

Not Reported in Cal.Rptr.3d. 2003 WL 22456746 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2003 WL 22456746 (Cal.App. 2 Dist.))

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Court of Appeal, Second District, Division 1, California.

Kay YAN et al., Cross-complainants and Appellants,

v.

MEMRAD MEDICAL GROUP, INC., Cross-defendant and Respondent.

No. B165661.

(Los Angeles County Super. Ct. No. NC030166).

Oct. 30, 2003.

As Modified on Denial of Rehearing Nov. 19, 2003.

APPEAL from a judgment of the Superior Court of Los Angeles County, Margaret M. Hay, Judge. Affirmed.

Valerie F. Horn & Associates, Valerie F. Horn; Dunn Koes, Pamela E. Dunn and Daniel J. Koes for Cross-complainants and Appellants.

Ballard Rosenberg Golper & Savitt, Linda Miller Savitt, Christine T. Hoeffner and Adrian J. Guidotti for Cross-defendant and Respondent.

VOGEL (MIRIAM A.), J.

*1 Two doctors, both women, went to work for a medical corporation and later became shareholders. When a second corporation was thereafter formed, shares were allocated among about three dozen employee-shareholders in proportion to their shares in the original corporation. The women claim that, as a result of gender discrimination by the original corporation, they received too few shares in the second corporation. The trial court granted summary judgment in favor of the original

corporation. We affirm.

FACTS

A.

In 1993, Nancy Bucciarelli, M.D., and Kay Yan, M.D., both radiologists, began working for Memrad Medical Group, Inc., and both became shareholders, Bucciarelli in September 1995, Yan in December 1996. At the time they became shareholders, Bucciarelli and Yan entered identical agreements with Memrad for the purchase of 700 Memrad shares in three annual installments. Bucciarelli received 200 shares in September 1995, 200 in September 1996, and 300 in September 1997; Yan received 200 in December 1996, 200 in December 1997, and 300 in December 1998.

B.

In February 1997-t which time Bucciarelli owned 400 Memrad shares and Yan owned 200-a second corporation, Radiology Practice Management, Inc. (RPM), was formed to manage Memrad's business operations. Under the original plan, RPM's shares were to be issued only to the Memrad shareholder-employees whose shares were fully vested (that is, those who had acquired all of the 700 shares each was entitled to under his agreement with Memrad). Of Memrad's 39 shareholders, 33 were fully vested; the remaining 6, including Bucciarelli and Yan, were not. As of that time, the 33 vested shareholders were all men; 5 of the remaining 6 (the "partial shareholders"), including Bucciarelli and Yan, were women. The partial shareholders consulted a lawyer, held a meeting, and ultimately persuaded the others to modify the original plan.

Pursuant to a modified plan adopted in June and acted upon in July, every Memrad shareholder received 3,250 RPM shares ("contributed shares"), and the remaining RPM shares ("founders' shares") were purchased by the Memrad shareholders in direct proportion to their Memrad ownership interests as of February 7, 1997. Thus, in addition to the

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contributed RPM shares distributed to every Memrad shareholder, Memrad's fully vested shareholders each received 3,750 RPM founders' shares, and Memrad's partial shareholders each received a proportionately lesser number of RPM founders' shares (the balance due to the partial shareholders were deposited into an escrow account for purchase by the partial shareholders over a 10-year period reduced by previous years of employment by Memrad). Bucciarelli and Yan, both partial shareholders in Memrad in February 1997, received a proportionally reduced number of shares in RPM.

As shareholders, Yan and Bucciarelli signed at least five repurchase agreements in July 1997 (some applied to contributed shares, others to founders' shares, and two applied only to partial shareholders), and thereby agreed (as relevant to this litigation) that their RPM shares were subject to repurchase under certain circumstances.

C.

*2 In 1998, RPM, originally a "C" corporation, changed its status to an "S" corporation. In December, the RPM repurchase agreement governing all shareholders' contributed shares was terminated. At the same time, the six partial shareholders on the one hand, and RPM on the other, executed two new repurchase agreements, both of which were subject to amendment with the consent of RPM and a majority of the partial shares. Under the 1998 agreements, the partial shareholders' escrowed founders' shares became subject to repurchase by RPM if the partial shareholder's employment relationship with Memrad was terminated before the shareholder became fully vested.

D.

In 2000, RPM's partial shareholders were notified that new repurchase agreements had been approved by a majority of all of RPM's shareholders, and that the partial shareholders were expected to execute the new agreements-which (according to Bucciarelli and Yan) went further than the 1998 agreements by, among other things, defining a "repurchase event" to include (in addition to separ-

ation from Memrad) a shareholder's decision to work part time rather than full time. This is the way they put it: "While the 1998 Repurchase Agreements subjected [the partial shareholders'] escrowed founder shares to mandatory repurchase, the 2000 Agreement completely stripped the Memrad [partial shareholders] of their founder shares if they left Memrad before serving a full ten years of employment. State[d] otherwise, none of the ... partial shareholders had any portable shares until after 10 years of employment at Memrad." Bucciarelli and Yan claim this amounted to a forfeiture of their founders' shares.

In January 2001, Bucciarelli switched from full time to part time employment at Memrad; in February, Yan resigned. Both were "repurchase events" under the 2000 Agreement, and RPM demanded that they relinquish their RPM shares. Both refused, and RPM initiated this lawsuit to compel them to return their shares.

E.

In September 2001, Bucciarelli and Yan filed gender discrimination complaints with the Department of Fair Employment and Housing, asserting that on July 28, 1997, and continuing through July 2001, they were denied equal stock ownership in RPM because they are women. Right to sue letters were issued, and Bucciarelli and Yan then answered RPM's complaint and cross-complained against RPM and Memrad (and two individuals included in our references to the corporations). Memrad, the subject of only one cause of action, is charged with gender discrimination.

Memrad answered the cross-complaint and then moved for summary judgment, claiming that Bucciarelli and Yan had failed to exhaust their administrative remedies, that their claims were barred by the one-year statute of limitations, and that the dispute about the shares is one between shareholders, not one between employer and employee. Over Bucciarelli's and Yan's opposition, the trial court granted the motion.^{FN1} Bucciarelli and Yan appeal from the judgment in favor of Memrad (RPM is not

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a party to this appeal).

FN1. The trial court ruled that the “denial of equal stock ownership on 7/28/97 was a discrete act, which does not allow for a ‘continuing violation’ to toll the statute of limitations,” and that the gender discrimination claim against Memrad was therefore time barred. The court also held that the FEHA claims were insufficient to cover anything more than the wrongs specifically stated in the claims, and that Bucciarelli and Yan had failed to exhaust their administrative remedies with regard to any alleged wrongdoing other than that described in the claim.

DISCUSSION

*3 In a series of related arguments, Bucciarelli and Yan contend the “continuing violation doctrine” applies as a matter of law to gender discrimination claims, that the “gender based discrimination” arose out of their employment status rather than their status as shareholders, and that they fully exhausted their administrative remedies. We disagree.

A.

According to their cross-complaint and their own declarations, Bucciarelli and Yan signed employment contracts when they went to work for Memrad in 1993. As of that time, each knew that, following two years of satisfactory employment, she would have the opportunity to purchase 700 Memrad shares over a three-year period. Bucciarelli became a Memrad shareholder in September 1995, Yan in December 1996. As the undisputed evidence shows, both Bucciarelli and Yan ultimately obtained their full allotments of Memrad shares, albeit after RPM was formed.

When RPM was incorporated in February 1997, Bucciarelli owned 400 Memrad shares, and Yan owned 200. As shown above, they therefore did not obtain as many RPM shares as their vested colleagues, and they (as well as the other partial

shareholders) were subject to repurchase terms that were not imposed on the vested shareholders. But everything that happened after the July 1997 issuance of the RPM shares had to do with RPM, not Memrad, and it is for this reason the trial court found that, assuming Memrad discriminated against its female employees when RPM was formed, a claim had to be filed within one year of that time. (Gov.Code, § 12960.) ^{FN2} Since Bucciarelli's and Yan's DFEH claims were not filed until September 2001, their cross-complaint against Memrad is time barred. (*Balloon v. Superior Court* (1995) 39 Cal.App.4th 1116, 1120, 46 Cal.Rptr.2d 161; *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 631, 86 Cal.Rptr.2d 497, overruled on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6, 130 Cal.Rptr.2d 662, 63 P.3d 220.)

FN2. All section references are to the Government Code. Subdivision (d) of section 12960 provides that “[n]o complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred.”

Bucciarelli's and Yan's claim that they did not discover Memrad's wrongdoing until later is legally irrelevant under these circumstances—because delayed discovery can extend the period of limitations for only 90 days, not for the three years required to make Bucciarelli's and Yan's claims timely. (§ 12960; *Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 92-93, 84 Cal.Rptr.2d 658.)

As their cross-complaints allege, it was the issuance of proportionally less stock to the six partial shareholders (five of whom were women) in July 1997 that constituted “wrongful[] discriminat[ion] ... on the basis of gender by Memrad, [which] caused the partial Memrad shareholders to be issued an inequitable shareholder status in ... RPM....” While they also allege that Memrad's wrongful conduct continued through March 2001

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because Memrad made annual deductions from their salaries for operating expenses equal to the deductions from the salaries of the vested shareholders, they offered no evidence to support this conclusory allegation, and they do not explain the nature or amount of the deduction or how it shows further wrongdoing similar to the issuance of stock in a new corporation. In any event, as discussed below, this is not a continuing violation case.

B.

*4 To avoid the bar of limitations, Bucciarelli and Yan contend this is an appropriate case for application of the continuing violation doctrine. We disagree.

As the Supreme Court recently explained, the continuing violation doctrine, when applied to a discrimination claim, permits a suit to continue outside the period of limitations when there is "a single, actionable course of conduct" shown by actions that are (1) "sufficiently similar in kind" (2) occurring with "sufficient frequency" but (3) have "not acquired a degree of permanence" so that employees are on notice that further efforts at informal conciliation with the employer ... would be futile." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802, 111 Cal.Rptr.2d 87, 29 P.3d 175.) Here, the most that Bucciarelli and Yan are able to show is that a deduction was made from their salaries once each year for operating expenses. They do not explain how that deduction is "similar in kind" to the allegedly discriminatory issuance of shares in a new corporation.

That their showing is insufficient is essentially conceded by their request that we hold, as a matter of law, that the continuing violation theory applies to every gender discrimination claim. In light of the Supreme Court's reaffirmation of the doctrine's application on a case by case basis as recently as 2001, that is not something we are willing to do. (*Richards v. CH2M Hill, Inc.*, *supra*, 26 Cal.4th at p. 802, 111 Cal.Rptr.2d 87, 29 P.3d 175.) Moreover, Memrad's alleged wrongdoing is so attenuated from the subsequent RPM agreements signed by Buc-

ciarelli and Yan that equity does not demand the extension they seek.

Bucciarelli and Yan assert in their opening brief that Memrad's continuous misconduct is shown "through its agent's" conduct. Although the reference is vague, it appears to be their position that, in 2000, an RPM director urged them to accept the new RPM agreements. This is not the stuff of which a continuing violation against Memrad is shown. (*Richards v. CH2M Hill, Inc.*, *supra*, 26 Cal.4th at p. 823, 111 Cal.Rptr.2d 87, 29 P.3d 175; *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1042, 128 Cal.Rptr.2d 660 ["a collection of isolated employment decisions" is insufficient to show a continuing violation sufficient to toll the statute of limitations].) Not to put too fine a point on it, but a naked claim of a continuing violation cannot revive a time-barred claim.^{FN3}

FN3. All of the other acts described in Bucciarelli's and Yan's appellate briefs were RPM's acts, not Memrad's. By way of example, the assertion that "the 2000 Agreement stripped the Memrad female employees of their vested founder shares if they left Memrad before serving a full ten years employment" may have some relevance to the claims against RPM, but those agreements were not with Memrad and cannot support a continuing violation theory against Memrad. For the record, there is no evidence to suggest the corporate status of either Memrad or RPM ought to be ignored, and there is no evidence to suggest that RPM was Memrad's agent; to the contrary, the evidence shows they were separate corporations and dealt with each other formally through written contracts. For these reasons, we summarily reject Bucciarelli's and Yan's assertion, raised for the first time in their reply brief, that a "corporation like Memrad" is "a legal fiction" that ought to be ignored. There is also the fact that Bucciarelli and Yan failed

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to distinguish between that which is required to prove agency and that which is required to disregard a corporation's legal status. In any event, neither point was preserved for appeal. (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624, fn. 2; *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 526, fn. 9.)

C.

Our conclusion that Bucciarelli's and Yan's claims are time barred makes it unnecessary to consider their remaining arguments, including their assertion that summary judgment was granted on a ground not raised by the motion for summary judgment (the scope of their FEHA claims). The bar of limitations was raised by the motion and was one of the grounds relied on by the court.

DISPOSITION

The judgment is affirmed. Memrad is entitled to its costs of appeal.

We concur: SPENCER, P.J., and ORTEGA, J.

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