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| **BGC Partners, Inc. v Avison Young (Canada) Inc.** |
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| 2014 NY Slip Op 51774(U) |
| Decided on December 15, 2014 |
| Supreme Court, New York County |
| Friedman, J. |
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| This opinion is uncorrected and will not be published in the printed Official Reports. |

Decided on December 15, 2014

Supreme Court, New York County

**BGC Partners, Inc., and G & E ACQUISITION COMPANY, LLC, Plaintiffs,**

**against**

**Avison Young (Canada) Inc., AVISON YOUNG (USA) INC., AVISON YOUNG — NEW YORK, LLC, AVISON YOUNG — NEVADA, LLC, AVISON YOUNG — WASHINGTON, D.C., LLC, AVISON YOUNG — CHICAGO, LLC, AVISON YOUNG — NEW ENGLAND, LLC, AVISON YOUNG — ATLANTA, LLC, AVISON YOUNG SOUTHERN CALIFORNIA, LTD., AVISON YOUNG — PITTSBURGH, LLC; and AVISON YOUNG — TEXAS, LLC, Defendants.**

652669/2012 E

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Marcy Friedman, J.

This action arises out of the acquisition by plaintiffs BGC Partners, Inc. (BGC) and its indirect subsidiary, G & E Acquisition Company, LLC, of various assets and causes of action of Grubb & Ellis Company (G & E), a real estate brokerage company. Plaintiffs sue a competing brokerage company, defendant Avison Young (Canada) Inc. (AY-Canada) and its United States affiliates (collectively AY defendants), alleging conspiracy to unlawfully loot the assets of G & [*2]E, tortious interference with contractual relationships, tortious interference with prospective business relationships, theft of trade secrets, and aiding and abetting breach of fiduciary duty. The AY defendants move to dismiss plaintiffs' Amended Complaint in its entirety pursuant to CPLR 3211 (a) (3) and (7). All of the defendants, with the exception of Avison Young-New York, likewise move to dismiss pursuant to CPLR 3211 (a) (8).

*Background*

The following factual allegations drawn from plaintiffs' Amended Complaint (AC) are deemed to be true for purposes of this motion. Prior to 2012, G & E, which now operates under the name Newmark Grubb Knight Frank, was one of the "oldest and largest real estate brokerages in the United States, with about 90 offices across the country." (AC ¶¶ 1, 30.) On February 20, 2012, G & E filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code.[FN1] (AC ¶ 28.) On the effective date of April 5, 2012, BGC, through its indirect subsidiary, G & E Acquisition Company, LLC, acquired "substantially all of the assets of Grubb & Ellis and its subsidiaries (including Grubb & Ellis Affiliates), including a beneficial interest in and right to acquire the assets of Grubb & Ellis and its subsidiaries" pursuant to Section 363 of the Bankruptcy Code. (AC ¶¶ 27-28.) "These assets included, among others, contracts and leads to provide management, leasing, sales and financial services, as well as the commissions for those contracts." (AC ¶ 27.) Plaintiffs claim that from February 20, 2012 through April 5, 2012, the assets of G & E were subject to the automatic stay codified in Section 362 (a) (3) of the Bankruptcy Code. (AC ¶ 31.)

Plaintiffs allege that AY-Canada, in furtherance of an "illegal scheme to loot Grubb & Ellis," subverted the automatic stay and the bankruptcy process by "steal[ing] as many of [G & E's] assets — including commissions, contracts, offices, trade secrets and personnel

— as possible." (AC ¶ 35.) Plaintiffs further allege that AY-Canada, a Canadian corporation with its principal place of business in Toronto, "tortiously conspired to induce certain affiliates" of G & E to breach their affiliation agreements and also "tortiously conspired to induce certain Grubb & Ellis brokers surreptitiously to reveal trade secret business opportunities and relationships and to convert brokerage opportunities." (AC ¶ 35.) This "illegal scheme" was allegedly executed pursuant to AY-Canada's "aggressive growth and expansion strategy" which was implemented in 2009. (AC ¶¶ 11, 33-34.) Plaintiffs attribute the implementation of this new strategy in 2009 to the leadership of Mark Rose who was appointed Chief Executive Officer of AY-Canada shortly after he resigned as Chief Executive Officer of G & E. (AC ¶ 33.)

Plaintiffs claim that this "illegal scheme" was "directed by Avison Young [the name used in the Amended Complaint for AY-Canada] and implemented by the regional Avison Young entities" that are defendants in this action. (AC ¶ 36.) The regional entities, or affiliates, of AY-Canada are:

Avison Young (USA) Inc., an Illinois corporation with its principal place of business in Rosemont, Illinois (AC ¶ 12) (AY-USA);

Avison Young — New York, LLC, a New York limited liability company with its principal place of business in New York, New York (AC ¶ 13) (AY-New York);

Avison Young — Nevada, LLC, a Nevada limited liability company with its principal place of business in Las Vegas, Nevada (AC ¶ 14) (AY-Nevada);

Avison Young — Washington D.C., LLC, a Maryland limited liability company with its [*3]principal place of business in Washington, D.C. (AC ¶ 15) (AY-DC);

Avison Young — Chicago, LLC, an Illinois limited liability company with its principal place of business in Chicago, Illinois (AC ¶ 16) (AY-Chicago);

Avison Young — New England, LLC, a Massachusetts limited liability company with its principal place of business in Boston, Massachusetts (AC ¶ 17) (AY-New England);

Avison Young — Atlanta, LLC, a Georgia limited liability company with its principal place of business in Atlanta, Georgia (AC ¶ 18) (AY-Atlanta);

Avison Young — Southern California, LTD., a California corporation with its principal place of business in Los Angeles, California (AC ¶ 19) (AY-California);

Avison Young — Pittsburgh, LLC, a Pennsylvania limited liability company with its principal place of business in Pittsburgh, Pennsylvania (AC ¶ 20) (AY-Pittsburgh); and

Avison Young — Texas, LLC, a Texas limited liability company with its principal place of business in Houston, Texas (AC ¶ 21) (AY-Texas)(collectively the AY affiliates).

Plaintiffs allege that each AY affiliate is "owned, directly or indirectly, and controlled by Avison Young [i.e., AY-Canada]" and is also "controlled indirectly by Mark Rose." (AC ¶¶ 12-22.) Moreover, plaintiffs allege that the "unlawful scheme and conspiracy . . . was conceived, directed, and controlled by officers, directors and/or employees of Avison Young [i.e., AY-Canada]. Avison Young's U.S. affiliates implemented and carried out the scheme and conspiracy under Avison Young's direction and control." (AC ¶ 23.)

*Standard*

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (*see*, CPLR 3026). [The court must]

accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]. *See 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002].) However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." (*Simkin v Blank*, 19 NY3d 46, 52 [2012] [internal quotation marks and citation omitted].) When documentary evidence under CPLR 3211(a) (1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Leon v Martinez*, 84 NY2d at 88.)

*Personal Jurisdiction*

As a threshold matter, the parties sharply dispute whether this court has jurisdiction over ten out of the eleven defendants. On a motion to dismiss for lack of personal jurisdiction over a defendant, the ultimate burden rests with the plaintiff, as the party asserting jurisdiction, to prove that personal jurisdiction exists over each of the defendants. (*Copp v Ramirez*, 62 AD3d 23, 28-29 [1st Dept 2009], *lv denied* 12 NY3d 711.) However, in opposition to a motion to dismiss under CPLR 3211 (a) (8), a plaintiff is not required to make a prima facie showing of jurisdiction, but need only make a "sufficient start," showing its position "not to be frivolous." (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 467 [1974]; *see also Mariner Pacific, Ltd. v Sterling Biotech Limited*, 106 AD3d 667, 668 [1st Dept 2013], *HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665, 666 [1st Dept 2011].) If a sufficient start is made, the court may "deny the motion . . . or may order a continuance to permit" discovery to take place to [*4]explore the issue. (*See* CPLR 3211 [d].)

It is undisputed that this court has personal jurisdiction over defendant AY-New York, a New York limited liability company, under CPLR 301. Plaintiffs contend that the court has personal jurisdiction over all other defendants pursuant to either CPLR 302 (a) (1), (2) or (3) (ii). For the reasons discussed below, the court concludes that plaintiffs have failed to make a sufficient start warranting jurisdictional discovery over defendants AY-Nevada, AY-DC, AY-Chicago, AY-New England, AY-Atlanta, AY-California, AY-

Pittsburgh, and AY-Texas. The court reaches a different result with respect to AY-Canada and AY-USA, as to which jurisdictional discovery will be ordered.

*CPLR 302 (a) (1)*

CPLR 302 (a) (1) provides in relevant part: "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non- domiciliary . . . , who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state." "Whether a non-domiciliary is transacting business within the meaning of 302 (a) (1) is a fact based determination, and requires a finding that the non-domiciliary's activities were purposeful and established a substantial relationship between the transaction and the claim asserted.'" (*Paterno v Laser Spine Inst.*, 2014 WL 6473661 [NY 2014], quoting *Fischbarg v Doucet*, 9 NY3d 375, 380 [2007].) "Although it is impossible to precisely fix those acts that constitute a transaction of business, our precedents establish that it is the quality of the defendants' New York contacts that is the primary consideration." (*Fischbarg*, 9 NY3d at 380.) In addition to the requirement that a defendant transact business within the state, long-arm jurisdiction under CPLR 302 (a) (1) is only properly exercised where the cause of action arose from the in-state transaction. (*Copp*, 62 AD3d at 28.) "If either prong of the statute is not met, jurisdiction cannot be conferred." (*Id.*)

Plaintiffs fail to allege any facts supporting a claim that AY-Canada, AY-USA, AY-Nevada, AY-New England, AY-Southern California, AY-Pittsburgh, and AY-Texas, have transacted any business within New York. Although plaintiffs allege that "the departing brokers regularly engaged in transactions involving properties and persons in New York state" (AC ¶ 73), this wholly conclusory allegation falls far short of a "sufficient start" warranting discovery on whether these defendants have transacted business within the state for purposes of 302 (a) (1).

As to brokers employed by three other AY entities — AY-Atlanta, AY-Chicago, and AY-DC — plaintiffs allege three instances in which the brokers transacted business within New York or developed business opportunities in New York subsequent to their departure from G & E. (AC ¶¶ 76, 79, 93.) Specifically, plaintiffs allege that "upon information and belief, on or about February to November 2011, a broker employed . . . at Grubb & Ellis's

Atlanta office . . . was negotiating a sale and a multi-year lease of a property located in . . . New York," and "the broker disclosed and continued to develop this Business Opportunity after the broker commenced employment at Avison Young's Atlanta office." (AC ¶ 76.) Plaintiffs further allege that "to date, BGC has not received the commission to which it is entitled."[FN2] (*Id.*) Plaintiffs contend that New York courts have found that section 302 (a) (1) provides personal jurisdiction over non-domiciliaries who negotiate leases or sales of New York property.

Plaintiffs' contention overstates the law. As the Court of Appeals has explained: "CPLR 302 (a) (1) . . . is a single act statute' and proof of one transaction in New York is sufficient to [*5]invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." (*See Kreutter v McFadden Oil Corp.*, 71 N2d 460, 467 [1988]; *McGee v International Life Ins. Co.*, 355 US 220, 22-223 [1957].) Thus, "[e]ven if a defendant has engaged in purposeful acts in New York, there must also exist a substantial relationship between those particular acts and the transaction giving rise to the plaintiff's cause of action." (*Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 95 [1st Dept 2010].)

In the instant case, plaintiffs fail to plead facts to support a claim that a substantial relationship exists between the New York transactions and the causes of action asserted against AY-Atlanta, AY-Chicago, and AY-DC. These causes of action are focused on allegedly tortious acts which occurred outside of New York. The "looting," "theft," or interference with trade secrets, contracts, and business relationships occurred in, and are substantially related to, the forums in which the brokers were employed and the entities resided — namely, Atlanta, Chicago, and Washington, D.C. Put another way, plaintiffs' causes of action arise out of the out-of-state transactions where the underlying torts of tortious interference or misappropriation of trade secrets or business opportunities occurred. The causes of action are not based on the New York sale or lease transactions themselves. Indeed, were this court to hold that jurisdiction existed over these entities as a result of their negotiation of a transaction involving New York realty, the holding would lead to the absurd result of subjecting these entities to personal jurisdiction in every forum in which their brokers may have negotiated a realty transaction. Even assuming arguendo

that AY-Atlanta, AY-Chicago and AY-DC have "minimum contacts" with New York based on a single realty transaction here, exercise of personal jurisdiction over these entities pursuant to CPLR 302 (a) (1) would be an overreaching result that would not comport with "traditional notions of fair play and substantial justice." (*See generally LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 217 [2000] ["Minimum contacts alone do not satisfy due process. The prospect of defending suit in the forum State must also comport with traditional notions of fair play and substantial justice'"] [internal quotation marks and citations omitted]; *Copp*, 62 AD3d at 30-31.)[FN3] The court accordingly holds that plaintiffs' allegations fail to set forth facts sufficient to support the exercise of personal jurisdiction over these defendants based on transaction of business in New York, or to warrant jurisdictional discovery under CPLR 302 (a) (1).

*CPLR 302 (a) (2)*

CPLR 302 (a) (2) provides: "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary

. . . who in person or through an agent: . . . 2. commits a tortious act within the state . . . ."

Plaintiffs submit that conspiracy jurisdiction under CPLR 302 (a) (2) over all the [*6]defendants is proper. (Ps.' Memo In Opp. at 6.)[FN4] "The bland assertion of conspiracy or agency is insufficient to establish jurisdiction for the purposes of section 302 (a) (2)." (*Chrysler Capital Corp. v Century Power Corp.*, 778 F Supp 1260, 1266 [SD NY 1991] [brackets omitted] [applying New York law].) Plaintiffs must make "a *prima facie* factual showing of a conspiracy" and "allege specific facts warranting the inference that the defendant was a member of the conspiracy." (*Id.*; *see generally Lawati v Montague Morgan Slade LTD.*, 102 AD3d 427 [1st Dept 2013].) A valid cause of action for conspiracy under New York includes allegations of a primary tort and four additional elements: "(a) a corrupt agreement between two or more persons, (b) an overt act in furtherance of the agreement, (c) the parties' intentional participation in the furtherance of a plan or purpose, and (d) the resulting damage or injury." (*Chrysler*, 778 F Supp at 1267.)

Once plaintiffs make a prima facie factual showing of conspiracy, plaintiffs must also show that "(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control, or at the request of or on behalf of the out-of-state defendant." (*Lawati*, 102 AD3d at 428 [internal quotation marks omitted], quoting *Best Cellars Inc. v Grape Finds at Dupont, Inc.*, 90 FSupp2d 431, 446 [SD NY 2000]; *Chrysler*, 778 F Supp at 1269 [same].)

The Amended Complaint alleges that AY-New York committed independent primary tortious acts, including tortious interference with G & E brokers' individual broker agreements with G & E/BGC; tortious interference with prospective business relationships by inducing G & E brokers to disclose trade secrets and to conceal business opportunities and commissions from BGC when they departed G & E; and aiding and abetting the G & E brokers' breach of their fiduciary duties. (AC Counts I-VII.) These acts by AY-New York are alleged to have occurred in New York. (AC ¶¶ 83-86.) As noted above, the Amended Complaint pleads that the conspiracy "was conceived, directed, and controlled by officers, directors and/or employees of Avison Young" (referred to in this decision as AY-Canada), and that the affiliates carried out the scheme "under Avison Young's direction and control." (AC ¶ 23.) The Amended Complaint in turn alleges that Mark Rose is the Chief Executive Officer of Avison Young (AC ¶ 33); that "Mark Rose and Kim Krugman are the officers of Avison Young (USA)" (referred to in this decision as AY-USA), the domestic national entity; and that AY-New York, among other affiliates, is "controlled indirectly by Mark Rose." (AC ¶ 22.) According to the Amended Complaint, "under Mr. Rose's new leadership, Avison Young embarked upon a[n] . . . aggressive growth and expansion strategy'" and acquired brokerage operations in various locations in the US market. (AC ¶ 33.)

The court holds that these allegations qualify as a "sufficient start" to warrant further jurisdictional discovery regarding AY-Canada and AY-USA under CPLR 302 (a) (2). (*See* (*Peterson*, 33 NY2d at 467; *HBK Master Fund*, 85 AD3d at 666 [awarding jurisdictional discovery to determine whether the "parents exercised control over the subsidiaries"].)

Further discovery is needed to establish whether a corrupt agreement did in fact exist and whether AY-New York was acting at the direction or under the control of AY-Canada and/or AY-USA. The Amended Complaint lacks specific factual allegations as to the communications [*7]or meetings which may have taken place between AY-Canada, AY-USA, and AY-New York regarding the scheme or the means by which it was to be implemented. However, this is precisely the type of information which is uniquely in the possession of defendants.[FN5]

The court reaches a different result with respect to jurisdiction over the remaining defendants under 302 (a) (2). Plaintiffs have wholly failed to allege that the activity of AY-New York was to the benefit of any of the other AY regional affiliates; that AY-New York was acting at the direction or under the control of the AY regional affiliates; or that such entities were aware of the effects of any activity on their part in New York. Accordingly, the court holds that there is no basis on which to award jurisdictional discovery as to AY-Nevada, AY-DC, AY-Chicago, AY-New England, AY-Atlanta, AY-California, AY-Pittsburgh, and AY-Texas, and that the court lacks personal jurisdiction over these defendants on a conspiracy theory under 302 (a) (2).

*CPLR 302 (a) (3) (ii)*

CPLR 302 (a) (3) (ii) provides:

"As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent: . . . (3) commits a tortious act without the state causing injury to person or property within the state . . . if he . . . (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

As discussed above, plaintiffs fail to allege that defendants AY-Nevada, AY-New England, AY-Southern California, AY-Pittsburgh, and AY-Texas have committed any tort that they "reasonably expected" to have consequences in the state of New York. The court accordingly holds that the Amended Complaint fails to plead a basis for jurisdictional

discovery or personal jurisdiction over these defendants under CPLR 302 (a) (3) (ii).

In their briefing of this motion, plaintiffs contend that the acts of AY-Atlanta, AY-Chicago, and AY-DC, which are discussed above, caused injury within New York because the brokers were engaged in the active solicitation of New York customers, negotiations and sales of New York properties, and theft of New York-centric trade secrets. (Ps.' Memo In Opp. at 10.) This contention is unsupported by the pleadings. The Amended Complaint does not in fact allege that the three customers involved in the Atlanta, Chicago, and DC transactions were based in New York. Furthermore, whether or not these customers were based in New York, they are alleged to have been customers of the G & E offices outside of New York. Even giving the Amended Complaint the benefit of all reasonable inferences, the trade secrets underlying these transactions were therefore also allegedly developed and misappropriated in foreign jurisdictions.

These facts distinguish this action from *Sybron Corp. v Wetzel*, (46 NY2d 197, 205 [1978]), the case upon which plaintiffs principally rely. In *Sybron*, the plaintiff alleged that a non-domiciliary defendant had a conscious plan to engage in unfair competition with the plaintiff by misappropriating the plaintiff's trade secrets. The Court held that the exercise of jurisdiction over the defendant was proper under CPLR 302 (a) (3) (ii), where the defendant hired a former employee of the plaintiff who had allegedly acquired the plaintiff's trade secrets [*8]while working for the plaintiff in New York, and the defendant had also actively solicited a major New York customer of the plaintiff. (*Id.* at 205-206.)[FN6] Here, in the case of AY-Atlanta, AY-Chicago, and AY-DC, the complaint alleges the misappropriation of a trade secret developed in a foreign jurisdiction by a non-domiciliary employee working for a non-domiciliary company, and its use to solicit a customer for a single deal in New York.

The court further finds that the only injury alleged to have been sustained in New York is the indirect or derivative economic injury to BGC as a result of the alleged diversion of commissions from the New York deals. New York courts have repeatedly held that such derivative injury is an insufficient basis on which to confer jurisdiction on a court under CPLR 302 (a) (3) (ii). (*See Fantis Foods v Standard Importing Co.*, 49 NY2d 317, 326-327 [1980] ["It has, however, long been held that the residence or domicile of the

injured party within a State is not a sufficient predicate for jurisdiction, which must be based upon a more direct injury within the State and a closer expectation of consequences within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled there"] [collecting authorities]; *see also American Eutectic Welding Alloys Sales Co., Inc. v Dytron Alloys Corp.*, 439 F2d 428, 432-435 [2d Cir 1971] [declining jurisdiction over non-domiciliary defendant where the defendant hired employees of the plaintiff, a New York corporation with a national sales force, and the employees solicited the plaintiff's customers in two states outside New York. The Court reasoned that the "stealing" of these out-of-state customers was not injury to the plaintiff in New York for the purposes of CPLR 302 [a] [3] [ii]].) Accordingly, the court holds that plaintiffs have failed to make a showing sufficient to warrant jurisdictional discovery as to AY-Atlanta, AY-Chicago, and AY-DC, or to plead jurisdiction over these defendants pursuant to section 302 (a) (3) (ii).[FN7]

For the reasons discussed above, the court declines at this juncture to decide whether jurisdiction exists under 302 (a) (3) (ii) over AY-Canada and AY-USA, as jurisdictional discovery is warranted. More information is needed to determine whether AY-Canada and AY-USA controlled AY-New York, whether the alleged out of state actions of AY-Canada and AY-USA caused an injury in New York, and whether either of these defendants had reason to foresee that its acts would produce enough forum contacts to make the exercise of personal jurisdiction reasonable. (*Sybron*, 46 NY2d at 206.)

Finally, in holding that the court lacks jurisdiction over the AY regional affiliates other than New York, the court recognizes that plaintiffs have alleged a concerted scheme by AY management to misappropriate BGC's business on a nation-wide basis, resulting in the defection of at least 41 G & E brokers to the regional affiliates. Under settled jurisdictional precepts, however, the court cannot exercise jurisdiction over the affiliates in the absence of minimum contacts with New York and satisfaction of due process standards. BGC is not without a remedy, but must pursue it in a more appropriate forum.

*Remaining Claims*

The court holds that the Amended Complaint adequately pleads plaintiffs' standing.

In moving to dismiss based on standing, defendants rely on a letter (Ex. C to Williams Aff. In Support), which refers to the assignment to a different entity of claims to G & E commissions that are unidentified, with one exception. This letter is not the kind of documentary evidence that conclusively demonstrates plaintiffs' lack of standing as a matter of law.

The branch of defendants' motion to dismiss for failure to state a cause of action will be held in abeyance, in the interests of judicial economy, pending resolution of defendants' claim that the court lacks jurisdiction over AY-Canada and AY-USA.

It is hereby ORDERED that the branch of defendants' motion to dismiss based on lack of personal jurisdiction is granted to the following extent: the complaint is dismissed in its entirety with respect to Avison Young — Nevada, LLC; Avison Young — Washington, D.C., LLC; Avison Young — Chicago, LLC; Avison Young — New England, LLC; Avison Young — Atlanta, LLC; Avison Young — Southern California, LTD.; Avison Young — Pittsburgh, LLC; and Avison Young — Texas, LLC; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the Amended Complaint as against the aforesaid defendants; and it is further

ORDERED that the remaining claims are severed; and the Clerk shall amend the caption accordingly; and it is further

ORDERED that the issue of personal jurisdiction over defendants Avison Young (Canada) Inc. and Avison Young (USA) Inc., including supervision of CPLR 3211 (d) discovery with respect to these defendants, and the holding of a traverse hearing, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that a copy of this order with notice of entry shall be served by plaintiffs BGC Partners, Inc. and G & E Acquisition Company, LLC forthwith on the Clerk of the Special Referee's Office (Room 119) to arrange a date for the reference to a Special

Referee; and it is further

ORDERED that a motion to confirm or reject the report of the Special Referee shall be made within 15 days of the filing of the report; and it is further

ORDERED that the branch of defendants' motion to dismiss based on standing is denied; and it is further

ORDERED that the branch of defendants' motion to dismiss for failure to state a cause of action is held in abeyance pending hearing and determination of the remaining jurisdictional issues.

This constitutes the decision and order of the court.

Dated:New York, New York

December 15, 2014

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Marcy Friedman, J.S.C.

**Footnotes**

**Footnote 1:** *In re: Grubb Ellis Company, et al.*, Case No. 12-10685 [Bankr SD NY Filed Feb. 20, 2012].

**Footnote 2:** The allegations with respect to AY-DC (AC ¶ 93) and AY-Chicago (AC ¶ 79) are substantially similar.

**Footnote 3:** The cases on which plaintiffs rely are not to the contrary. In *Black River Assocs. v Newman* (218 AD2d 273, 279 [4th Dept 1996]), the defendant, a non-

domiciliary, was the named signatory and purchaser of real property in New York and, in connection with the purchase, appointed the New York Secretary of State to act as his agent to receive service. The cause of action in *Black River* sought specific performance of, and contractual remedies flowing from, a contract for New York property which had a "substantial connection with the forum." (*Id.* at 280.) Thus, the cause of action in *Black River* arose directly out of the New York transaction. Similarly, in *People v Frisco Mktg. of NY LLC* (93 AD3d 1352, 1353-54 [4th Dept 2012]), the individual defendants signed leases for stores in New York which made allegedly fraudulent sales, and were the officers of corporations that made the allegedly fraudulent sales in the New York stores.

**Footnote 4:** "While there is no cognizable action for a civil conspiracy, a plaintiff may plead conspiracy in order to connect the actions of the individual defendants with an actionable underlying tort and establish that those acts flow from a common scheme or plan." (*American Preferred Prescription, Inc. v Health Mgt., Inc.*, 252 AD2d 414, 416 [1st Dept 1998].)

**Footnote 5:** *See* Oral Argument Transcript at 23-24 [Ps.' Attorney: ". . . without jurisdictional discovery, of course I can't show how Mark Rose directed the operations from here to there to there. . . . Because what we will show is a coordinated attempt to go after Grubb & Ellis nationwide. That's what happened, and I posit to your Honor that if it happened, it didn't happen by happenstance"].)

**Footnote 6:** Interestingly, in *Sybron* the Court expressly noted that it need not determine "whether the loss of a small New York account would suffice" to establish an injury in New York, as it found that that the non-domiciliary had solicited a "major" New York customer of the plaintiff, and the loss was therefore significant. (46 NY2d at 205-206.) Plaintiffs in the instant case do not plead that the loss of business in New York based on the tortious acts committed outside of the State would be significant.

**Footnote 7:** The court has held above that no basis exists on which to assert jurisdiction over the other AY regional affiliates because the Amended Complaint does not plead that AY-NY acted on their behalf or that they committed any tort that they reasonably expected to have consequences in New York. The court notes further, on the authority cited above, that any injury arising from their out-of-state misappropriation of BGC's trade secrets or business opportunities would at best be "indirect injury" in New York that would not support the exercise of jurisdiction over them under CPLR 302 (a) (3) (ii). The G & E brokers whose business the AY affiliates allegedly misappropriated were employees of G & E out-of-state entities (AC ¶¶ 18, 27), and this is not a case in which it is alleged that their out-of-state torts caused a major loss of business in New York. (See *American Eutectic*, 439 F2d at 435.)

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