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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
CIVIL TERM IAS PART 3

COLLEGE POINT TILE CORP.	X	BY: Justice John A. Milano
Plaintiff,	:	Index No. 21955/01
- against -	:	Motion Date: January 8, 2002
COLONIAL COOPERATIVE INSURANCE	:	Motion Cal. No.: 2
COMPANY, et al.	:	
Defendants.	:	
	X	

Defendant Tom Tungseng Tai Agency, Inc. (hereinafter "defendant Tai") has moved for an order dismissing the complaint against it pursuant to CPLR 3211(a)(7) and for summary judgment.

Plaintiff College Point Tile Corp. owned or leased premises known as 37-05 College Point Boulevard, Flushing, New York. On or about July 2, 2001, Alex Shell, alleging that he had sustained personal injury on the premises in December, 2000, brought a negligence action against College Point. Plaintiff College Point had procured through defendant Tai a premises liability insurance policy from defendant Colonial Cooperative Insurance Company which was in effect from November 29, 2000 to November 29, 2001. Plaintiff College Point notified defendant Colonial of the action brought by Alex Shell, but, by letter dated April 3, 2001, the defendant insurer disclaimed coverage because the insured had allegedly failed to give timely notice of an occurrence. The disclaimer letter reads in relevant part: "You did

not report this loss at the time to your broker, as investigation with Tom Tungseng Tai Agency reveals you did not report this loss until Saturday, 3/14/01, almost three months after it occurred." The plaintiff subsequently brought this action for a declaratory judgment and for breach of contract.

The opponent of a motion for summary judgment has the burden of producing evidence sufficient to show that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) Plaintiff College Point failed to carry this burden. Defendant Tai alleges that it acted as the agent of defendant Colonial. Assuming this was the case, then the defendant agency correctly invokes the rule that "[w]here there is a disclosed principal-agent relationship and the contract relates to a matter of the agency, the agent will not be personally bound unless there is clear and explicit evidence of the agent's intention to be personally bound." (Leonard Holzer Associates, Inc. v Orta, 250 AD2d 737; see, Star Video Entertainment, LP v J & I Video Distributing, Inc., 268 AD2d 423; Palisades Office Group, Ltd. v Kwilecki, 233 AD2d 490.) There is no evidence in this case that defendant Tai intended to be bound on the insurance contract or that defendant Tai committed any tortious act which could serve as a basis of liability. (See, James T. Kelly Jr., P.E., P.C. v Schroeter, 209 AD2d 737; Trenga Realty v Tiseo, 117 AD2d 951.) On the other hand, there are cases which state that an insurance broker is the agent of the insured (see, e.g., 2540 Associates, Inc. v Assicurazioni Generali, S.P.A., 271 AD2d 282; Meade v Finger Lakes-Seneca Co-op Ins. Co., 184 AD2d 952) or that an insurance

broker is "typically" the agent of the insured and not of the insurer (see, Indian Country Inc. v Pennsylvania Lumbermens Mut. Ins. Co., 284 AD2d 712), but even if defendant Tai was the agent for the plaintiff, there was no showing that defendant Tai breached a duty owed to the plaintiff such as by failing to procure requested insurance. (See, e.g., Reilly v Progressive Ins. Co., 288 AD2d 365.) The plaintiff, not the defendant agency, allegedly delayed in giving notice of the occurrence, thereby possibly giving cause for the insurance company to disclaim. Moreover, while the complaint alleges that defendant Tai "by its agency guaranteed that claims would be honored by [the defendant insurer]," the plaintiff cites no authority for this novel proposition. Finally, there is no merit to the plaintiff's contention that the defendant agency is a necessary party to the cause of action for a declaratory judgment. The plaintiff can obtain complete relief on its causes of action, if proven, from the defendant insurer. (See, Kapsalis v Greek Orthodox Archdiocese of North & South America, 276 AD2d 595.)

Accordingly, defendant Tai's motion is granted.

Short form order signed herewith.

Dated: March 25, 2002

Justice John A. Milano