

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION-CIVIL**

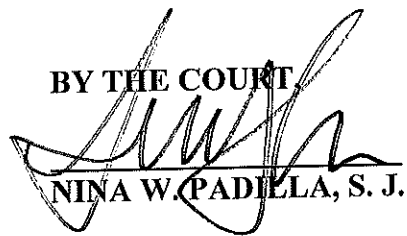
RITTENHOUSE PLAZA, INC.,	:	March Term 2021
	:	
Plaintiff,	:	
	:	
v.	:	No. 1723
	:	
1911 WALNUT STREET, LLC, ET. AL.,	:	
	:	
Defendants.	:	Commerce Program
	:	
	:	
	:	Control Nos. 21041586/21041391

**ORDER**

**AND NOW**, this 2<sup>nd</sup> day of June, 2021, upon consideration of Defendant Hunter Roberts Construction Group, LLC's Preliminary Objections to Plaintiff's Complaint and Plaintiff's response in opposition and Defendant 1911 Walnut Street, LLC's Preliminary Objections to Plaintiff's complaint and plaintiff's response in opposition, and the attached Opinion, it hereby is **ORDERED** that the Preliminary Objections are **Sustained** as follows:

1. Count II (negligence per se) is dismissed against defendants Hunter Roberts Construction Group LLC and 1911 Walnut Street, LLC.
2. The complaint against defendant Hunter Roberts Construction Group, LLC only is dismissed.
3. Count I (breach of contract) is subject to arbitration as set forth in the Agreement between the parties. This matter is stayed and the parties are ordered to arbitrate the remaining claim for breach of contract.

**BY THE COURT**

  
NINA W. PADILLA, S. J.

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**OPINION**

Plaintiff Rittenhouse Plaza, Inc. brings this action alleging breach of contract and negligence *per se* based on noise from an adjoining construction site in Center City Philadelphia. Presently before the court are defendant Hunter Robert Construction Group, LLC and defendant 1911 Walnut Street, LLC's respective preliminary objections to plaintiff's complaint. For the reasons set forth below, the preliminary objections are sustained.

Plaintiff Rittenhouse Plaza, Inc. ("Plaintiff") is a co-operative association incorporated in Pennsylvania with an address of 1901 Walnut Street, Philadelphia, PA 19103.<sup>1</sup> Plaintiff owns a high-rise residential building at 1901-05 Walnut Street, Philadelphia, PA.<sup>2</sup> Defendant 1911 Walnut Street, LLC ("Developer") is currently building a new high-rise residential tower a few feet away from the west side of the plaintiff's building, known as the Laurel.<sup>3</sup> Developer contracted with defendant Hunter Roberts Construction Group, LLC ("Hunter Roberts") to build

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<sup>1</sup> As a co-operative association, plaintiff Rittenhouse Plaza, Inc. may institute litigation in its own name on behalf of itself or two or more proprietary lessees on matters affecting the cooperative. See, 68 Pa. C. A. § 4302 (a) (4).

<sup>2</sup> Complaint, ¶ 1.

<sup>3</sup> Id, ¶ 5.

the new high-rise tower.<sup>4</sup> On December 18, 2018, the plaintiff and Developer entered into a Development and Operation Agreement (“Agreement”) which provides in part as follows:

7) Construction Activity.

During the period of time from the commencement of excavation or underpinning for the Project, whichever is earlier, until a Final Certificate of Occupancy for the entire Project (excluding fit outs of tenant or condominium unit owner spaces) is issued to Owner by the City of Philadelphia (the “Period of Construction”), the Owner will comply with the following terms and conditions:

....  
(j) Noise-creating construction activity will be performed Mondays through Fridays from 7:00 a.m. until no later than 5:00 p.m., and on Saturdays from 8:00 a.m. until 5:00 p.m. Loading of material into the building and quiet cleaning activities may take place beyond those hours as permitted by applicable City of Philadelphia ordinances. No work will be performed on Sundays. ...

(k) the Owner shall use commercially reasonable construction efforts to cause its contractors to restrict vehicles, cranes or other equipment from idling before or after the hours when construction is allowed.<sup>5</sup>

Hunter Roberts is not a party to this Agreement.

The Philadelphia Code at § 10-400 et seq. exists to prevent noise and excessive vibration and to limit, control and eliminate noise and excessive vibration in general from whatever source.<sup>6</sup> Specifically, § 10-403 entitled Prohibited Conduct provides in pertinent part as follows:

(3) Sound from Non –Residential Properties. No person shall create or cause, or permit the creation of, sound originating from a property used for a non-residential purpose that exceeds:

(a) 5 decibels above background level measured at the property boundary of the nearest occupied residential property;...<sup>7</sup>

...  
An exception exists for construction activity which provides as follows:

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<sup>4</sup> Complaint, ¶ 1

<sup>5</sup>Agreement, Exhibit “A” attached to the Complaint.

<sup>6</sup> Chapter 10-400 Noise and Excessive Vibration, § 10-401 (2)(a).

<sup>7</sup> *Id.* at § 10-403.

(8) Exception for Construction Activity. The restrictions of paragraphs (1) through (5) and 7(b) do not apply to regular construction and emergency and public works construction, provided that all equipment used in connection with such construction is maintained and operated in compliance with all applicable laws.<sup>8</sup>

Additionally, the Chapter 10-400 defines “Construction” and “Regular Construction” as follows:

(3) Construction. Site preparation, excavation, filling or grading or the assembly, erection, repair, alteration or demolition of any structure or part of the right-of-way.

(11) Regular Construction. Construction between the hours of 7 a.m. and 8 p.m. Monday through Friday, or between the hours of 8 a.m. and 8 p.m. on weekends and legal, national or state holidays.<sup>9</sup>

Plaintiff alleges that over the course of several months and continuing, Developer has violated the work hour restrictions in the Agreement and in the Philadelphia Code virtually on a daily basis, often conducting loud construction work earlier than 6:00 a.m. and continuing after 7:00 p.m.<sup>10</sup> The alleged noise wakes plaintiff’s residents and disrupts their early mornings causing sleep deprivation which causes stress and poses a risk to their health.<sup>11</sup> Plaintiff further alleges that work after allowable hours causes disruption to plaintiff’s residents’ peace and comfort to enjoy their homes especially during the extended “stay at home” mandates which prevent them from being able to avoid the disruptions.<sup>12</sup> According to the complaint, the 100

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<sup>8</sup> Chapter 10-400 Noise and Excessive Vibration, § 10-403 (8)

<sup>9</sup> *Id.* at § 10-403 (3) and (11).

<sup>10</sup> Complaint ¶ 10.

<sup>11</sup> Complaint ¶ 13.

<sup>12</sup> *Id.*

residents who live in the west facing units that look upon the construction site are most affected.<sup>13</sup>

On March 16, 2021, after attempts were allegedly made by plaintiff to resolve this matter amicably, plaintiff initiated this action against Developer and Hunter Roberts alleging claims for breach of contract against Developer and negligence *per se* against Developer and Hunter Roberts. On March 18, 2021, plaintiff also filed an emergency petition for injunctive relief and temporary restraining order against defendants requesting the court to stop defendants from engaging in work at the site outside the hours of 7 a.m. to 5:00 p.m. on weekdays and outside the hours of 8:00 a.m. to 5:00 p.m. on Saturdays and never on Sundays.<sup>14</sup> Defendants filed responses to the petition for preliminary injunctive relief as well as preliminary objections to the complaint. Plaintiff filed responses to the preliminary objections which are now ripe for decision.

## **DISCUSSION**

### **I. Count II alleging Negligence *Per Se* is dismissed as a matter of law.**

In count II of the complaint, plaintiff purports to state a claim for negligence *per se* against defendants Developer and Hunter Roberts. Specifically, plaintiff alleges that defendants collectively violated Philadelphia Code § 10-403 (3)(a) as qualified by § 10-403(8) whose purpose is to protect the interest of residents of an adjacent property from noise.

Negligence *per se* has been defined as “[c]onduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding

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<sup>13</sup> Complaint ¶ 15.

<sup>14</sup> The petition for preliminary injunction is addressed in a separate order and opinion.

circumstances.”<sup>15</sup> Pennsylvania recognizes that a violation of a statute or ordinance may serve as the basis for negligence *per se*. However, a court will not use a statute or regulation as the basis of negligence *per se* where the purpose of the statute is to “secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public.”<sup>16</sup> Plaintiff’s reliance on §10-403 for its negligence *per se* claim is misplaced as the ordinance is enacted for the benefit of all Philadelphians and not for a specific group that includes plaintiff.

In order to prove a claim based on negligence *per se*, the following four requirements must be met: (1) The purpose of the statute must be, at least in part, to protect the interest of a group of individuals, as opposed to the public generally; (2) The statute or regulation must clearly apply to the conduct of the defendant; (3) The defendant must violate the statute or regulation; (4) The violation of the statute or regulation must be the proximate cause of the plaintiff’s injuries.<sup>17</sup>

The City of Philadelphia City Council found that noise and excessive vibration degrade the environment of the City to a degree which is “harmful and detrimental to the health, welfare and safety of its inhabitants.”<sup>18</sup> Additionally, City Council found that effective control and elimination of noise and excessive vibration is essential to the “health and welfare of the City’s inhabitants and to the conduct of the normal pursuits of life, recreation and commerce and industrial activity.”<sup>19</sup> The ordinance does not create a private right of action against those who

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<sup>15</sup> *Wagner v. Anzon, Inc.*, 684 A.2d 570, 574, 453 Pa.Super. 619, 626–27 (Pa.Super. 1996) citing *White by Stevens v. Southeastern PA. Transp.*, 359 Pa.Super. 123, 135, 518 A.2d 810, 815 (1986), *alloc. denied*, 515 Pa. 609, 529 A.2d 1083 (1987) (quoting Black’s Law Dictionary, p. 933 (5th ed. 1979)).

<sup>16</sup> *Id.* citing *Centolanza v. Lehigh Valley Dairies*, 430 Pa.Super. 463, 478, 635 A.2d 143, 150 (1993), *aff’d*, 540 Pa. 398, 658 A.2d 336 (1995) (quoting Restatement (Second) of Torts, § 288(b) (1965)).

<sup>17</sup> *Id.*

<sup>18</sup> See, Chapter 10-400 Noise and Excessive Vibration §10-401 (1) (a)(1).

<sup>19</sup> *Id.* at §10-401 (1) (a)(1).

violate any provisions within the ordinance. Rather, the ordinance specifically provides that it is to be enforced by the Department of Public Health, the Police Department and the Department of Licenses and Inspection. Based on the references to “inhabitants” and the ordinance’s concerns with the “health and welfare” of the City of Philadelphia inhabitants as well as the absence of a private right of action for violations of this ordinance, this court finds that the intent and purpose of this ordinance is to protect all Philadelphians from noise and excessive vibrations and not a specific group of residents within the City of Philadelphia.<sup>20</sup>

In reaching this conclusion, the matter of *Wagner v. Anzon Inc.*, 684 A.2d 570, 573 (1996) is instructive. In *Wagner*, a class of individuals, who resided within a half-mile radius of a lead processing facility, attempted to maintain a cause of action for negligence per se based upon the facility’s violation of the Philadelphia Air Management Code of 1969. After reviewing the code, the court concluded that “the purpose of the code was to protect the ‘atmosphere over the city’ of Philadelphia, with a concomitant [sic] benefits to its ‘inhabitants.’ There is no indication . . . the code was meant to protect a particular class of individuals; rather it was enacted in ‘furtherance of the health and welfare of [the] city’s inhabitants . . . .’”<sup>21</sup>

Similarly, as in *Wagner*, the Noise and Excessive Vibration Ordinance is not intended to protect a specific group of individuals. Rather the ordinance’s purpose is to protect the community at large. The court is not persuaded that the reference to “at the property boundary” and “of the nearest occupied residential property” in § 10-403 (3)(a), as argued by plaintiff, is evidence of an intent to protect the residents living next to the construction site at the time of the

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<sup>20</sup> §10-401 (2)(a).

<sup>21</sup> *Wagner, supra.* at 628.

construction. On the contrary, the reference to “at the property boundary” and “of the nearest occupied residential property” in § 10-403 (3)(a) is the yardstick for measuring whether the noise is above 5 decibels. Section 10-403 (3) specifically refers to “sound originating from a property”, not an adjoining property or nearby property, indicating that in order to enforce this provision of the ordinance one need not be an adjoining property owner. City Council’s purpose and intent for enacting the Noise and Excessive Vibration Ordinance is clearly set forth, to “eliminate noise and excessive vibration for the health, welfare and safety of its inhabitants.”<sup>22</sup> Based on the foregoing, defendants’ preliminary objection is sustained and count II is dismissed as a matter of law.

**II. This court lacks jurisdiction over count I (breach of contract) as the parties agreed to arbitrate this claim.**

In count I of the complaint plaintiff purports to state a claim for breach of contract. Specifically, plaintiff alleges that Developer breached and continues to breach paragraph 7 (j) of the Agreement by repeatedly starting noisy work earlier than 7:00 a.m. and continuing later than 5:00 p.m.<sup>23</sup> The parties Agreement contains an arbitration provision which provides in pertinent part as follows:

Any dispute, claim or controversy arising out of or relating to this Agreement, subject to the notice and cure provisions set forth in Section 22 (h) below, shall be determined by final, binding and non-appealable arbitration in Philadelphia, Pennsylvania, administered by the American Arbitration Association pursuant to its Commercial Rules... Nothing herein shall preclude the Parties from seeking emergency equitable remedies from a Pennsylvania court with appropriate jurisdiction.<sup>24</sup>

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<sup>22</sup> Chapter 10-400 §10-401 (1)(a)(1) and (c).

<sup>23</sup> Complaint ¶ 25.

<sup>24</sup> Agreement ¶16.



Arbitration agreements are to be strictly construed and not extended by implication. When parties have agreed to arbitrate in a clear and unmistakable manner, every reasonable effort should be made to favor the agreement unless it may be said with positive assurance that the arbitration clause involved is not susceptible to an interpretation that covers the asserted dispute.<sup>25</sup> A two part test is employed to determine whether a matter should be compelled to arbitration.<sup>26</sup> First, we examine whether a valid agreement to arbitrate exists. Second, we must determine whether the dispute is within the scope of the agreement.<sup>27</sup>

Here, a valid agreement to arbitrate exists in the Agreement as acknowledged by both parties. It is also undisputed that the Agreement excludes requests for emergency equitable remedies from arbitration. While plaintiff did file a petition seeking emergency preliminary injunctive relief, this court in a separate order and opinion denied plaintiff's request for emergency relief. Hence, at this time, the only matter before the court is the non-emergency relief that plaintiff seeks in count I of the complaint for breach of contract. This breach of contract claim is subject to arbitration as it is a claim arising out of and relating to the Agreement between the parties. As such, Developer's preliminary objection is sustained and the parties are compelled to arbitrate their contractual dispute as set forth by the terms of their Agreement.

### CONCLUSION

For the foregoing reasons, the parties' preliminary objections are sustained. The claim for negligence per se in count II is dismissed against defendants. The complaint is dismissed

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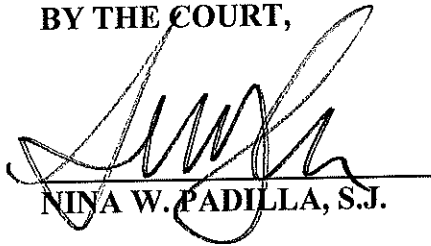
<sup>25</sup> *Callan v. Oxford Land Dev., Inc.*, 858 A.2d 1229, 1233 (Pa. Super. 2004) (citations and quotation marks omitted).

<sup>26</sup> *Elwyn v. DeLuca*, 48 A.3d 457, 461 (Pa. Super. 2012), quoting *Smay v. E.R. Stuebner, Inc.*, 864 A.2d 1266, 1270 (Pa. Super. 2004).

<sup>27</sup> *Fellerman v. PECO Energy Co.*, 159 A.3d 22, 26 (Pa. Super. 2017).

against defendant Hunter Roberts Construction Group, LLC. This matter is stayed as plaintiff and defendant 1911 Walnut Street, LLC are compelled to arbitrate the claim in count I for breach of contract as set forth in their Agreement.

**BY THE COURT,**

A handwritten signature in black ink, appearing to read "Nina W. Padilla", is written over a horizontal line. The signature is stylized with loops and flourishes.

**NINA W. PADILLA, S.J.**