors and Continental Capital Merchant Bank that have not already been produced and were created or received during the time period from January 1, 1995, forward, and is otherwise **DENIED.**