IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE 220 PARTNERSHIP (Debtor)	:	Miscellaneous No. 95-247
	:	
v.	:	
	:	
GREAT AMERICAN INSURANCE COMPANIES	:	
and	:	
ROBERT H. WISE MANAGEMENT CO., INC.	:	

MEMORANDUM AND ORDER

VanArtsdalen, S.J. October 21, 1997

This case was initiated by The 220 Partnership, then a debtor in bankruptcy, filing an adversary proceeding against Great American Insurance Companies (Great American) and Robert H. Wise Management Co., Inc. (Wise Management) seeking to recover on a claim for property damage to the bankrupt's sole asset, a 12-story partially occupied office building. The property damage was allegedly caused by two separate incidents of bursting frozen water pipes and/or a frozen malfunctioning valve on a rooftop water tank. The first incident occurred on or around the end of December, 1993 and/or over the New Year's weekend, 1994. The second incident occurred on or about January 19, 1994. The bankrupt filed an adversary proceeding in Bankruptcy Court against Great American, that was the property damage insurer and against Wise Management. Wise Management was a property management company that had been appointed as a "temporary receiver" on August 23, 1993 for a "minimum period" of ninety days, pursuant to a state court order. Prior to the adversary hearing in Bankruptcy Court, Great American settled with The 220

Partnership for $195,000.

The basis of the claim against Wise Management was for negligence and/or breach of a fiduciary duty in failing to promptly report the loss to the insurer, Great American. One of the defenses that the insurer asserted against the claim prior to the settlement was late notice. The 220 Partnership asserted that it was "forced to settle" with Great American for far less than the actual building property and loss of income damages caused by the two incidents of water damage resulting from frozen water pipes bursting and/or freezing of water supply facilities.

Although the case was apparently conceded by both parties to be a non-core matter, it proceeded to trial before the Bankruptcy Court on the basis that the Bankruptcy Court would make a Report and Recommendation to the District Court for final determination pursuant to 28 U.S.C. §§157(c)(1) and 157(c)(2) and Federal Rule of Bankruptcy Procedure 9033. Neither party has challenged that procedure. After a full trial and the filing of post trial briefs, the Bankruptcy Court on October 10, 1995 filed a 23-page Report and Recommendation containing extensive and detailed findings of fact, proposed conclusions of law and discussion of the relative factual and legal issues, concluding that judgment should be entered in favor of Wise Management and that The 220 Partnership recover nothing on its claim against Wise Management. The 220 Partnership filed objections to the Report and Recommendation and Wise Management filed a response.

On November 1, 1995 a conference was held and the

objections were set for hearing on November 27, 1995. Thereafter, for reasons not established on the record, no hearing was held and the matter remained in limbo apparently because one or both counsel wanted to await the conclusion of certain state court proceedings by one or more of the tenants in the building who were seeking to recover claimed property damage and/or business interruption losses from their respective insurers arising out of the two incidents. Recently, counsel for The 220 Partnership advised that he was ready to proceed. A conference was held on September 16, 1997. At that conference counsel for The 220 Partnership requested that there be a hearing to receive additional testimony that might throw doubt on the credibility of testimony by Mr. Davis, an employee of Wise Management who testified before the Bankruptcy Judge. The 220 Partnership counsel also proposed to provide additional live testimony by a witness whose testimony had been presented at trial before the Bankruptcy Court by deposition. Not surprisingly, the attorney for Wise Management objects to any further evidentiary hearing in the District Court. As a result of the conference, I directed that the parties submit briefs on the issues presented, especially as to the proposed proceedings. Both parties have now submitted briefs.

Although The 220 Partnership filed extensive objections to the Report and Recommendation, the most recent brief submitted concedes that upon a de novo review of the record, the Report and Recommendation would "inevitably" be approved unless the record

is opened and new evidence is taken and considered. The opening paragraph of the most recent brief of the 220 Partnership states as follows:

> Having carefully reviewed both the record in the instant adversary proceeding and the report and recommendation of the bankruptcy judge, unless this Court exercises its discretion to either allow a de novo hearing on this matter so as to allow further evidence to be entered into the record or remands this matter to the bankruptcy court to do so, it appears inevitable that this Court will accept the aforementioned report and recommendation and enter judgment thereon.

In light of that concession, I conclude that it is not necessary to review in detail each of the objections filed by The 220 Partnership to the Report and Recommendation.

The parties appear to agree that the question of whether or not the record should be opened and additional testimony taken is a matter of discretion. The dispute between the parties as to the present procedure is whether any further evidence should be taken.

I have reviewed the full record in this case including the trial testimony, admitted depositions and trial exhibits and have given a complete de novo review. I have also considered the question of allowing further evidence and conclude that neither additional evidence should be taken nor should the matter be remanded back to the Bankruptcy Court. Consequently, the Report and Recommendation will be approved and entered as the final decision of the District Court.

The central theme of The 220 Partnership's claim is that it settled with Great American for less than its actual losses because Wise Management failed to promptly notify Great American of the two incidents. The Report and Recommendation of the Bankruptcy Judge points out that the claimant of The 220 Partnership presented little, if any, evidence that Great American settled for anything less than it otherwise would because of any late notice. The Bankruptcy Judge concluded that the settlement of $195,000 was "quite adequate" for the losses established. In reaching this conclusion, the Bankruptcy Judge reviewed the estimates provided by both sides. The 220 Partnership presented an estimate of $265,278 by a Mr. Shoemaker, contractor. An estimate made by an independent adjusting agency at the request of Great American placed the loss at $142,036, reduced by depreciation to $119,103. Mr. Banks, who appears to be the principal or general partner of The 220 Partnership, added to Mr. Shoemaker's estimates the sums of $40,000 for out of pocket expenses and $150,000 for lost tenants. In addition, a contractor, Brian Weller, hired by Great American, prepared a detailed estimate of repairs totaling $97,842.

Although Mr. Shoemaker's testimony was submitted by deposition, claimant now wants Mr. Shoemaker to be allowed to testify live because "in the opinion of counsel for plaintiff" Mr. Shoemaker is "a very credible witness". Claimant suggests that he could not call Mr. Shoemaker live because of a change in the trial date. There is no evidence in the record to show that

claimant's counsel ever sought a continuance or requested that the record be kept open or that he be permitted to have a further hearing to call Mr. Shoemaker live. In addition, there is nothing in the Report and Recommendation that suggests that the Bankruptcy Judge did not give full credence to Mr. Shoemaker's testimony. The real issue and the difference between the estimates seems to be the question of what damage was caused by water occurring from the two incidents and additional water damage caused by other completely unrelated prior incidents.

The Bankruptcy Judge concluded that claimant had simply failed to establish that it sustained any additional monetary losses by reason of any delay in reporting the damage to the insurance company even if there was a delay and a duty on the part of Wise Management to report such damage.

The 220 Partnership contends that Mr. Davis, an employee of Wise Management, falsely testified that the water damage that occurred was only from the fifth or sixth floor downward. Claimant contends that damage occurred from the top floor downward by reason of the freezing of a valve on the rooftop water tank. Mr. Davis testified that the only damage he observed from the two incidents was from the fifth or sixth floor downward. Claimant contends that based on state court proceedings, Dr. Brown, a third floor tenant, testified that Mr. Davis told him that the damage to his apartment occurred from the freezing of the rooftop valve. Claimant wants Dr. Brown to testify about this conversation to impeach Mr. Davis's

credibility.

The record of the adversary proceeding hearing (Notes of Testimony, 25 & 26) shows that Mr. Davis testified that as to the New Year's weekend damage, all water damage occurred from the fifth or sixth floor downward from a bursting pipe. However, he also testified as to that incident that when the plumbers came the next day, the plumbers "traced the line out up to the tank in the roof where the float had frozen in a closed position allowing no water in the building", thereby cutting off water services to the building. Mr. Davis testified that he was never informed of any water damage to any of the upper floors (Notes of Testimony, 29). As to the damage occurring on or around January 19th, Mr. Davis's report, which was read into the record during the adversary hearing said, "the same set of circumstances caused a water line to freeze and break at the fifth floor" and damaged telephone lines throughout the building. It is clear from this and other testimony presented that the Bankruptcy Judge fully considered the evidence as to the cause and location of the water damage.

Claimant's contention that the frozen valve on the rooftop necessarily means that water flooded from the twelfth floor downward is not borne out by the evidence. The testimony is that the water went down the elevator shaft through a "water chase" and flooded out telephone lines in a "telephone chase" and disrupted elevator service. There was no direct evidence of water damage from the two incidents on any floors above the sixth

floor, and certainly the Bankruptcy Judge in reaching his findings of fact and conclusions of law did consider all of the evidence and testimony as to where the water damage occurred, and the extent of the damage and the originating cause of the damage.

Claimants also apparently want to present testimony by Dr. Brown (a third floor tenant) and Dr. Snyder (a ninth floor tenant) to establish that there was extensive water damage in their respective offices. Claimant contends that it had issued subpoenas to Doctors Brown and Snyder. Claimant's counsel asserts that he thought there was an agreement to submit this evidence by stipulation in lieu of their live testimony. In fact, a stipulation was entered of record that Dr. Brown had made a claim for damages for both incidents. At no time during the hearing did counsel for The 220 Partnership contend there was any misunderstanding between counsel nor did he seek to have the hearing continued, nor did he make any request that he be permitted to call any additional witnesses or a motion to enforce the subpoenas. His suggestion in the present brief he filed that "it was too late to summon them to the courtroom" is absurd, especially since the record fails to show that counsel made any application to the Bankruptcy Judge.

Dr. Snyder (a tenant on the tenth floor) apparently did make a claim for damages but counsel for Wise Management asserts that the claim was only for business interruption by reason of the elevator and the telephone lines being out of service. It seems clear that although a full and complete hearing was held

before the Bankruptcy Judge and fully and fairly considered by the Bankruptcy Judge, that The 220 Partnership having been unsuccessful, now, in effect, wants a new trial de novo. It is worth noting that The 220 Partnership took the position initially that the matter was a core proceeding and should be decided by the Bankruptcy Court subject only to a right of appeal. Now, rather than treat it as an appeal The 220 Partnership wants the entire matter reopened. This would amount to an entirely new trial.

A careful review of the entire record does not convince me that either the Bankruptcy Judge nor I sitting as the District Judge would reach any different result even if all of the evidence that claimant suggests it could and would present, if afforded an opportunity, were received in evidence. Therefore, the Report and Recommendation will be approved and adopted.

Essential to The 220 Partnership establishing any claim against Wise Management, it would have to prove at a minimum the following:

1) Wise Management had a fiduciary duty under its state court temporary receivership appointment to report and file a claim with Great American, the insurer.

2) There was late notice to Great American.

3) Because of such late notice Great American was either not liable at all or was liable for some amount less than the total amount for which it otherwise would have been liable.

4) Because of late notice Great American settled for

less than it otherwise would have paid.

The record certainly does not make clear precisely what Wise Management's duties were beyond collecting the rents and deducting therefrom the expenses of maintaining the building and its services and paying over the net to PECO on whose application the appointment was made. Even assuming there was a duty to determine the insurance coverage and to file a claim, there was extensive testimony by Mr. Davis explaining that he did not think the water damage would exceed the deductible amount of coverage and was afraid a claim might result in cancellation of the insurance. Although this testimony may or may not have been accurate there remains at least uncertainties as to whether there was a duty to file a claim under the circumstances.

The 220 Partnership asserts that it was "forced to settle" for less than the full extent of its losses because of late notice to the carrier. Great American did assert late notice as one of its defenses. Obviously, The 220 Partnership was not forced to settle with any party. It could have proceeded with the adversary proceeding against both Great American and Wise Management. If Great American's late notice defense was upheld that would have been a complete defense. Then, and only then, as I see it, could Wise Management be held liable in any amount if claimant established that Wise Management failed in a duty to timely report the loss to Great American.[1]

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[1] There is evidence in the record from which it could be found that Mr. Banks, who frequently visited the premises, knew

The fatal defect in the proof presented by The 220 Partnership is a total absence of any proof that Great American settled for any quantifiable amount less than it otherwise would have paid by reason of its asserted late notice.[2] The amount that Great American did pay in settlement was significantly higher than the amount its own adjusters and estimators placed on the loss. Had the adversary proceeding continued against Great American, it is very doubtful that the award, whether against Great American or Wise Management, either jointly or severally, would have equalled the $195,000 received in settlement. In any event, there is no evidence that would support a filing that had Wise Management immediately notified Great American of the two incidents of water damage from freezing pipes bursting and/or a valve on the rooftop float freezing that Great American would have settled with The 220 Partnership any sooner than it did or for any sum greater than $195,000.

Claimant could have called a representative of Great American or possibly some other witness who had direct knowledge of the reasons and motivations of Great American's settlement calculations to establish its claim for delay in settlement

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of the two incidents and that he did timely notify the insurance broker through whom the Great American policy was obtained.

[2] The settlement agreement between The 220 Partnership and Great American recited that the failure to give timely notice contributed to the parties agreement to compromise the claim. However, Wise Management was not a party to the settlement agreement and the amount that was "compromised" by the late notice is nowhere quantified.

damages and a reduction in the settlement amount because of late notice. Whether the sum paid to the claimant by the insurer in settlement of the claims fully compensated claimant for its losses is irrelevant to the issue of whether Wise Management is liable to The 220 Partnership. Wise Management's liability could only be predicated upon a determination that Wise Management had a duty to provide timely notice and failed in that duty and that such late notice was proximate cause for The 220 Partnership receiving some quantifiable amount less in settlement than it otherwise would have received. Claimant has totally failed to sustain its burden of proof on all of these issues.

Whether the scope of review that I should give to the Report and Recommendation of the Bankruptcy Judge is a full de novo review or some more differential review, under any standard, after a complete review of the entire record and the briefs and submissions by the parties, I am convinced that no further evidentiary hearing should be held and that the matter does not justify a remand to the Bankruptcy Court and finally that the Report and Recommendation of the Bankruptcy Judge is fully supported by the record and is both factually and legally correct as to the result. The Report and Recommendation will, therefore, be approved and judgment will be entered in favor of Wise Management Company. An appropriate order follows.

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O R D E R

For the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** as follows:

1. The Report and Recommendation of the Bankruptcy Judge dated September 8, 1995 is APPROVED and ADOPTED.

2. Judgment is entered in favor of the defendant Robert H. Wise Management Co., Inc. and against the claimant The 220 Partnership.

3. Any and all further relief sought by The 220 Partnership is DENIED and DISMISSED.

BY THE COURT:

October 21, 1997

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Donald W. VanArtsdalen, S.J.