

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 29, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-0703  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-CV-275**

**IN COURT OF APPEALS  
DISTRICT III**

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**LUTHERAN CHURCH EXTENSION FUND - MISSOURI SYNOD,**

**PLAINTIFF-RESPONDENT,**

**V.**

**EPIPHANY LUTHERAN CHURCH,**

**DEFENDANT-APPELLANT,**

**TCI DEVELOPERS, INC.,**

**DEFENDANT.**

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APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Epiphany Lutheran Church appeals a summary judgment in an action the Lutheran Church Extension Fund—Missouri Synod (the Fund) brought against it to foreclose two mortgages. Epiphany argues that (1) the trial court should not have entered summary judgment against it because neither party requested it and the court did not meet the requirements for a sua sponte judgment, (2) factual disputes between it and the Fund preclude summary judgment, and (3) the court should not have entered summary judgment against TCI Developers, Inc., on the counterclaim of unjust enrichment because no party requested the relief and the court did not meet the requirements for a sua sponte judgment.

¶2 We conclude that the trial court should not have entered, sua sponte, summary judgment against Epiphany. Neither party requested it, and the court failed to give Epiphany notice and an opportunity to develop facts and present a legal defense, which fairness requires. Accordingly, we affirm in part, reverse in part and remand.<sup>1</sup>

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<sup>1</sup> Because of our resolution of this case, we need not address Epiphany's affirmative defenses that involve disputed issues of fact.

TCI's unjust enrichment counterclaim survives summary judgment because it was not addressed in the trial court's judgment. On appeal, the parties discuss the viability of the claim. However, because the trial court has not yet addressed the issue, we do not consider it here.

The trial court also granted summary judgment in favor of the Fund against TCI on the issue whether TCI had an ownership interest in the property subject to forfeiture. This was the issue on which the Fund requested summary judgment, TCI had notice and the hearing focused. Neither party appeals this portion of the judgment, and we therefore affirm this part of the judgment.

## BACKGROUND

¶3 Epiphany raised many factual issues. We address only the background necessary to resolve the dispositive issue.

¶4 Epiphany is a Lutheran congregation that was unable to obtain bank financing to purchase land for a new church and school. The Fund is a corporation with a mission to assist Lutheran congregations to develop their facilities. The Fund financed Epiphany's purchase of the land. In January 1995 and July 1996, the Fund issued three promissory notes to Epiphany, secured by two mortgages. Epiphany also entered into an agreement with TCI Developers to develop and sell excess land it purchased but did not need for the church and school.

¶5 Epiphany alleges that it made advance payments on the principal of the loan that the contract did not require. These payments, Epiphany claims, depleted its cash reserves and made it unable to timely pay the promissory notes.

¶6 The Fund brought a claim against Epiphany to foreclose the mortgages, and Epiphany raised a number of affirmative defenses. The Fund also joined TCI, and TCI counterclaimed, asserting that it had acquired an interest in the real estate and that the Fund would be unjustly enriched by foreclosure. Early in the suit, the Fund filed a motion for summary judgment against both Epiphany and TCI.

¶7 At a November 20, 2000, scheduling conference, the Fund requested only a ruling on its motion for summary judgment concerning whether TCI had an ownership interest in the real property. The Fund also told the trial court that it and Epiphany were pursuing mediation. At the conclusion of the conference, the court summarized that the upcoming hearing "would seem to me to be the day that

we would decide what if any interest TCI has in this matter.” All three parties agreed. The trial court confirmed in a scheduling order that it would hold a hearing on the Fund’s partial summary judgment motion against TCI. Further, the court ordered mediation between Epiphany and the Fund.

¶8 All parties were present at the summary judgment motion hearing on January 30, 2001, but the Fund reiterated that it requested only partial summary judgment declaring that TCI had no ownership interest in the real property. The hearing addressed only that issue. In fact, counsel for Epiphany and the Fund reported to the court their progress in the mediation process.

¶9 On February 2, 2001, only a few days after the hearing, the trial court disposed of the entire action by a written decision. It entered summary judgment that TCI had no interest in the land. Also, without notice to Epiphany and without providing an opportunity for Epiphany to present factual or legal arguments, the court granted summary judgment in favor of the Fund on its foreclosure action against Epiphany.

¶10 Epiphany requested reconsideration or clarification of the trial court’s decision, and the request was not opposed by the Fund. The court did not respond to the request and Epiphany now appeals.<sup>2</sup>

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<sup>2</sup> Subsequently, TCI and Epiphany settled and TCI assigned its rights against the Fund to Epiphany. This court granted a motion to substitute Epiphany as the only appellant in this matter in an order dated July 9, 2001.

## STANDARD OF REVIEW

¶11 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.<sup>3</sup>

## DISCUSSION

¶12 Epiphany argues that the trial court should not have entered summary judgment against it because (1) the Fund did not request the relief and (2) the trial court did not satisfy the legal requirements for issuing a sua sponte judgment.

¶13 It is appropriate for a trial court, sua sponte, to raise issues necessary to disposition of a matter. *See State v. Holmes*, 106 Wis. 2d 31, 41, 315 N.W.2d 703 (1982). However, when a trial court raises a legal issue sua sponte, “fairness requires that the parties have the opportunity to develop the relevant facts and to present legal arguments on the issue.” *Hydrite Chem. Co. v. Aetna Cas. & Surety Co.*, 220 Wis. 2d 26, 49, 528 N.W.2d 423 (Ct. App. 1998).

¶14 Here, the trial court did not give the parties notice that it was going to dispose of the entire matter. Rather, the summary judgment motion hearing was scheduled to be about, and focused entirely on, the issue of whether TCI had an interest in the property. At the same hearing, Epiphany and the Fund updated the

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<sup>3</sup> All statutory references are to the 1999-2000 Wisconsin Statutes unless otherwise noted.

court on their plans for mediation. Epiphany had no notice that the trial court was going to enter judgment on the Fund's claims against it. Nor did Epiphany have the opportunity to develop its fact-based affirmative defenses or argue the legal issues before the court issued its sua sponte judgment.

¶15 We conclude that the trial court should have given Epiphany notice and an opportunity to be heard before it sua sponte considered the Fund's summary judgment motion against Epiphany. Because it did not, the trial court committed error as a matter of law.<sup>4</sup> Accordingly, we reverse the judgment against Epiphany and remand to the trial court for further proceedings consistent with this opinion.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE § 809.23(1)(b)5.

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<sup>4</sup> Additionally, Epiphany was prejudiced by losing the opportunity to avoid foreclosure via settlement. This prejudice is the policy behind the requirements that a party be afforded notice and an opportunity to present a defense before a trial court enters a sua sponte judgment.

