UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MARK S. WALLACH,
Trustee,

Appellant,

v.

GERALD A. BUCHHEIT, JR.,

Appellee.

DECISION AND ORDER

1:13-CV-00583 EAW

INTRODUCTION

Appellant Mark S. Wallach ("Appellant" or "Trustee") appeals from a Judgment After Trial (Dkt. 1-18) entered by the Honorable Carl L. Bucki, Chief United States Bankruptcy Judge for the Western District of New York. (Dkt. 3). Appellee Gerald L. Buchheit ("Appellee") has filed a cross-appeal. (Dkt. 4).

FACTUAL BACKGROUND

Appellee is the sole shareholder and principal of Northstar Development Corp. ("Northstar"), a New York corporation incorporated on April 15, 1996. (Dkt. 1-11 at ¶¶ 1-2). On February 21, 2008, Northstar filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Western District of New York. (*Id.* at ¶ 3). Appellant was appointed the Chapter 7 trustee. (*Id.* at ¶ 4).

Prior to August 18, 2006, Northstar was the owner of real property, improvements, and fixtures known as the Statler Towers, located at 107 Delaware Avenue, Buffalo, New

York. (*Id.* at ¶ 5). On August 18, 2006, Northstar conveyed its title to the Statler Towers to BSC Development BUF, LLC ("BSC Development"). (*Id.* at ¶ 6).

On or about October 22, 1992, Appellee transferred $1 million to York Statler, Inc. ("York Statler") and One W. Mohawk, Ltd. ("One W. Mohawk"), for the purpose of enabling York Statler to purchase the Statler Towers and to enable One W. Mohawk to purchase the nearby parking lot. (*Id.* at ¶ 8). In return for the transfer of $1 million, York Statler, One W. Mohawk, John Arcadi, Charles A. Goldsmith, Dharam P. Malik, and Zane Sexsmith executed a Promissory Note and Pledge Agreement dated October 22, 1992. (*Id.* at ¶ 9).

On October 22, 1992, York Statler acquired title to the Statler Towers by a Referee's Deed made by Richard Krieger for Niagara Square Associates to York Statler, which was recorded on October 23, 1992. (*Id.* at ¶ 11). After October 22, 1992, Appellee became one of several shareholders in York Statler. (*Id.* at ¶ 14).

On about November 22, 1993, York Statler and One W. Mohawk executed and delivered a $1 million Amended Promissory Note payable on demand to Appellee, together with an interest rate of 10% per annum. (*Id.* at ¶ 15). To secure the Amended Promissory Note, York Statler and One W. Mohawk executed and delivered a mortgage dated November 22, 1993, granting a secured lien on the Statler Towers including the real estate, improvements, and fixtures, and on the parking lot, in favor of Appellee. (*Id.* at ¶ 17). The November 22, 1993 mortgage was recorded with the Erie County Clerk on November 24, 1993. (*Id.* at ¶ 19).

On January 22, 1996, One W. Mohawk merged into York Statler, and the surviving corporation in the merger was York Statler. (*Id.* at ¶ 20). Subsequently on November 9, 1998, York Statler merged with Northstar, and the surviving corporation was Northstar. (*Id.* at ¶ 21).

On September 29, 1999, Appellee, as the sole director of Northstar, executed a Written Consent of Director. (*Id.* at ¶ 22). Appellee executed a second Written Consent of Director on that date, which included a Consent of Shareholder. (*Id.* at ¶ 24). On September 29, 1999, Northstar executed a Demand Promissory Note in favor of Appellee, in the amount of $468,383.40, payable on demand, together with ten percent interest. (*Id.* at ¶ 26).

Thereafter, on September 17, 2004, Appellee, as sole director and shareholder executed a Unanimous Written Consent of the Sole Director and Sole Shareholder Without a Meeting. (*Id.* at ¶ 28). On September 22, 2004, Northstar executed a Replacement Demand Note in favor of Appellee (*id.* at ¶ 30), and a Demand Note in favor of Appellee, for $957,698.55 (*id.* at ¶ 31).

As noted above, Northstar sold the Statler Towers to BSC Development on August 18, 2006. (*Id.* at ¶ 33). Northstar was insolvent on the day before the August 18, 2006 closing of the sale, and at all times thereafter. (*Id.* at ¶ 34). The purchase price of the sale of the Statler Towers from Northstar to BSC Development was $3,500,000, of which $300,000 was paid by deposit. (*Id.* at ¶ 36). The disbursements at the closing included disbursements to Appellee in the amounts of $59,567.54 and $749,852.22. (*Id.* at ¶ 37). At the closing, Appellee delivered a Discharge of Mortgage of the $1,000,000 mortgage

by York Statler and One W. Mohawk, dated November 22, 1993. (*Id.* at ¶ 38). Also at the closing, Appellee delivered a Discharge of Mortgage of the $1.2 million mortgage made by Northstar to M&T Real Estate Trust, and assigned to Appellee by Assignment of Mortgage dated June 23, 2006 and recorded July 23, 2006. The Discharge of Mortgage was recorded on August 18, 2006. (*Id.* at ¶ 40).

The law firm of Duke, Holzman, Yeager & Photiadis ("Duke Holzman") represented Northstar at the closing of sale of the Statler Towers to BSC Development. (*Id.* at ¶ 42). By letter dated August 23, 2006, from Gregory P. Photiadis, Esq., Duke Holzman transmitted a client trust check to Appellee in the amount of $89,401.31, representing that it was the net amount of the purchase deposit for the sale of the Statler Towers after paying past due utilities and legal fees. (*Id.* at ¶ 43).

Prior to August 18, 2006, Northstar engaged Wolfgang & Weinmann to challenge the tax assessments for the 2005-2006 and 2006-2007 calendar year. (*Id.* at ¶ 45). By letter dated February 13, 2007, Wolfgang & Weinmann transmitted to Appellee three checks representing real estate tax refunds, including: (1) $51,883.37 by attorney trust check payable to Appellee; (2) $2,050.10 from the Buffalo Sewer Authority payable to Northstar; and (3) $4,474.86 from the County of Erie payable to Northstar. (*Id.* at ¶ 46). Shortly thereafter, the checks payable by the Buffalo Sewer Authority were deposited by Northstar and the proceeds, totaling $6,524.96, were paid to Appellee by check dated February 16, 2007. (*Id.* at ¶ 48). Northstar then issued the following checks to Appellee:

(1) on September 1, 2006, Northstar issued check no. 1286 at Appellee, in the amount of $6,642.52;

(2) on October 25, 2006, Northstar issued check no. 1289 to Appellee, in the amount of $15,000;

(3) on October 27, 2006, Northstar issued check no. 1290 to Appellee in the amount of $2,434.85;

(4) on November 21, 2006, Northstar issued check no. 1291 in the amount of $7,708.90;

(5) on December 12, 2006, Northstar issued check no. 1293 to Appellee in the amount of $6,211.37;

(6) on January 3, 2007, Northstar issued check no. 1293 to Appellee in the amount of $5,849.98; and,

(7) on March 7, 2006, Northstar issued check no. 1295 to Appellee, in the amount of $260.

(*Id.* at ¶¶ 50-56).

Contract Specialists International, Inc. ("Contract Specialists") provided janitorial services to the Statler Towers prior to August 18, 2006, and was a creditor of Northstar on August 18, 2006. (*Id.* at ¶ 57). On June 29, 2007, judgment was entered in New York State Supreme Court, Erie County, in favor of Contract Specialists and against Northstar in the amount of $38,839.67 with interest of $2,949.60 and costs in the amount of $499, for a total of $42,288.36. (*Id.* at ¶ 58). Contract Specialists did not receive satisfaction of its judgment.

On November 1, 2007, Contract Specialists filed a complaint against Appellee and Northstar, in New York Supreme Court, Erie County, asserting causes of action to avoid transfers and fraudulent conveyances. (*Id.* at ¶¶ 60-61). On March 26, 2008, the Trustee removed the case to the Bankruptcy Court. (*Id.* at ¶ 62). The Trustee filed a Second Amended Complaint on February 24, 2010 (*id.* at ¶ 63), and on March 10, 2010,

Appellee filed an answer and a counterclaim (*id.* at ¶ 64). On March 23, 2010, the Appellant filed a reply to Appellee's counterclaim. (*Id.* at ¶ 65).

PROCEDURAL HISTORY

The case was removed to the United States Bankruptcy Court for the Western District of New York on March 26, 2008. (Dkt. 1-2). Plaintiff-appellant filed an amended complaint on July 1, 2009 (Dkt. 1-4), and a second amended complaint on February 24, 2012 (Dkt. 1-7). Defendant-appellee filed a counter-claim on July 24, 2009. (Dkt. 1-5). The Trustee sought two forms of relief: (1) the avoidance of transfers to the Appellee; and (2) the subordination of Appellee's claims to the claims of other unsecured creditors.

The Bankruptcy Court held a hearing on the parties' claims on May 24-25, 2011. (Dkt. 1-14 & 1-15). The Bankruptcy Court issued a Decision and Order on February 10, 2012. (Dkt. 1-16 & Dkt. 1-17). With respect to the Trustee's request to avoid certain transfers to the Appellee, the Bankruptcy Court granted judgment to the Trustee "only for the amount of accrued interest from the date of demand to the date of payment of the principal sum of $102,515.95," and granted judgment to Appellee "as to all other demands in the trustee's complaint." (Dkt. 1-16 at 15). With respect to the request for subordination, the Bankruptcy Court granted the Trustee's request to equitably subordinate Appellee's existing claim to all other unsecured claims. (*Id.*). A Judgment After Trial was issued on February 12, 2013. (Dkt. 1-18).

Appellant filed his notice of appeal on June 4, 2013 (Dkt. 1), and Appellee filed a cross-appeal on March 7, 2013 (Dkt. 1-20). Appellant filed a brief in support of his

appeal on June 19, 2013. (Dkt. 3). Appellee filed his response brief and a brief in support of a cross-appeal on July 3, 2013. (Dkt. 4). Appellant filed a reply brief on July 17, 2013 (Dkt. 5), and Appellee filed a reply brief in further support of its cross-appeal on July 31, 2013. (Dkt. 6). The case was transferred to the undersigned on January 27, 2015. (Dkt. 7).

DISCUSSION

I. Standard of Review

"District courts are vested with appellate jurisdiction over bankruptcy court rulings pursuant to 28 U.S.C. § 158(a)." *In re Plumeri*, 434 B.R. 315, 327 (S.D.N.Y. 2010). On appeal, the Court "may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings." Fed. R. Bankr. P. 8013. "Generally in bankruptcy appeals, the district court reviews the bankruptcy court's factual findings for clear error and its conclusions of law *de novo*." *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 482-83 (2d Cir. 2012).

II. Fraudulent Conveyance

Appellant appeals from the Bankruptcy Court's determination that Northstar's payment of $89,401.31 (the balance of the purchase deposit for the Statler Towers) on August 23, 2006 (the "August 23rd Payment"), was made on account of secured indebtedness. (Dkt. 3). Appellant further asks that if the Court reverses the Bankruptcy Court's holding as to this point, the Court equitably subordinate "any claim asserted by [Appellee] based on the repayment of the fraudulent conveyance" to the claims of all other creditors. (*Id.* at 4).

The Bankruptcy Court determined that it was more probable than not that the August 23rd Payment was made as consideration for the discharge of Appellee's mortgages because: (1) the mortgages released by Appellee secured a balance of indebtedness greater than the total amount paid to Appellee at closing and from escrow; (2) the payment derived from proceeds from the sale of the mortgaged collateral; and (3) the timing of the August 23rd Payment (three business days after transfer of title to the Statler Towers) supports the conclusion that it was part of the closing process. (Dkt. 1-16 at 9-10).

The Court reviews the Bankruptcy Court's factual determination that the August 23rd Payment was made on account of secured indebtedness for clear error. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *In re Guadalupe*, 365 B.R. 17, 19 (D. Conn. 2007) (quotation omitted). "The role of 'the reviewing court under this extremely deferential standard of review is not to decide disputed factual issues *de novo* or to reverse simply if [it] would have decided the case differently, but rather to determine whether the [bankruptcy] court's account of the evidence is plausible in light of the record viewed in its entirety.'" *In re Delphi Corp.*, No. 06 CIV. 863 LTS RLE, 2006 WL 1470929, at *3 (S.D.N.Y. May 30, 2006) (quoting *United States v. Rizzo*, 349 F.3d 94, 98 (2d Cir. 2003)).

Appellant argues that the Bankruptcy Court's treatment of the August 23rd Payment was clearly erroneous because it was undisputed that the August 23rd Payment

was made after the closing at which Appellee discharged the mortgages held by him. (Dkt. 3 at 11). This argument is unpersuasive.

The Bankruptcy Court correctly held that it was the Trustee's burden to prove the elements of its fraudulent conveyance claims by a preponderance of the evidence, and that the Trustee had failed to do so. (Dkt. 1-16 at 10). The record amply supports the Bankruptcy Court's conclusion that the Trustee failed to demonstrate that the August 23rd Payment was made as anything other than part of the sale of the Statler Towers and in partial satisfaction of Appellee's mortgages. It was stipulated before the Bankruptcy Court that the $300,000 deposit from which the August 23rd Payment was made was part of the purchase price for the sale of the Statler Towers. (Dkt. 1-11 at ¶ 36). The Closing Statement for the conveyance from Northstar to the purchaser and the testimony of Appellee confirm this stipulated fact. (Dkt. 1-13 at 8 & Dkt. 1-14 at 135). Moreover, the payment was made directly to Appellee from Northstar's attorneys out of their escrow account, where the deposited funds had been held pending completion of the sale. (Dkt. 1-13 at 14). As the Bankruptcy Court noted, this payment was made only three business days after the closing. (Dkt. 1-16 at 9-10).

Appellant has not demonstrated that it was impermissible for Appellee to agree to delay receipt of some portion of the consideration for the discharge of his mortgages. As Appellee argues, New York Courts have repeatedly held that parties may agree to delay the performance of certain aspects of a real estate purchase agreement until after the closing. *See, e.g., H.B. Singer, LLC v. Thor Realty, LLC*, 57 A.D.3d 613, 614 (2d Dep't 2008); *Goldsmith v. Knapp*, 223 A.D.2d 671, 673 (2d Dep't 1996). Moreover, the

purpose of an attorney escrow account is to safeguard funds that have been entrusted to an attorney as a fiduciary incident to his practice of law, *see In re Jae-Bum Chung*, 85 A.D.3d 74, 75 (2d Dep't 2011), and Appellee could thus be confident that he would in fact receive the net proceeds of the purchase deposit. On these facts, the Bankruptcy Court inferred that Appellee discharged his mortgages on August 18, 2006, with the understanding that the funds held in Northstar's attorneys' escrow account would be released to him as soon as practicable.

Considering the record as whole, it was not clearly erroneous for the Bankruptcy Court to conclude that part of the consideration for Appellee's discharge of his mortgages on the Statler Towers was payment of the net proceeds of the purchase deposit and that the August 23rd Payment was thus made on account of secured indebtedness. As a result, Appellant's argument, which depends on the conclusion that the August 23rd Payment was not a payment made to secure the discharge of Appellee's mortgage, is unavailing.

In light of this holding, the Court does not reach Appellant's request that the Court equitably subordinate any claim asserted by Appellee based on the repayment of the allegedly fraudulent conveyance to the claim of all other creditors.

III. Equitable Subordination

Appellee cross-appeals from the Bankruptcy Court's holding that Appellee's claims were equitably subordinated to all other creditors' claims. (Dkt. 4). In particular, Appellee argues that the Bankruptcy Court erred because even if Appellee engaged in inequitable conduct, no creditors were harmed as a result. (*Id.* at 4).

The Bankruptcy Court found that Appellee acted inequitably when he caused Northstar to make disbursements in excess of $100,000 to himself between September 1, 2006, and February 16, 2007, on account of unsecured indebtedness. (Dkt. 1-16 at 13). The Bankruptcy Court further held that this inequitable conduct bestowed an unfair advantage on Appellee, to the detriment of other creditors. (*Id.* at 14). The Bankruptcy Court determined that subordination of Appellee's entire claim was necessary to remedy this harm because "unless subordinated, [Appellee's] claim would realize nearly the entire amount that the trustee might distribute from any recovery on his causes of action against [Appellee] himself." (*Id.* at 14-15). As the Bankruptcy Court explained, "[Appellee] attempted to secure an advantage over all other creditors. In fairness, those other creditors should now receive a similar advantage over [Appellee]." (*Id.* at 15). The Bankruptcy Court thus subordinated Appellee's claim, less $102,515.95 voluntarily paid by Appellee to the Trustee, to the claims of all other creditors. (*Id.*).

Appellee does not challenge, for purposes of this appeal, the Bankruptcy Court's finding that he engaged in inequitable conduct when he caused Northstar to pay him $102,515.95 on account of unsecured debt. (Dkt. 4 at 16). Instead, Appellee argues that the Bankruptcy Court erred when it equitably subordinated the majority of Appellee's claim because such action was punitive and not remedial. Specifically, Appellee argues that because he repaid the $102,515.95, he gained no benefit and no creditors were harmed. (Dkt. 4 at 21).

"Equitable subordination . . . presents a mixed question of fact and law." *In re Alternate Fuels, Inc.*, 789 F.3d 1139, 1154 (10th Cir. 2015). "[The Court] reviews the

bankruptcy court's factual findings for clear error, and . . . the bankruptcy court's application of the legal test for equitable subordination *de novo*." *Id.* The Bankruptcy Code provides that "after notice and a hearing, the court may . . . under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest." 11 U.S.C. § 510. Equitable subordination is appropriate when "(1) the claimant who is to be subordinated has engaged in inequitable conduct; (2) the misconduct results in injury to competing claimants . . . and (3) subordination is not inconsistent with bankruptcy law." *Sure-Snap Corp. v. State St. Bank & Trust Co.*, 948 F.2d 869, 876 (2d Cir. 1991) (quotation omitted). "This last requirement has been read as a reminder to the bankruptcy court that although it is a court of equity, it is not free to adjust the legally valid claim of an innocent party who asserts the claim in good faith merely because the court perceives that the result is inequitable." *United States v. Noland*, 517 U.S. 535, 539 (1996) (quotation omitted).

Here, the Bankruptcy Court applied the proper legal standard in considering the Trustee's request for equitable subordination, including an explicit acknowledgement that "a claim should be subordinated only to the extent necessary to offset the harm suffered." (Dkt. 1-16 at 14) (quotation omitted). The Court reviews the Bankruptcy Court's factual determinations that (1) other creditors suffered harm and (2) equitable subordination of the majority of Plaintiff's claim was necessary to remedy that harm for clear error. The Court reviews the Bankruptcy Court's legal determination that equitable subordination in this case does not conflict with the bankruptcy law *de novo*.

A. Harm Suffered by Other Creditors

"The purpose of equitable subordination is to undo wrongdoing by an individual creditor in the interest of the other creditors. . . . Moreover, the doctrine is remedial, not penal, and should be applied only to the extent necessary to offset specific harm that creditors have suffered on account of the inequitable conduct." *In re Enron Corp.*, 379 B.R. 425, 434 (S.D.N.Y. 2007) (quotations omitted). "The fundamental aim of equitable subordination is to undo or offset any inequity in the claim position of a creditor that will produce injustice or unfairness in terms of the bankruptcy results." *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 498 (S.D.N.Y. 1994) (quotations omitted).

There is adequate evidence in the record to support the conclusion that other creditors were harmed by Appellee's inequitable conduct. As the Bankruptcy Court explained, other unsecured creditors were seeking to recover from Northstar at the same time that Appellee caused Northstar to pay him $102,515.95. In particular, it is undisputed that Contract Specialists was a creditor of Northstar that was actively seeking to recover on its debt during the relevant time period. (*See* Dkt. 1-11 at ¶¶ 57-58). Appellee's receipt of payments from Northstar harmed Contract Specialists and other unsecured creditors because it negatively impacted their ability to collect on their debts. This is the kind of harm that may render equitable subordination appropriate. *See, e.g., In re Le Cafe Creme, Ltd.*, 244 B.R. 221, 237 (Bankr. S.D.N.Y. 2000) (equitable subordination appropriate where insider causes repayments on its own loans to be made, thus "gain[ing] an unfair advantage and . . . siphon[ing] money from the Debtor to the injury of its creditors."); *In re KDI Holdings, Inc.*, 277 B.R. 493, 514 (Bankr. S.D.N.Y.

1999) (to satisfy harm prong of equitable subordination inquiry, it is sufficient to show "that general creditors are less likely to collect their debts" as a result of the alleged inequitable conduct") (quotation omitted).

That Appellee ultimately repaid the $102,515.95 does not change the fact that harm was done in the first instance (though it is relevant as to the inquiry into whether equitable subordination was necessary as an additional remedy). The Bankruptcy Court's factual determination on this point was not clearly erroneous.

B. Proportionality of Remedy

The Court must next determine whether it was clearly erroneous for the Bankruptcy Court to conclude that Appellee's repayment of the monies he received from his inequitable conduct was insufficient to fully remedy the harm to other creditors. Appellee maintains that the subordination of the majority of his claim was punitive, rather than remedial, because "creditors will be allowed to share proportionately in the monies returned to the Trustee (with interest) as if the payment had never been made." (Dkt. 4 at 17).

The Bankruptcy Court held that subordination of the majority of Appellee's claim was required because in the absence of subordination, Appellee would realize virtually the entire amount that the Trustee would distribute from his claims against Appellee. (Dkt. 1-16 at 14-15). In other words, if Appellee's claim was not subordinated, his return of funds would be nothing more than a paper transfer, because those funds would be returned to him on account of his claim. The Bankruptcy Court concluded that "[e]quity demands an outcome more fair than such cyclical regurgitation." (*Id.* at 15).

"The equitable powers of the bankruptcy court are broad, and it may adjust . . . equities among the creditors in a flexible manner." *In re W.T. Grant Co.*, 699 F.2d 599, 605 (2d Cir. 1983) (quotations and citations omitted). "The doctrine of equitable subordination, codified in section 510(c) of the Bankruptcy Code, is one such equitable power that a bankruptcy court may employ to rearrange the priorities of creditors' interests and to place all or part of a wrongdoer's claim in an inferior status, in order to achieve a just result in the reorganization of a debtor." *In re LightSquared Inc.*, 511 B.R. 253, 346 (Bankr. S.D.N.Y. 2014).

"While the harm and amount of injury should be based upon the supportive evidence of the record, the remedy of equitable subordination should remain flexible to deal with the inequitable conduct at issue." *Id.* at 349. "Harm" in this context may include "(1) quantifiable monetary harm that results from delay; (2) harm that results from uncertainty; and (3) harm that results from delay that can be measured by professional fees and administrative expenses incurred by the estate as a result of the litigation." *Id.* at 350. "In determining the amount of harm, the bankruptcy court . . . need not arrive at a figure with precise accuracy and . . . any difficulty in precisely quantifying the harm should not redound to the benefit of the wrongdoer." *Id.* at 352 (quotation omitted).

Appellee's contention that the only "harm" that the Bankruptcy Court could consider in crafting its remedy is the specific quantifiable monetary harm occasioned by his inequitable conduct is inconsistent with the case law discussed above. It was reasonable for the Bankruptcy Court to conclude that Northstar's other creditors were

harmed by the uncertainty occasioned by Appellee's inequitable conduct, and that that uncertainty was caused, at least in part, by Appellee's inequitable conduct. Given the particular inequitable conduct here, whereby Appellee essentially moved himself to the front of the line of unsecured creditors, it was not clearly erroneous for the Bankruptcy Court to conclude that the appropriate remedy was to move Appellee to the back of the line. The alternative advocated by Appellee – that Northstar's other unsecured creditors would receive almost nothing while Appellee received "nearly the entire amount" recovered by the Trustee – would be no remedy at all. The Bankruptcy Court's conclusion was therefore not clearly erroneous.

C. Consistency with the Bankruptcy Law

Finally, the Court reviews *de novo* the Bankruptcy Court's determination that equitable subordination in this matter is consistent with the bankruptcy law. "[S]ince the Bankruptcy Code, unlike its predecessors, expressly authorizes the remedy of equitable subordination," "if a court determines that the party advocating equitable subordination has satisfied the first two prongs of the . . . test, it is difficult to imagine a situation in which equitable subordination would not be warranted by bankruptcy law." *In re 80 Nassau Associates*, 169 B.R. 832, 841 (Bankr. S.D.N.Y. 1994).

Appellee maintains that the Bankruptcy Court ran afoul of § 726(a)(2) of the Bankruptcy Code, "which provides for *pro-rata* payments to unsecured creditors" without regard to the size of their claims. (Dkt. 6 at 6). Appellee's argument is untenable on its face. The doctrine of equitable subordination by definition permits the Court to assess "whether notwithstanding the apparent legal validity of a particular claim, the

conduct of the claimant in relation to other creditors is or was such that it would be unjust or unfair to permit the claimant to share *pro rata* with the other claimants of equal status." *In re Adler, Coleman Clearing Corp.*, 277 B.R. 520, 563 (Bankr. S.D.N.Y. 2002) (quotation omitted).

The Bankruptcy Court in this case did not simply determine, as Appellee seems to suggest, that his claim was too large and thus must be subordinated to the other creditors. Instead, the Bankruptcy Court determined that Appellee had engaged in inequitable conduct that had caused harm to other creditors and that, in light of the size of his claim, equitable subordination was necessary to remedy this harm. This result is consonant with the bankruptcy law, for all the reasons discussed above.

CONCLUSION

For the foregoing reasons, the Judgment of the United States Bankruptcy Court for the Western District of New York, entered on October 18, 2013 (Dkt. 1-18), is affirmed in all respects.

SO ORDERED.

ELIZABETH A. WOLFORD
United States District Judge

Dated: March 4, 2016
Rochester, New York