

STATE OF WISCONSININ SUPREME COURT

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST BRIAN T.
STEVENS, ATTORNEY AT LAW,

OFFICE OF LAWYER REGULATION,

Complainant,

BRIAN T. STEVENS,

Respondent.

CASE NO. 2022AP12-D

FILED**OCT 26 2022****CLERK OF SUPREME COURT
OF WISCONSIN**

DECISION AND ORDER ON OLR'S MOTION TO AMEND PLEADINGS

PROCEDURAL POSTURE

Pursuant to the Scheduling Order in this matter, a Final Pretrial Conference was conducted via Zoom on September 28, 2022. Attorney Stevens (hereinafter "Stevens") participated with his Attorney, Stacie Rosenzweig (hereinafter "Rosenzweig"). Attorney John Payette (hereinafter "Payette") participated on behalf of OLR.

The first matter brought to my attention was OLR's failure to properly state a claim for restitution. Payette advised me he had spoken with Rosenzweig about this prior to my joining the call. Payette explained an error in the ordinary OLR procedures and asked permission to present a claim for restitution at the upcoming hearing. Rosenzweig indicated she needed time to discuss this with her client, and the pretrial was adjourned to the following day (September 29 at 2:30 p.m.). I invited both attorneys to be prepared to cite any Supreme Court Rules, Wisconsin Statutes or case law in support of their positions. The September 29 proceeding was also conducted by Zoom. There was therefore no record made of either proceeding.

There were identical appearances on September 29. Rosenzweig stated her client did not agree with OLR's request. Both parties provided me with citations that might be informative, although they acknowledged they were not precisely on-point. After hearing their arguments, I stated I was inclined to

grant OLR's request, but required it file a Motion and supporting Affidavit the same day. Payette did so. Rosenzweig filed a response September 20.

After reviewing the materials submitted by counsel, I began preparing this Decision and Order on October 1. My husband fell that evening and suffered a severe femur fracture. I wrote both attorneys on October 3 that I would not be able to complete this prior to the October 5 hearing, but had made a decision to grant OLR's Motion to Amend Pleadings and Rosenzweig's request to be allowed to amend her Answer and Affirmative Defenses accordingly. In my email, I advised both attorneys we could make a more thorough record at the outset of the hearing if either desired to do so and stated we could adjourn the restitution portion of the hearing if Stevens needed more time to prepare to defend against it. Rosenzweig stated she did not believe her client desired any adjournment. Payette filed an Amended Complaint on October 3 and Rosenzweig filed an Answer to the Amended Complaint on October 7.

I made a record of this at the outset of the October 5 hearing and offered both attorneys an opportunity to supplement it, which they declined. Rosenzweig stated Stevens was prepared to proceed to defend the restitution claim at the hearing.

FACTS

In his Affidavit of 9/29/2022, Payette sets forth facts regarding OLR's ordinary procedure for stating a claim for restitution and their error in this case. Those facts are undisputed. Payette also correctly asserts that, while the prayer for relief at the conclusion of the Complaint does not reference restitution, there are numerous paragraphs in the factual basis of the Complaint that describe the restitution alleged to be owed. Payette also correctly asserts that, in his Answer, Stevens concedes the facts regarding restitution and asserts Affirmative Defenses to a restitution claim.

LEGAL ANALYSIS

Sec. 809.09(2), Wis. Stats. permits amendment to the pleadings once as a matter of course at any time within 6 months after filing of the Summons and Complaint or within the time set in a scheduling order. OLR's Motion to Amend was filed approximately 9 months after the filing of the Summons and Complaint and the Scheduling Order does not establish an alternate date. "Otherwise, a party may amend the pleading only by leave of court or by written consent of the adverse party." Sec. 802.09, *id.* There is no written consent in this case, and OLR requests leave of the court. Sec. 802.09 further provides that ". . .leave shall be freely given at any stage of the action when justice so requires."

I conclude justice requires me to grant OLR's request to amend the Complaint solely for purposes of squarely stating a claim for restitution in its prayer for relief. In reaching that conclusion, I have considered OLR's explanation for failing to state their claim more precisely. I have also balanced the prejudice to the complainant against the prejudice to Stevens.

Count 2 of the Complaint alleges a violation of SCR 20:1.15 (e) (1), asserting Stevens failed to notify Wendy Burkart (hereinafter "Burkart") in writing of receipt of funds in which she had an interest and by failing to promptly deliver to her \$4,500 she was entitled to receive. The facts in support of this Count are set forth in paragraphs 5, 6, 7, 8, 10, 14, 15, 21, 26 and 27 of the Complaint. While the "WHEREFORE" conclusory paragraph of the Complaint does not set forth a claim for restitution to Burkart, the facts supporting such a claim are thoroughly described in the Complaint. And in his Answer, Stevens does not contest the facts contained in those paragraphs and admits he did not disburse funds to Burkart. Stevens goes on to assert an affirmative defense for failing to do so. Additionally, Stevens respectfully declined my offer to adjourn the restitution portion of the hearing to allow him additional time to defend against it. I conclude granting OLR's Motion results in minimal, if any, prejudice to Stevens.

Conversely, the potential prejudice to Burkart is significant. SCR 21.16 (2m)(a)1 authorizes monetary restitution to a person whose money was misappropriated or misapplied as a form of lawyer discipline. In his Affidavit, Payette describes the ordinary OLR procedures to ensure a Complainant is afforded the opportunity to receive restitution in a disciplinary matter. OLR admits an error in this instance, but I conclude "justice so requires" Burkart not be deprived of a claim ordinarily litigated in a lawyer disciplinary proceedings because of OLR's inadvertence. I am also mindful of the fact Sec. 802.09 requires leave *shall be freely given at any stage* if justice so requires (emphasis added).

NOW THEREFORE, IT IS HEREBY ORDERED: OLR's Motion to Amend Pleadings is **HEREBY GRANTED.**

Dated this 21st day of October, 2022 as of the 3rd day of October, 2022, NUNC PRO TUNC.

A handwritten signature in blue ink, reading "Hon. Sue E. Bischel", is written over a horizontal line.

Hon. Sue E. Bischel
Referee and Reserve Judge