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

GOLON, INC. *FORMERLY KNOWN AS*,
GOLON MASONRY RESTORATION, INC.,

Plaintiff,

17cv0819
ELECTRONICALLY FILED

v.

SELECTIVE INSURANCE COMPANY OF
THE SOUTHEAST and SELECTIVE
INSURANCE COMPANY OF AMERICA,

Defendants.

**MEMORANDUM ORDER RE: DEFENDANTS' RULE 12(b)(6)
PARTIAL MOTION TO DISMISS PLAINTIFF'S COMPLAINT (DOC. NO. 9)**

On May 1, 2012, an employee of Plaintiff Golon, Inc., f/k/a Golon Masonry Restoration, Inc. ("Golon" or "Plaintiff"), was involved in a motor vehicle accident while driving a vehicle owned by Golon that resulted in injuries to Thomas Straw, his wife, Jennifer, and their son, Rowan, and in the death of the Straw's six-year-old son, Elijah. Doc. No. 1-1. Thereafter, the Straw family filed suit seeking compensation for personal injuries against Golon and its employee in the Court of Common Pleas of Allegheny County, Docket No. GD-3-3294 (the "Underlying Action"). *Id.*

Golon gave notice of the Underlying Action to its insurer, Defendant Selective Insurance Company of the Southeast ("Selective Southeast"). Doc. No. 1-1. Selective Southeast then assumed the defense of the Underlying Action on behalf of Golon. *Id.* Selective Southeast informed Plaintiff that the potential award in the Underlying Action could exceed the $11 Million policy limits of coverage. *Id.*

The Underlying Action resulted in a $32 Million verdict in favor of the Straw family against Golon. *Id.* Prior to trial, Golon alleges that Selective Southeast and Defendant Selective Insurance Company of America ("Selective America") employed a "bad-faith, high-risk, brinksmanship negotiation strategy," over the objections of Golon, that resulted in a failure to settle the Underlying Action, within the policy limits during a mediation, or for $8.5 Million on the eve of trial, despite the recommendation of the trial judge.

Golon alleges three claims against Defendants Selective Southeast and Selective America: first, that the Defendants breached the terms of the policy and the "duty to act reasonably and in good faith when considering whether to pay a third party in settlement of the third party's claim[,]" ("Count I"); second, that Defendants breached their duty as fiduciaries of "undivided loyalty and fidelity, not to engage in self-dealing, not to prefer [their] interest[s] over Golan's, and to act reasonably, in good faith, and with due care when making settlement decisions[,] ("Count II"); and third, that Defendants acted in bad faith by failing to settle the Underlying Action within the policy limits, rejecting the Straw family's final settlement demand (which was within the policy limits), and otherwise lacking a reasonable basis for refusing to settle the Underlying Action within the policy limits, ("Count III"). Doc. No. 1-1.

Defendants have moved to partially dismiss Golan's Complaint. Doc. No. 9. Defendants moved to dismiss Count II, the breach of fiduciary duty claim, as barred by the "gist of the action" doctrine. *Id.* Additionally, Selective America moved to dismiss all claims against it because it is not the entity that issued the insurance policy to Golan and is therefore not a party to the contract. *Id.*

I. Legal Standards

Federal Rule of Civil Procedure 12(b)(6), provides for dismissal for "failure to state a claim upon which relief can be granted." Detailed factual pleading is not required – Rule 8(a)(2) calls for a "short and plain statement of the claim showing that the pleader is entitled to relief" – but a Complaint must set forth sufficient factual allegations that, taken as true, set forth a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The plausibility standard does not require a showing of probability that a claim has merit, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007), but it does require that a pleading show "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. Determining the plausibility of an alleged claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. The Court must consider the specific nature of the claims presented and determine whether the facts pled to substantiate the claims are sufficient to show a "plausible claim for relief." *Covington v. Int'l Ass'n of Approved Basketball Officials*, 710 F.3d 114, 118 (3d Cir. 2013); *see also* *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010).

In addition to the averments in a complaint, the Court may consider "an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Benefit Guar. Corp. v. White Consolidated Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993). Further, the Court may also consider a document "integral to or explicitly relied upon in the complaint" without converting the motion to dismiss into one for summary judgment. *U.S. Express Lines v. Higgins*, 281 F.3d 383, 388 (3d Cir. 2002). Accordingly, the Court has considered the insurance policy between Golon and Selective Southeast appended to Defendants' brief.

A federal court exercising diversity jurisdiction is bound by the *Erie* doctrine to follow state law as announced by the highest state court. *Wayne Moving & Storage of New Jersey, Inc. v. School Dist. of Philadelphia*, 625 F.3d 148, 154 (3d Cir. 2010). If the state's highest court has not addressed the precise question presented, the federal court must predict how the state's highest court would resolve the issue. *Id.*

II. Discussion

Golon urges this Court to find that, "under Pennsylvania law, a policyholder may sue an insurance company for breach of its fiduciary duty to settle within policy limits, and at the same time sue for breach of contract, without violating the gist of the action doctrine." Doc. No. 20, p. 4. Golon follows this argument further in a footnote, stating "[i]t is questionable whether the gist of the action doctrine can *ever* bar tort claims against insurance companies if the words "mutual consensus" in *Bohler-Uddeholm* were read according to their ordinary meaning, because the terms of insurance policies are rarely the result of bargaining. Doc. No. 20, FN 1 (emphasis in original).

In *Bohler-Uddeholm*, the United States Court of Appeals for the Third Circuit considered whether it was proper for a district court to allow the plaintiff to proceed to trial on breach of contract and breach of fiduciary duty claims in a "complicated commercial case" that "emerge[d] from the disintegration of a joint venture" and also included misappropriation of trade secrets and civil conspiracy claims. *Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc.*, 247 F.3d 79 (3d Cir. 2001).

The Court of Appeals applied Pennsylvania's "gist of the action" test and found that the plaintiff's breach of fiduciary duty claim was related to separate conduct beyond the breach of contract claim in the action, and was based upon the fiduciary duty imposed on joint venturers

under Pennsylvania law "to act toward one's joint venturer in the utmost good faith and with scrupulous honesty[.]" *Id.* at 104-05 (internal citations omitted). However, the Court of Appeals found that the plaintiffs' misappropriation of trade secrets claim was defined by the contract and interwoven with the breach of contract claim and therefore barred by the gist of the action doctrine. *Id.* at 106.

More than ten years after the Court of Appeals decision in *Bohler-Uddeholm*, the Pennsylvania Supreme Court reviewed the precedent on the "gist of the action" doctrine and reaffirmed the standard by which to determine whether or not a plaintiff's claim is "truly one in tort, or for breach of contract." *Bruno v. Erie Ins. Co.*, 106 A.3d 48 (Pa. 2014). The Pennsylvania Supreme Court summarized the test as follows:

> The general governing principle which can be derived from our prior cases is that our Court has consistently regarded the nature of the duty alleged to have been breached, as established by the underlying averments supporting the claim in a plaintiff's complaint, to be the critical determinative factor in determining whether the claim is truly one in tort, or for breach of contract. In this regard, the substance of the allegations comprising a claim in a plaintiff's complaint are of paramount importance, and, thus, the mere labeling by the plaintiff of a claim as being in tort, e.g., for negligence, is not controlling. If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract—i.e., a specific promise to do something that a party would not ordinarily be obligated to do but for the existence of the contract—then the claim is to be viewed as one for breach of contract. If, however, the facts establish that the claim involved the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort.

Bruno, 106 A.3d at 111-112 (internal citations omitted).[1]

[1] *Cf. Ash v. Cont'l Ins. Co.*, 932 A.2d 877, 885 (Pa. 2007) (holding that bad faith action against insurer pursuant to 42 Pa. C.S.A. § 8371 is for breach of a duty "imposed by law as a matter of social policy, rather than one imposed by mutual consensus[.]"). Selective Southeast has not moved to dismiss Golon's statutory bad faith claim (Count III). Doc. No. 9.

Here, the duty owed to Golon was created by the insurance contract. Golon alleged in the Complaint that "Defendants breached their fiduciary duty to Golon by acting or failing to act as set forth in the preceding paragraphs of the Complaint" which refer to the paragraphs set forth to establish Golon's breach of contract claim against Defendants. Doc. No. 1-1.

Contrary to Golon's argument questioning "whether the gist of the action doctrine can *ever* bar tort claims against insurance companies[,]" doc. no. 20, FN 1, Defendants cite numerous cases from the District Courts of Pennsylvania, applying Pennsylvania law, that have found fiduciary duty claims against insurance companies to be barred by the gist of the action doctrine. *See* Doc. No. 26, pp. 4-5 (collecting cases). Accordingly, Golon's breach of fiduciary duty claim, Count II of the Complaint, will be DISMISSED as barred by the gist of the action doctrine.

Turning to Selective America's motion to dismiss all claims against it because it is not the entity that issued the insurance policy to Golan, Golon does not dispute that the breach of contract claim against Selective America cannot stand, and therefore, Count I against Selective America is DISMISSED.

However, to determine whether an entity is an "insurer" that may be liable under the bad faith statute, Pennsylvania courts examine both the policy documents and "the actions of the company involved" with significant focus on the company's actions. *Brown v. Progressive Ins. Co.*, 860 A.2d 493 (Pa. Super. Ct. 2004). Golon has pled adequate factual allegations to show that Selective America may have been the entity responsible for handling its claim under the policy and the negotiations in the Underlying Action at issue. Doc. No. 1-1, ¶¶ 27 and 31. Accordingly, it would be premature for the Court to dismiss Selective America at this stage of the proceedings and Selective America's Motion to Dismiss Count III will be DENIED.

III. Conclusion

For the reasons set forth, Defendant's Motion to Dismiss is GRANTED IN PART AND DENIED IN PART. Plaintiff's Breach of Fiduciary Duty claim (Count II) is DISMISSED WITH PREJUDICE. Plaintiff's Breach of Contract claim (Count I) against Defendant Selective Insurance of America is DISMISSED WITH PREJUDICE. Defendant Selective Insurance of America's Motion to Dismiss Plaintiff's Bad Faith claim (Count III) is DENIED.

SO ORDERED, this 20th day of July, 2017

/s Arthur J. Schwab
Arthur J. Schwab
United States District Judge