When a complaint fails to set forth a cause of action, a preliminary objection in the nature of a demurrer should be sustained. *Rose v. Wissinger*, Pa. Super. Ct. , 439 A. 2d 1193 (1982); *Sinn v. Burd*, 486 Pa. 146, 404 A. 2d 672 (1979); *Gekas v. Shapp*, 469 Pa. 1, 364 A. 2d 691 (1976); *Commonwealth ex rel. Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A. 2d 812 (1974). It appearing evident to this Court that the additional defendants' complaint, on its face, does not allege a sufficient cause of action which would permit recovery from the additional defendants II; their demurrers are accordingly sustained.

ORDER OF COURT

NOW, this 14th day of July, 1982, the Additional Defendants' II preliminary objections in the nature of demurrers are sustained.

The Additional Defendants are granted leave to file an amended complaint within twenty (20) days of this date.

Exceptions are granted the additional defendants.

COVER, ET AL v. HORTON, ET AL, C.P. Fulton County Branch, A.D. 1982 - 48 of 1982 - C

Equity Jurisdiction - Demurrer - Paving of subdivision's roads

1. A preliminary objection in the nature of a demurrer is itself insufficient when it merely states that a pleading is insufficient and raises no issue, or that it does not set forth a cause of action.

2. Damages for the failure to pave the roads in a subdivision can be readily ascertained in monetary terms and there is an adequate remedy at law for such damages.

3. Unjust enrichment per se is not a basis for equitable jurisdiction.

George E. Wenger, Jr., Esq. Counsel for Plaintiffs

Charles H. Davison, Esq., Counsel for Defendant Horton

Gary D. Wilt, Esq., Counsel for Defendant Ayr

KISER, Tawnya	72 Villager	349.78
MYERS, James & Janet	62 Homette	270.69
PRICE, Paul	57 Elcar	230.06
	WAYNESBORO BOROUGH	
EYLER, Ernest S. & Estella	409 W. 5th St.	606.17
WOLFE, Janet M. Kinley	111 W. King St.	1,410.94

Stanley J. Kerlin, Esq., Counsel for Defendant Fulton

OPINION AND ORDER

KELLER, J., July 14, 1982:

This action in equity was instituted by complaint filed on March 2, 1982, by the above-named plaintiffs, all of whom are residents of and landowners in Ayr Heights, Ayr Township, Fulton County, Pennsylvania. As to the defendant Helen G. Horton, the complaint alleges that she has not performed a promise to the plaintiffs to pave certain roads in Ayr Heights, a real estate subdivision in Ayr Township, Fulton County, Pennsylvania developed by her and her late husband. The plaintiffs join Ayr Township and Fulton County because of their alleged negligence in failing to require the Hortons to post a bond to guarantee construction of the streets or actual construction thereof pursuant to Ayr Township Ordinance Number 2 dated April 14, 1972, and Section 11(a) of the ordinance entitled "Subdivision Ordinance of Fulton County" dated August 31, 1973, Section 304.c. The plaintiffs' prayer for equitable relief, while most unclear, appears to seek a mandatory injunction requiring some or all of the defendants to restore the rough grade and then pave and maintain the streets in the development, or "*in the alternative*" seeks an order requiring the defendants to pay costs including attorney's fee and such other relief as the court deems appropriate. (Italics ours) Preliminary objections in the nature of demurrers, motions to strike, and motions for more specific pleadings were filed by the defendants. Argument was heard on June 22, 1982, and the matter is now ripe for disposition.

Fulton County and Ayr Township, hereafter Fulton and Ayr, have each filed a demurrer to the complaint and contend that the plaintiffs have failed to state a cause of action against them. The plaintiffs allege that these two defendants were negligent in failing to require Horton to post a bond that would have guaranteed construction of the streets.

Section 103 of the Fulton County Land and Subdivision Ordinance of September 10, 1973 provides inter alia:

> The power of the Fulton County Board of Commissioners to enact, amend and repeal Subdivision, Mobile home Park, and Land Development Regulations shall be limited to land in those boroughs and townships wholly or partly within Fulton County which have no Subdivision, Mobile home Park and/or Land Development Ordinance in effect at the time these

> regulations are introduced before the Fulton County Board of Commissioners, and until the borough or township's Subdivision, Mobilehome Park and/or Land Development Ordinance is in effect and a certified copy of such Ordinance is filed with the Fulton County Planning Commission.

Obviously this can only be construed to mean that Fulton's power to enact, amend, and repeal subdivision and land development ordinances was limited to land located within the county, which was not subject to a subdivision or land development ordinance then in effect. Ayr Township Ordinance Number 2, dated April 14, 1972, thus pre-empted the field of subdivision regulation in Ayr Township. Parenthetically, it must also be observed Fulton's Land and Subdivision Ordinance of September 10, 1973, was not in existence when the original subdivision of the Horton land occurred in May of 1970, nor when the two original plans of lots were recorded on April 14, 1972. Therefore, Fulton was totally without power to approve, disapprove, require any bond or in any way regulate the subdivision of land in Ayr Township. In addition, the plaintiffs did not allege in their complaint that Fulton ever approved or, indeed, was ever asked to approve the development. Such approval would be a precondition for Fulton to require any type of bond. Accepting the plaintiffs' well-pleaded facts as true for the purpose of Fulton's demurrer, as we must, we must also grant Fulton's demurrer. Having sustained Fulton's demurrer, it is not necessary for us to address ourselves to its laches argument.

In our consideration of Ayr's demurrer, we preliminarily note that the complaint does allege negligence on the part of this defendant. Preliminary objections in the nature of a demurrer should be sustained only where it appears with certainty that the law will not permit recovery. *Papieves v. Lawrence*, 437 Pa. 373, 263 A. 2d 118 (1970); *London v. Kingley*, 368 Pa. 109, 81 A. 2d 870 (1951).

Ayr's demurrer is merely a naked assertion that the plaintiffs' complaint fails to state a cause of action. Pa. R.C.P. 1028; 2A Anderson Pa. Civ. Proc. Sec. 1028.1(e). A preliminary objection in the nature of a demurrer is itself insufficient when it merely states that a pleading is insufficient and raises no issue, or that it does not set forth a cause of action. A demurrer must state specifically the basis for the contention that the pleading of the adverse party does not set forth a cause of action. *Spickler v. Lombardo*, 3 D&C 3d 591

(1977); *Brennan v. Smith*, 6 Pa. Cmwlth. 342, 299 A 2d 683 (1973). Ayr's demurrer is denied. We do, however, note that Ayr argues in its brief that its demurrer is very general because the complaint is so vague. We agree with Ayr and will treat its demurrer as a request for a more specific pleading. The plaintiffs will amend paragraphs 15, 16 and 23 of their complaint to allege the material facts required by the Rules of Civil Procedure with more specificity so the defendants can readily comprehend the plaintiffs' cause of action.

Ayr contends that paragraph 24A of the plaintiffs' complaint is so "ungrammatically correct" that it cannot understand it. The plaintiffs concede that it is grammatically incorrect and have agreed to amend the offending paragraph. Leave to amend will be granted.

The defendant Horton has withdrawn her preliminary objection in the nature of a motion to strike paragraph 16 of the complaint. The plaintiffs concede paragraphs 15, 17, 18, 19, 21 and 24A of their complaint lack specificity and will accordingly amend as demanded by defendant Horton's preliminary objections 2, 3, 4, 5, 6, and 7. Leave to amend will be granted.

Defendant Horton's 8th and final preliminary objection is to the jurisdiction of the equity side of the court on the grounds that the plaintiffs have a full, adequate and complete non-statutory remedy at law. Pa. R.C.P. 1509(c). The plaintiffs' complaint alleges that they "were promised by the defendant Horton, and her husband, now deceased, that roads would be paved in the development." (Paragraph 15) The complaint essentially alleges that Ayr and Fulton were negligent in failing to require the Hortons to post a bond, which might have prevented any injury from this breach of promise. These are the only apparent and potentially valid causes of action pleaded in the complaint. The Court fails to see how monetary damages would not fully and adequately compensate the plaintiffs for their alleged injuries, and provide the financial means to pave their streets. When the breach of a construction contract occurs, an adequate remedy at law exists in the form of an action in assumpsit if the plaintiffs could be compensated by readily ascertainable money damages. *Barco, Inc., Appellant v. Steel Crest Homes, Inc.*, 420 Pa. 553, 558, 218 A. 2d 221 (1966); *George Shegda, Inc. v. Standard Merchandising Co., Inc., Appellant*, 231 Pa. Super. 194, 332 A. 2d 498 (1974). The cost of paving roads in the development at this point in time is readily ascertainable.

It is well established that a court will grant equitable relief only in the absence of an adequate remedy at law. *Robinson v. Abington Ed. Assn.*, 492 Pa. 218, 423 A. 2d 1014 (1980); *Joston Alum. Products v. Mt. Carmel Dist.*, 256 Pa. Super. 353, 359, 389 A. 2d 1160 (1978); *Mahon, Appellant v. Lower Merion Twp.*, 418 Pa. 558, 212 A. 2d 217 (1965); *Marshalek v. Marshalek*, 415 Pa. 582, 204 A. 2d 277 (1964); *Sixsmith, Appellant v. Martsolf*, 413 Pa. 150, 153, 196 A. 2d 662 (1964); *Meehan v. Cheltenham Twp.*, 410 Pa. 446, 189 A. 2d 593 (1963). In our perception there is an adequate remedy at law in the form of monetary damages.

The plaintiffs urge us to recognize the difficulty in calculating damages for future road maintenance. However, their complaint only alleges that Horton promised that someone would pave roads in the development. The complaint alleges in paragraph 16 that "It was the intention of the plaintiffs. . .that the streets. . .would be laid and maintained by the defendant Horton or alternatively by the defendant Ayr." Obviously plaintiffs' intention is of no legal effect and certainly not binding on the defendants. Thus, future road maintenance is not a proper matter for our consideration in the present posture of the pleadings.

The plaintiffs also argue that the defendant Horton will be unjustly enriched if the action proceeds at law. Unjust enrichment per se is not a basis for equitable jurisdiction. There must be some additional fact present to make the remedy at law inadequate. *Franklin Fed. S&L Assn. v. Superb Realty Co. et al.*, 53 D&C 186 (1944).

The plaintiffs' enrichment contention is predicated on their theory that the defendant Horton owns the roads in the development and she will be unjustly enriched if the plaintiffs win monetary damages and pave her roads. Absent the citation of authority, we find no merit in the contention, for "Ordinarily an abutting owner owns to the center of the road subject to the public right." P.L.E. Highways Sect. 11; *Phillips v. Dunkirk, W&P.R. Co.*, 78 Pa. 177 (1875). Even then, the laying out of a road only gives to the public a mere right of way. The owner of the soil is not thereby divested of his title to the land. *Phillips v. Dunkirk, W&P.R. Co.*, supra.

Even assuming arguendo that Horton did own the land where the roads are to be paved, it would make little practical difference whether Horton paved the road or paid damages for

someone else to do it. Either way, the plaintiffs would receive the relief, and Horton would benefit equally. Consequently, unjust enrichment by Horton does not appear to be a viable issue.

We note plaintiffs cite and appear to rely upon the Opinion of the Honorable G. Thomas Gates, P.J., Lebanon County in *Stafford et al. v. Board of Commissioners, Annville Twp.*, et al., No. 6 Equity 1976 in which our sister court denied preliminary objections to equity jurisdiction. Having read Judge Gates' excellent memorandum opinion, we agree entirely with his decision. However, we find it inapplicable to the case at bar, for the facts related in the opinion disclose that plaintiffs allege an agreement within the Township whereby it would "lay the surfact and maintain the street abutting the plaintiffs' various properties." No such allegation appears in plaintiffs' complaint.

We are not persuaded that equity must or, indeed, may have jurisdiction over this matter. Plaintiffs have failed to demonstrate that there is not a full, adequate, and complete remedy at law available to them. The proceeding will be certified to the law side of the court.

ORDER OF COURT

NOW, this 14th day of July, 1982, the defendant Fulton's demurrer is sustained. The defendant Ayr's demurrer is denied. The court will treat Ayr's demurrer as a motion for a more specific pleading, and that motion will be granted as to paragraphs 15, 16, 23 and 24A. Defendant Horton's motions for more specific pleadings as to paragraphs 15, 17, 18, 19, 21 and 24A are granted. Defendant Horton's preliminary objection No. 8 is sustained, and this proceeding will be certified to the law side of the Court.

The plaintiffs are granted leave to file an amended complaint within twenty (20) days of this date.

Exceptions are granted the plaintiffs and defendants.