

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

AUTO-OWNERS INSURANCE COMPANY,
LARRY E. LAWSON and SHIRLEY A. LAWSON,

Plaintiffs,

v

File No. 03-6318-NP (Consolidated)
HON. PHILIP E. RODGERS, JR.

ACCUFLEX INDUSTRIAL HOSE, LTD., KURITEC
MANUFACTURERS, INC., FORGAMEX, S.A.
DE C.V. and KURIYAMA CANADA, INC.,

Defendants,

and

AUTO-OWNERS INSURANCE COMPANY,
LARRY E. LAWSON and SHIRLEY A. LAWSON,

Plaintiffs,

v

ACCUFLEX INDUSTRIAL HOSE, LTD., KURIYAMA
OF AMERICA, INC., KURITEC CORPORATION,
FORGAMEX, S.A. DE C.V.,

Defendants.

Peter C. Payette (P18732)
Attorney for Plaintiffs

Richard P. Carroll (P38807)
Attorney for Kuritec Corp., Accuflex and Kuriyama

Paul K. Leary, Jr.
Co-Counsel for Attorney for Kuritec Corp., Accuflex and Kuriyama

ORDER REGARDING PLAINTIFFS' MOTION
FOR RELIEF FROM ORDER DATED OCTOBER 3, 2003

On January 17, 2003, the Plaintiffs filed a lawsuit against Defendants Accuflex Industrial Hose, Ltd., Kuriyama of America, Inc., Kuritec Corporation and Forgamex, S.A. de C.V. The case was assigned case no. 03-6165-NP. Summons were issued that same day and expired on

April 18, 2003. A proof of service was filed on February 18, 2003 showing that Defendant Accuflex Industrial Hose, Ltd. was served with process on January 27, 2003. No other proofs of service were ever filed. On April 15, 2003, counsel appeared on behalf of Defendant Kuritec Corporation and filed an answer, special and affirmative defenses, jury demand and cross-claim on Kuritec's behalf. On April 22, 2003, counsel appeared on behalf of Defendants Accuflex Industrial Hose, Ltd. and Kuriyama of America, Inc. On May 14, 2003, an answer, affirmative and special defenses, cross-complaint and identification of non-party at fault were filed by Defendants Accuflex Industrial Hose, Ltd. and Kuriyama of America, Inc.

By order dated August 1, 2003, counsel for Defendants Accuflex Industrial Hose, Ltd. and Kuriyama of America, Inc. was permitted to withdraw and counsel for Defendant Kuritec Corporation became counsel for Defendants Kuritec Corporation, Accuflex Industrial Hose, Ltd., Kuriyama of America, Inc. On August 13, 2003, the Court entered an order, based on the stipulation of the parties, striking the Defendants' cross-complaints.

On June 25, 2003, the same Plaintiffs filed a second lawsuit against Defendants Accuflex Industrial Hose, Ltd., Kuritec Manufacturers Inc., Forgamex S.A. de C.V., and Kuriyama Canada, Inc. This case was assigned case no. 03-6318-NP and summons were issued that expired September 24, 2003.

A proof of service was filed on July 14, 2003 showing that Kuritec Manufacturers, Inc. was served on June 30, 2003. A proof of service was filed on August 4, 2003 showing that Kuriyama Canada, Inc. was served on July 29, 2003. A proof of service was filed on August 4, 2003 showing that Accuflex Industrial Hose, Ltd. was served on July 29, 2003. And, finally, a proof of service was filed on August 13, 2003 showing that Forgamex, S.A. de C.V. was served on July 30, 2003.

On August 13, 2003, the Court, having noticed that the Plaintiffs had filed two lawsuits that presented substantial and controlling common questions of law and fact, consolidated the cases to facilitate a better allocation of judicial resources. That Order expressly stated: "The Court further orders that all future filings shall be made in case no. 03-6318-NP (consolidated) and that **case no. 03-6165-NP shall be closed.**" However, the Clerk made an erroneous docket entry, as follows: "Order of consolidation - **consolidates with #03-6165-NP, which is not closed** - all pleadings to be entered in #03-6318-NP." [Emphasis added.] A copy of the Order of Consolidation is attached.

In lieu of a responsive pleading, Defendants Accuflex Industrial Hose, Ltd., Kuritec Manufacturers Inc., and Kuriyama Canada, Inc. filed a Motion for Summary Disposition on August 15, 2003, pursuant to MCR 2.116(C)(7). These Defendants argued that the action was barred by the statute of limitations. It was undisputed that the Plaintiffs' cause of action accrued on January 24, 2000 and that case no. 03-6318-NP was not filed until June 25, 2003. The only question presented, briefed and determined was whether the 3-year applicable statute of limitations applicable to products liability cases, breach of warranty claims and negligence claims applied or whether the 6-year statute of limitations for general contract actions applied.

In their brief in response to the Defendants' Motion for Summary Disposition, the Plaintiffs did not rely upon the timely filing of their initial lawsuit, case no. 03-6165-NP, on January 17, 2003, just inside the 3-year period of limitations. In addition, the parties made no mention of Defendants Kuriyama of America, Inc. and Kuritec Corporation, two of the Defendants named only in the initial lawsuit.

On September 29, 2003, the parties waived oral argument on the Defendants' Motion for Summary Disposition and the Court took the matter under advisement. On October 3, 2003, the Court issued a written decision, held that the 3-year statute of limitations applied and dismissed the case with prejudice because it was not filed within the applicable period of limitations.

The Plaintiffs appealed. The Court of Appeals, relying upon the erroneous docket entry, concluded that the Court's October 3, 2003 Order "did not pertain to the complaint filed on January 17, 2003" and that "the claims against defendants [in the initial lawsuit] are still outstanding."

The Plaintiffs have now filed a Motion for Relief from the Order of October 3, 2003. The Plaintiffs seek to reinstate their action against Defendant Forgamex, S.A. de C.V. only. Forgamex, S.A. de C.V. was a named Defendant in the initial lawsuit filed on January 17, 2003 within the applicable 3-year period of limitations. However, Forgamex was not served in the initial lawsuit. According to the official court files, Forgamex S.A. de C.V. was served twice in the second lawsuit only: once on July 30, 2003 by personal service upon a member of the corporation's human resources department and again on September 22, 2003 by certified mail, which the return receipt shows the Defendant received on September 29, 2003. In any event, the applicable period of limitations had expired prior to the second complaint being filed. Consequently, it would be futile for the Court to reinstate the case against Defendant Forgamex, S.A. de C.V., as it is time-barred. Accuflex Industrial Hose, Ltd. was also a named Defendant

in both lawsuits. Accuflex Industrial Hose, Ltd. was served with process in the initial lawsuit on January 27, 2003. The case was consolidated with the second lawsuit. Therefore, the statute of limitations did not bar the action against Accuflex Industrial Hose, Ltd. Although the prior timely service was not brought to the Court's attention by counsel, it was clear legal error for the Court to grant summary disposition in favor of Accuflex Industrial Hose, Ltd. and dismiss the lawsuit against it. The case against Accuflex Industrial Hose, Ltd. should be and hereby is reinstated.

The other two Defendants named only in the second lawsuit, Kuritec Manufacturers Inc. and Kuriyama Canada, Inc. were not named Defendants in the initial lawsuit. They were only named Defendants in the second lawsuit which the Court has already held is time-barred. Therefore, the dismissal as to these two Defendants was proper and is affirmed.

The other two Defendants named only in the initial lawsuit, Kuriyama of America, Inc. and Kuritec Corporation, filed responsive pleadings before the two lawsuits were consolidated. However, they were not parties to the Motion for Summary Disposition. Therefore, it was clear legal error for the Court to grant the motion as to these Defendants. This action should be and hereby is reinstated as to Defendants Kuriyama of America, Inc. and Kuritec Corporation.

In summary, this lawsuit is reinstated as to those Defendants who were named and served in the initial lawsuit which was filed within the applicable statute of limitations, including Accuflex Industrial Hose, Ltd., Kuriyama of America, Inc. and Kuritec Corporation. As to all other Defendants, whether named in the initial lawsuit or the second lawsuit, the Court's October 3, 2003 Order granting summary disposition and dismissing the case is affirmed. The Court shall commence the pre-trial process accordingly.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: S/ 08/10/04