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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RAYMOND EDWARDS II, Plaintiff and Appellant, v. ARTHUR ANDERSEN LLP, Defendant and Respondent.	B225801 (Los Angeles County Super. Ct. No. BC294853)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

Randolph & Associates, Donald C. Randolph; Teren Law Group, Pamela M. Teren and Lauren E. Miller for Plaintiff and Appellant.

Latham & Watkins, Wayne S. Flick, Yury Kapgan, Anita P. Wu and Kristine L. Wilkes for Defendant and Respondent.

In *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 944, 955 (*Edwards I*), the California Supreme Court held the "Termination of Non-Compete Agreement" (TONC) Arthur Andersen LLP (Andersen) required its departing employees to sign was not unlawful for purposes of establishing an intentional act to satisfy the third element of a tort claim for interference with a prospective economic advantage. In this appeal from a judgment in which the trial court granted Andersen's motion for summary judgment on Edwards's claim for intentional interference with prospective economic advantage, our focus is on the first element of the tort claim that requires an economic relationship between the plaintiff and a third party.[1] We conclude the trial court properly granted summary judgment because the undisputed evidence establishes plaintiff Raymond Edwards II (Edwards) did not have an economic relationship with his prospective employer HSBC USA, Inc. (a New York-based banking corporation) that was independent from the economic relationship Andersen created for him upon the sale of the Private Client Services (PCS) group to HSBC and Wealth and Tax Advisory Services, Inc. (WTAS) (unless specified, hereafter HSBC). Andersen, as a matter of law, was not a stranger to the economic relationship. Since our resolution of this issue disposes of the entire complaint, Edwards's appeal challenging the trial court's order granting summary adjudication of his request for punitive damages is moot.

MATERIAL FACTUAL AND PROCEDURAL BACKGROUND

1. *Edwards's Employment with Andersen*

When Edwards was hired as a tax manager in Andersen's Los Angeles office, he signed the firm's noncompetition agreement. Edwards worked in Andersen's PCS group

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[1] At oral argument, for the first time Edwards cited to, and relied on, our previously unpublished opinion following remand in *Edwards I*. (*Edwards v. Arthur Andersen LLP* (Dec. 18, 2008, B178246 [nonpub. opn.].) In that opinion, we did not consider the limitation to the use of this tort as a remedy for the disruption of economic relationships. A judicial decision is not authority for a point that was not actually raised and resolved. (*Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 64.)

until 2002, when Andersen announced it would cease providing public accounting services.

Edwards received a memorandum from Andersen that his employment would end upon the earlier of (1) the offer of a position in connection with a transaction between Andersen and a third party, (2) acceptance of any new employment position, or (3) July 27, 2002.

2. *Andersen Partners Negotiate the Sale of the PCS Group to HSBC*

As part of its efforts to sell its U.S.-based tax practices, three partners from Andersen's PCS group entered into negotiations with HSBC. Edwards was approached by the partners and asked if he was interested in employment with HSBC. Edwards believed that HSBC intended to hire him, and he wanted to work for HSBC. Edwards, however, was not involved in the employment negotiations.

In May 2002, one of the partners sent Edwards (and others in the PCS group) an e-mail announcing that they had entered into a "Memorandum of Understanding" (MOU) with HSBC. The e-mail anticipated Andersen's involvement, including negotiating "our departure from the firm." The e-mail also stated: "I believe that offer letters for partners and employees will be forthcoming in the next couple of days."

Andersen partners Joseph P. Toce, Mark L. Vorsatz, and William M. Pace were named in the MOU with HSBC and agreed to establish a private client tax advisory business, referred to as "Newco," and later identified as WTAS in the final acquisition agreement between Andersen and HSBC. Paragraph No. 9 of the MOU refers to the transaction with Andersen. "Subject to the approval of HSBC, it is recognized and agreed by the parties that Newco will furnish such consideration as necessary to permit the release of the former Andersen partners and personnel from Andersen to Newco and the transfer of files, furniture and other property as HSBC shall determine is appropriate to the conduct of the business (the 'Andersen Transaction'). HSBC shall participate in such negotiations with Andersen to conclude such release and transfer and shall have final approval of the terms and conditions of any agreement with Andersen."

Edwards initially was identified as one of the employees included in the Andersen-HSBC transaction. As part of the Andersen-HSBC transaction, HSBC required a release of any restrictive covenants or noncompetition agreements entered into between Andersen and those identified employees. Andersen prepared a check-out process for what it termed the "Andersen Transition for PCS & BPO Transaction." The check-out process required those Andersen employees indentified in the Andersen-HSBC transaction to (1) resign from Andersen, and (2) sign the TONC.

Under the terms of the final acquisition agreement between Andersen and HSBC, at the closing of the Andersen transaction, Andersen had to deliver to HSBC a "Termination of Non-Compete Agreement with respect to each Restricted Employee." "Restricted Employee" was defined in the agreement as those "Transferred Employees who are bound by non-compete provisions in favor of Andersen[.]" Edwards was a restricted employee. Assuming the terms were met, HSBC agreed to employ the transferred Andersen employees upon the close of the transaction.

3. *HSBC Extends Edwards a Contingent Employment Offer*

As part of the Andersen-HSBC transaction, Edwards received a conditional job offer from HSBC. The offer was contingent on: "(i) the closing of the transaction contemplated by the Memorandum of Understanding (or similar agreements) between HSBC USA, Inc. and Joseph P. Toce, Jr., Mark L. Vorsatz, and William M. Pace; and (ii) receipt by Wealth and Tax Advisory Services, Inc. or HSBC USA, Inc. of a release executed by Arthur Andersen LLP ('Andersen') (and in a form satisfactory to Wealth and Tax Advisory Services, Inc. in its sole discretion) which releases you, effective at the closing of the transaction (the 'Closing'), from any . . . non-competition, non-solicitation or other restrictive covenants . . . ."

On July 8, 2002, Edwards received a final contingent offer from HSBC, restating the conditions described above. Edwards accepted the conditional offer, but did not sign the TONC. Under the terms of the final acquisition agreement between Andersen and HSBC, Andersen had to deliver an executed TONC for each restricted employee.

4. *Edwards's Offer is Withdrawn*

The Andersen-HSBC transaction closed without Edwards. Edwards was informed late on July 8, 2002, or early July 9, 2002 before the transaction closed that his name "had been stricken from the list of employees in the transaction," and he would be terminated. On July 9, 2002, before terminating Edwards, Andersen offered him another opportunity to sign the TONC. Edwards again refused.

On July 29, 2002, HSBC withdrew its conditional employment offer. The letter stated the offer was withdrawn because HSBC had not received a release from Andersen at the closing of the transaction "which occurred on July 9, 2002."

5. *Edwards Asserts a Cause of Action Against Andersen for Intentional Interference with Prospective Economic Advantage*

Based upon the theory that Andersen prevented Edwards's employment with HSBC because Andersen would not release him from his noncompetition agreement, Edwards asserted a cause of action for intentional interference with prospective economic advantage. The complaint specifically alleges that Edwards received the final employment offer on July 8, 2002, but since he refused to sign the TONC and Andersen threatened to enforce his noncompetition agreement, Edwards was denied employment with HSBC. This is the only remaining cause of action in the operative complaint.

6. *Andersen's Motion for Summary Judgment Granted*

Andersen filed a motion for summary judgment, contending Edwards had no economic relationship with HSBC (third party) to establish the first element of his tort claim of intentional interference with prospective economic advantage.[2] Andersen argued the first element of this tort required Edwards to establish that Andersen was a

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[2] The trial court considered the propriety of a second motion for summary judgment to dispose of this cause of action. The trial court exercised its discretion in determining that Code of Civil Procedure section 437c, subdivision (f)(2) did not bar summary judgment because this motion addressed a legal issue not raised in the motion decided in *Edwards I* or on remand in *Edwards v. Arthur Andersen LLP*, *supra*, B178246, at pp. 2-3. (See *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 72.) We find no abuse of discretion.

stranger to his employment opportunity, but the undisputed evidence established Andersen was not a stranger. Andersen created Edwards's employment opportunity with HSBC, and Andersen's performance was necessary in order for HSBC to hire Edwards. The trial court agreed with Andersen, granted summary judgment, and entered judgment in Andersen's favor. This timely appeal followed.[3]

DISCUSSION

Edwards contends the trial court improperly granted the summary judgment motion because at least 67 material facts were disputed, focusing on 14 facts to illustrate his point. Before we consider whether the evidence supports Edwards's contention, we first look to the allegations in the operative complaint because those allegations frame the issues pertinent to the summary judgment motion. (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) Thus, the principal questions before us as framed by the pleadings are: (1) whether Edwards's employment offer with HSBC was independent of the Andersen-HSBC transaction; and (2) whether the employment offer was contingent upon Andersen's performance. Based upon our standard of review, the admissible evidence presented in support of and in opposition to the motion for summary judgment, and the applicable law, it is undisputed that Andersen was not a stranger to Edwards's employment opportunity. Thus, we conclude summary judgment was properly granted.

1. *Standard of Review*

In moving for summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action—for example, that the plaintiff cannot prove element *X*." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853; see Code Civ. Proc., § 437c, subd. (*o*)(1).) Although we independently review the grant of summary judgment (*Lunardi v. Great–West Life Assurance Co.*

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[3] Edwards also appeals from the trial court's order granting Andersen's motion for summary adjudication of his request for punitive damages. Because we conclude there are no triable issues of fact on the only remaining cause of action in the operative complaint, the propriety of the ruling on the summary adjudication motion is moot.

(1995) 37 Cal.App.4th 807, 819), our review is limited in two respects. First, our assessment of the propriety of summary judgment is based upon the contentions raised in the opening brief, thus we disregard arguments made for the first time in Edwards's reply brief. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126.) Second, our review of the evidence to determine if there is a triable issue of fact does not include evidence to which objections have been sustained. (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 711; Code Civ. Proc., § 437c, subd. (c).) Since Edwards has not challenged the trial court's evidentiary rulings, he not only has forfeited any contentions of error (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1181), but we also cannot rely on this inadmissible evidence to determine if a triable issue of fact exists. (Code Civ. Proc., § 437c, subd. (c).)

Since our review is de novo, we need not address Edwards's arguments related to the trial court's improper findings, improper inferences, and other purported failings related to the order granting summary judgment.

2. *It is Undisputed that Andersen Was Not a Stranger to Edwards's Job Offer*

Edwards contends it is disputed whether Andersen interfered with his employment opportunity with HSBC, arguing the employment offer was between him and HSBC and Andersen was a "stranger-interloper" to that economic relationship. As stated, an element of a tort claim for intentional interference with prospective economic advantage is "an economic relationship between the plaintiff [Edwards] and a third party [HSBC], with the probability of a future economic benefit to the plaintiff." (*Edwards I*, *supra*, 44 Cal.4th at p. 944; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.) The tort duty not to interfere falls only on strangers-interlopers who have no legitimate interest in the scope or course of the economic relationship. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 513-514; *PM Group, Inc. v. Stewart* (2007) 154 Cal.App.4th 55, 65; *Woods v. Fox Broadcasting Sub., Inc.* (2005) 129 Cal.App.4th 344, 350-351; *Kasparian v. County of Los Angeles* (1995) 38 Cal.4th 242, 260-262.)

"There is an important limitation to the use of this tort as a remedy for the disruption of contractual relationships. *It can only be asserted against a stranger to the relationship*. '[C]onsistent with its underlying policy of protecting the expectations of contracting parties against frustration *by outsiders* who have no legitimate social or economic interest in the contractual relationship, the tort cause of action for interference with a contract does not lie against a party to the contract. [Citations.]' . . . [¶] . . . [T]he same rationale should also bar prosecution of the tort of interference with prospective economic advantage against a party to the relationship from which the plaintiff's anticipated economic advantage would arise." (*Kasparian v. County of Los Angeles*, *supra*, 38 Cal.App.4th at p. 262.)

Citing *Woods v. Fox Broadcasting Sub., Inc.*, *supra*, 129 Cal.App.4th 344, Edwards contends Andersen is a stranger to his employment opportunity with HSBC because Andersen was not a party to the contingent offer HSBC extended to him. *Woods* is inapposite. In *Woods*, corporate officers sued a major shareholder of the corporation for interference with contractual and economic relations in connection with the sale of the corporation. The corporate officers alleged the decreased sales price of the corporation resulted in a reduction in value of their contractual stock options. (*Id*. at pp. 347-348.) The *Woods* court held that persons or entities with ownership interests in a corporation are not automatically immune from liability for interfering with their corporation's contractual obligations. (*Id*. at p. 353.) *Woods* does not hold that all noncontracting parties may be held liable for tort interference. Nor did the *Woods* court address a factual situation in which, as here, the prospective economic opportunity was created by the purported stranger (Andersen) and contingent upon the performance of the purported stranger.

In *PM Group, Inc. v. Stewart*, *supra*, 154 Cal.App.4th 55, we concluded a noncontracting party was not a stranger-interloper when that party's performance was necessary to the plaintiffs' prospective economic relationship. In *Stewart*, we held that because the subcontracts at issue provided for Rod Stewart's concert performance, neither Rod Stewart nor his representatives, including his manager, his lawyer, and his

agent, could be liable to the plaintiffs for interfering with the subcontracts they had negotiated with third parties. (*Id*. at pp. 57-58, 64-65.)

Like Stewart, Andersen was not a stranger but a necessary party to Edwards's employment opportunity with HSBC. Edwards admits the opportunity arose and was negotiated by Andersen (initially through the PCS partners). Edwards's employment opportunity with HSBC was dependent upon Andersen's performance under the terms of the final acquisition agreement between Andersen and HSBC. HSBC agreed to employ Edwards, a restricted employee, if (1) the sale closed, and (2) Andersen delivered a release to HSBC. Although Andersen was not a signatory to Edwards's employment offer, without Andersen's performance, HSBC was not obligated to employ Edwards. Moreover, in both the operative complaint, and in declarations Edwards submitted throughout these proceedings, he understood the HSBC employment offer arose from the Andersen-HSBC transaction. Andersen cannot be liable for interfering with its own contract in which, as part of that contract to sell the PCS group, it negotiated Edwards's employment opportunity.[4]

Edwards next contends he had a separate employment offer with HSBC following the close of the Andersen-HSBC transaction. This contention is inconsistent with Edwards's admission that he received a final contingent offer on July 8 that required both the closing of the Andersen-HSBC transaction and a release from Andersen. Moreover, the July 8 offer signed by Edwards sates: "This agreement contains the entire understanding of the parties and may be modified only in a document signed by the parties and referring explicitly hereto." Edwards apparently views Andersen's attempt on July 9th, the day of the closing, to persuade him to sign the TONC as a separate employment offer from HSBC. There is no evidence to support this assertion.

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[4] Although we disregard arguments raised for the first time in reply briefs, we note that Edwards argues the contingencies in the HSBC employment offer did not refer to Andersen, but required closing the deal with the three partners that negotiated the HSBC transaction. The MOU refers to the three partners, but the MOU indisputably contemplated Andersen's approval and involvement in negotiating the terms of the sale of the PCS group to HSBC.

We also reject Edwards's contention that there is a triable issue of fact as to whether HSBC independently intended to offer him employment outside of the Andersen-HSBC transaction. We accept as true Edwards's statements that the PCS partners who initially signed the MOU asked Edwards if he was interested in joining HSBC, and that HSBC intended to hire him. This evidence, however, does not create a disputed material fact because Edwards admits the only employment offer he received was a contingent offer arising from the Andersen-HSBC transaction.

3. *It is Undisputed that Edwards's Employment Offer from HSBC was Contingent upon Andersen's Performance*

Edwards contends his employment offer was not contingent upon signing the TONC, but only upon a release from Andersen, thus creating a triable issue of fact as to whether HSBC actually required him to sign the TONC as a condition of employment. At oral argument, Edwards's counsel argued our previous unpublished opinion already concluded a triable issue of material fact existed on this point. (*Edwards v. Arthur Andersen LLP*, *supra*, B178246, at pp. 22-23.) This argument ignores both the legal issues raised here related to the stranger doctrine, which was not previously considered, and the undisputed facts presented in this motion related to Edwards's employment opportunity with HSBC.

It is undisputed that Andersen was a party to the final acquisition agreement in which HSBC agreed to employ the transferred employees as part of the sale of the PCS group to HSBC. Under the terms of the final acquisition agreement between Andersen and HSBC, Andersen had to deliver a "duly executed copy" of the TONC with respect to each restricted employee identified in the transaction that would transfer to HSBC. Andersen had to perform to close the transaction, and it is undisputed that a condition of Edwards's offer was the close of the Andersen-HSBC transaction.

To summarize, the undisputed evidence establishes Edwards's contingent employment offer from HSBC was created by Andersen, and contingent upon Andersen's performance of the terms in the final acquisition agreement with HSBC. Thus, as a matter of law, Edwards cannot establish interference by a stranger to the economic

relationship between him and HSBC to proceed to trial with his claim for intentional interference with prospective economic advantage. Summary judgment was properly granted.

DISPOSITION

The judgment is affirmed. Andersen is awarded costs on appeal.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.