

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ERIE OPERATING, LLC d/b/a	)	
GOLDEN LIVING CENTER-WALNUT	)	
CREEK, ERIE ACQUISITION, LLC;	)	
GOLDEN GATE NATIONAL SENIOR	)	
CARE, LLC; GGNSC EQUITY	)	
HOLDINGS, LLC; GGNSC CLINICAL	)	
SERVICES, LLC;	)	
GGNSC ADMINISTRATIVE SERVICES,	)	
LLC; SPECTRA HEALTHCARE	)	
ALLIANCE, INC.; SPECTRA	)	
HEALTHCARE ALLIANCE VI, LLC; and	)	
BEVERLY ENTERPRISES, INC.,	)	
Plaintiffs,	)	
v.	)	
TOM FOSTER, Administrator of the	)	
Estate of Kenneth W. Foster, Deceased,	)	
Defendant.	)	

C.A. No. 14-72 Erie

**MEMORANDUM OPINION AND ORDER OF COURT**

On June 1, 2016, Magistrate Judge Susan Paradise Baxter issued a Report and Recommendation (“R&R”) (ECF No. 57), which recommended that DEFENDANT’S MOTION FOR SUMMARY JUDGMENT (ECF No. 48) filed by Defendant Tom Foster, Administrator of the Estate of Kenneth W. Foster (“Foster”) be GRANTED and that judgment be entered in favor of Defendant and against Plaintiffs. Now pending before the Court is the OBJECTION TO REPORT AND RECOMMENDATION (ECF No. 58) filed by Plaintiffs (collectively, “Erie Operating”). Defendant filed a response in opposition to the Objection. Accordingly, the Objection is ripe for disposition.

This action was referred to United States Magistrate Judge Susan Paradise Baxter for a report and recommendation (“R&R”) in accordance with the Magistrates Act, 28 U.S.C. §

636(b)(1), and Local Rules 72.1.3 and 72.1.4. The procedural history is tortuous and has been set forth in the R & R and in prior opinions of this Court. Thus, it need not be recited in full herein. In essence, the parties dispute whether Wrongful Death and/or Survival claims are within the scope of an ADR Agreement executed between a resident and a skilled nursing facility.

The narrow issue in this Federal Arbitration Act case is strictly procedural – in what forum should the underlying substantive claims be resolved? Erie Operating contends that both the Survival and Wrongful Death claims should be resolved in arbitration. Foster contends that both the Survival and Wrongful Death claims should proceed in the Erie County Court of Common Pleas. On August 13, 2015 Magistrate Judge Baxter concluded that the claims should be severed, such that the Wrongful Death claim would go forward in Erie County and the Survival claim (if valid and enforceable) would be arbitrated. The Court adopted the August 13 R & R in a Memorandum Opinion and Order dated October 8, 2015.

Subsequently, Foster moved for summary judgment on the basis of *res judicata*/ collateral estoppel/ issue preclusion. Foster contends that this federal lawsuit is precluded by the decision of the Honorable John Garhart of the Erie County Court of Common Pleas. Judge Garhart held, in a written opinion dated September 10, 2015, that Foster could not be compelled to arbitrate the Wrongful Death claim; that the Wrongful Death and Survival claims must be consolidated in a single action; and therefore, that both the Wrongful Death and Survival claims must proceed in the Erie County Court.

On June 1, 2016, Magistrate Judge Baxter issued a 12-page R & R, in which she thoroughly analyzed the applicable principles of issue preclusion under Pennsylvania law. Magistrate Judge Baxter concluded that the issue in this case was identical to the issue decided

by Judge Garhart; that Judge Garhart's decision was a final judgment on the merits; that Erie Operating was a party in that case; and that Erie Operating had been given a full and fair opportunity to litigate the issue. In sum, Magistrate Judge Baxter now recommends that summary judgment be granted in favor of Defendant Foster.

Magistrate Judge Baxter's preclusion analysis is consistent with several recent opinions in this district which addressed similar efforts to enforce nearly identical nursing home arbitration agreements. *See, e.g., GGNSC Uniontown, LP v. Bauer*, No. CV 15-231, 2015 WL 9304508, at \*2 (W.D. Pa. Dec. 22, 2015) (Bissoon, J.) (dismissing entire Complaint on issue preclusion grounds based on state court ruling, rather than severing Wrongful Death and Survival claims); and *GGNSC Erie Western Reserve, LP v. Stubits*, CA #15-61 (W.D. Pa. Aug. 7, 2015) (Rothstein, J.) (same). In *GGNSC Altoona Hillview LP v. Martz*, 2016 WL 502089, at \*4 (W.D. Pa. Feb. 8, 2016), Judge Gibson noted a split among courts "as to whether a survival claim can be compelled to arbitration in a case where, as in the case at hand, there is a related wrongful death claim that cannot be compelled to arbitration." *Id.* (citing the October 8, 2015 Memorandum Opinion in this case in the minority). Judge Gibson concluded that issue preclusion principles required the dismissal of the nursing home's entire federal complaint. This member of the Court is persuaded by these decisions and by the analysis of Magistrate Judge Baxter. Accordingly, it will adopt her June 1, 2016 R&R as the opinion of the Court.

An appropriate Order follows.

McVerry, S.J.

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 Plaintiffs, )  
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 v. )  
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 TOM FOSTER, Administrator of the )  
 Estate of Kenneth W. Foster, Deceased, )  
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 Defendant. )

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**ORDER OF COURT**

**AND NOW**, this 20th day of July, 2016, **IT IS HEREBY ORDERED, ADJUDGED**  
**and DECREED** that the R&R of June 1, 2016 is **ADOPTED** as the Opinion of the Court;  
 Plaintiffs’ OBJECTION TO REPORT AND RECOMMENDATION (ECF No. 58) is **DENIED**;  
 and DEFENDANT’S MOTION FOR SUMMARY JUDGMENT (ECF No. 48) is **GRANTED**.  
 Judgment will be entered in favor of Defendant and against Plaintiffs. The clerk shall docket this  
 case closed.

s/ Terrence F. McVerry  
 TERRENCE F. McVERRY  
 Senior United States District Judge

cc: U.S. Magistrate Judge Susan Paradise Baxter

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