

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

CHRISTOPHER NELSON, Individually	)	
and as the Special Administrator of the	)	
Estate of ROGER NELSON, Deceased,	)	
	)	
Plaintiff,	)	No. 17 L 3354
	)	
v.	)	
	)	
Avocet Enterprises, Inc.,	)	
	)	
Defendants.	)	
	)	

**ORDER**

This cause comes before the court on Defendant, Avocet Enterprise, Inc., a dissolved Illinois corporation, f/k/a Ventfabrics, Inc.’s (“Avocet”) Motion for Summary Judgment pursuant to 735 ILCS 5/2-1005. The court, after considering the pleadings, memorandum, and exhibits attached thereto, states as follows:

***Background:***

Roger Nelson worked as a sheet metal worker and was allegedly exposed to asbestos dust produced by Avocet products. Avocet was incorporated in the State of Illinois as Ventfabrics, Inc. in 1954. It ceased operations on December 29, 1986, and changed its name to Avocet Enterprises, Inc. On July 11, 2014, Avocet dissolved. At the time of Avocet’s dissolution in 2014, Section 12.80 of the Illinois Business Corporation Act (“IBCA”) provided a five-year survival period in which a corporation may sue or be sued after dissolution, but only for claims existing or liabilities incurred prior to dissolution.

On April 3, 2017, approximately three years after Avocet dissolved, Plaintiff’s Decedent, Roger Nelson, commenced this action based on his alleged exposure to asbestos and subsequent diagnoses of mesothelioma. Nelson discovered his injury upon his diagnosis in February 2017. In 2015 the IBCA was amended by Illinois Legislature to extend the scope of the five-year survival period to encompass claims or liabilities incurred after a corporation’s dissolution. The statute has no express provision for retroactive application to corporations dissolved prior to its enactment.

***Summary Judgment Standard:***

The function of Summary Judgment is to determine the existence of a triable issue of fact. *Purtil v. Hess*, 111 Ill. 2d 229 (1986). Summary Judgment should be granted if the pleadings, depositions and admissions show that there is no genuine issue of material fact, and the movant is entitled to judgment under the law. 735 ILCS 5/2-1005(c). Pleadings alone are not sufficient to create an issue of material fact. *Hall v. Burger*, 277 Ill. App. 3d 757. Summary Judgment is a drastic method of disposing of a case and should be allowed only when the moving party's right to do so is clear and free from doubt. *Purtil v. Hess*, 111 Ill. 2d 229 (1986).

The opponent to a Motion for Summary Judgment does not need to prove his case at the summary judgment stage; he must only come forward with enough evidence to adequately create a genuine issue of material fact. *Henderson v. W.R. Grace & Co.*, 185 Ill. App. 3d 523 (3<sup>rd</sup> Dist. 1989). Because a motion for summary judgment must be viewed in the light most favorable to the non-movant, the motion will not be sustained unless all the evidence so overwhelmingly favors the movant that no contrary verdict based on that evidence could stand. *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343 (1992).

***Business Corporation Act:***

A corporation can exist only under the express laws of the state by which it was created. *Blankenship v. Demmler Manufacturing Co.*, 89 Ill. App. 3d 569, 573 (1st Dist. 1980). "Accordingly, the right to sue a dissolved corporation is limited to the time established by the legislature." *Id.* The dissolution of a corporation is, in legal effect, the same as the death of a natural person. *Markus v. Chicago Title & Trust Co.*, 373 Ill. 557, 561 (1940) *overruled on other grounds by ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526 (2010). Avocet was incorporated under the laws of the state of Illinois and under Illinois law ceased to exist when it dissolved on July 11, 2014.

At the time of Avocet's dissolution in 2014 the IBCA provided, in pertinent part, "The dissolution of a corporation . . . shall not take away nor impair any civil remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within five years after the date of dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name."

After Avocet's dissolution, on January 1, 2015, Public Act 98-776 § 5 amended the act to allow "for any right or claim existing or any liability accrued or incurred, either prior to, at the time of, or **after** such dissolution, if such action is commenced within five years after the date of such dissolution." (emphasis added).

***Argument:***

Defendant argues that the current statute **does not** include corporations that were dissolved prior to its enactment. Furthermore, Defendant contends the statute, as amended, cannot be applied retroactively because the change in the law is substantive. Plaintiff contends that retroactive application would only be relevant for discussion if Decedent's claim was pending after Avocet's dissolution, but before the enactment of the amended statute. Alternatively, Plaintiff contends that the current statute **does** include corporations that were dissolved prior to its enactment because it is a procedural change in the law. Subsequently, both parties delve into their respective claims of causation or lack thereof.

***Analysis:***

Defendant's argument is persuasive. There is no material issue of fact to be submitted to the jury because, based on the IBCA in effect at the time, there is no cause of action, which can be brought against Avocet for liabilities occurring after its dissolution. Additionally, the current IBCA cannot be retroactively applied to Defendant, because the change in the statute is substantive. In other words, the statute creates a new cause of action that did not exist prior to its enactment.

The amended statute is not applicable in this case because it became effective January 1, 2015, and Avocet dissolved on July 11, 2014. The Illinois legislature long ago enacted the Statute on Statutes (5 ILCS 70/4), which has been interpreted to provide that, in the absence of express language providing for retroactive application, procedural changes to statutes may be applied retroactively, while substantive changes may not. *People v. Glisson*, 202 Ill. 2d 499, 507 (2002). Here, in amending section 12.80 of the Illinois Corporation Act, the legislature did not provide that it should be applied retroactively. The question then turns on whether the amendment is substantive or procedural.

Procedural law is the "machinery for carrying on a suit," including pleading, process, evidence, and practice. *Deicke Center-Marklund Children's Home v. Illinois Health Facilities Planning Board*, 389 Ill. App. 3d 300, 303 (2009). In contrast, a substantive change in the law

establishes or defines rights. *Schweickert v. AG Services of America, Inc.*, 355 Ill. App. 3d 439, 442 (2005). A substantive change will be found if applying the change to the Defendant's conduct would "impose a new liability on defendant's past conduct." *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 1-7. In this case, the scope of this cause of action has been broadened to include claims against dissolved corporations materializing after dissolution creating a new liability that did not exist before Avocet dissolved.

Because this is a substantive change in the law, the court must apply Illinois corporation law in effect at the time Avocet existed. At the time of Avocet's dissolution in 2014, future contingent claims and liabilities were abated as of the date of dissolution, and a corporation had no liability for claims that accrued after dissolution. *Blankenship v. Demmler Manufacturing Co.*, 89 Ill. App. 3d 569, 573 (1st Dist. 1980). The current amendment makes such suits possible, which completely alters the substantive rights of Illinois corporations. In the absence of language expressing legislative intent for retroactive application, it is to be assumed the amendatory act was framed with the legislative intent to have prospective operation only. *Caveney v. Bower*, 207 Ill. 2d 82, 93-94 (2003).

To apply the amended version of section 12.80 to Avocet under these circumstances would deprive Avocet of its vested right to the defense it possessed when it dissolved under the pre-amendment act. Plaintiff's claims against Avocet are therefore barred as a matter of law. As this Court's finding disposes of this case against Avocet, the Court need not examine the parties' arguments with respect to the admissibility of any evidence or the establishment of an issue of fact relating to alleged causation or lack thereof.

**IT IS HEREBY ORDERED:**

Defendant Avocet's Motion for Summary Judgment pursuant to 735 ILCS 5/2-1005 is GRANTED, this case is Dismissed with Prejudice as to Defendant Avocet only.

JUDGE CLARE E. McWILLIAMS

ENTER:

MAR 15 2018

Circuit Court - 1889

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JUDGE