No. 101301-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Ginger Atherton,

Petitioner,

v.

KeyBank, N.A.,

Respondent.

RESPONDENT'S ANSWER TO SECOND AMENDED PETITION FOR REVIEW

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I. INTRODUCTION

The Petition for Review (the "Petition") is nothing more than a squatter's attempt to continue living rent-free in a Sammamish mansion despite having no legal basis to delay a foreclosure that the borrowers stipulated to several years ago. Respondent KeyBank reached a settlement with its borrowers to foreclose two loans on the sprawling "Street of Dreams" mansion at issue in this case in 2011. But while in default, the borrowers quitclaimed the property to a family trust. Another settlement entered in 2019 resulted in the family trust agreeing to a foreclosure judgment and KeyBank agreeing to either share in the proceeds from the foreclosure sale or allow the trust to redeem the property. That settlement also included an arbitration provision.

The trustee of the family trust is Henry Dean; he and his wife, appellant Ginger Atherton, have lived in the property for years without making payments of any kind to anyone.

Two years after the trust agreed to a stipulated foreclosure judgment, the trial court entered a decree of foreclosure ordering the sale of the property. Atherton objected to the decree of foreclosure and asked the trial court to stay the case and compel arbitration on the 2019 settlement agreement. Atherton claims to be an assignee of the trust's rights under that agreement. The trial court denied Atherton's last-minute stall tactic, which the Court of Appeals affirmed.

Atherton now asks this Court to grant review based on newly-raised and undeveloped constitutional and jurisdiction arguments. The Petition makes no credible argument that the Court of Appeals' decision conflicts with precedent; thus, the Petition must show either that the Court of Appeals' decision

involves "a significant question of law under the Constitution of the State of Washington or of the United States," or that the decision involves "an issue of substantial public interest that should be determined by the Supreme Court" in order for this Court to grant review under RAP 13.4(b). The Court of Appeals' decision did neither. There is no significant question of constitutional law because RCW 7.04A.060(2) empowers trial courts to decide whether "a controversy is subject to an agreement to arbitrate." The Court of Appeals' decision is not a matter of substantial public interest because is it an unpublished opinion, and therefore has no precedential value, and because the decision does nothing more than apply well-established law regarding the role of courts in deciding a motion to compel arbitration.

Accordingly, the Petition does not meet any of the criteria set forth in RAP 13.4(b) and should be denied.

II. BACKGROUND

A. In 2007, KeyBank loaned $2.5 million, the borrowers defaulted on the loan, transferred title of the mansion to the Trust, and agreed to KeyBank's foreclosure.

This case arises from two home loans totaling $2.5 million, which KeyBank made to Scott and Kelly Bingham in 2007 that were never repaid. CP 34 ¶ 3. The loans were secured by deeds of trust on a sprawling "Street of Dreams" mansion located in Sammamish, Washington owned by the Binghams. CP 34 ¶ 4.

KeyBank and the Binghams entered into a settlement agreement in 2011 to address their various debts to KeyBank. CP 231 ¶ 6. The settlement confirmed KeyBank's right to foreclose on the mansion. CP 30 ¶ 3.

Meanwhile, the 2007 Sharon Graham Bingham Trust ("Trust") recorded a quitclaim deed executed by the Binghams that transferred the mansion to the Trust. CP 137, Recital E.

Atherton's husband, Henry Dean, serves as the trustee of the Trust, and KeyBank understands that Dean and his wife, Atherton, have lived in the mansion since roughly the time of the quit claim deed. CP 187 ¶ 1.

B. KeyBank filed this foreclosure action in 2016 and was granted a foreclosure decree in 2021 based on the parties' 2019 Settlement Agreement.

KeyBank initiated this judicial foreclosure action in March 2016, naming the Binghams, the Trust, and other junior creditors. CP 1. The six-year history of this case is complex, but KeyBank was ultimately granted a $4.4 million judgment and decree of foreclosure on August 10, 2021. CP 199-203. The judgment is against the property only, as KeyBank waived any right to a deficiency judgment against its borrowers. CP 201 ¶ 4.

The judgment was granted pursuant to a 2019 settlement agreement (the "Settlement Agreement") in which Dean, as

trustee of the Trust, confirmed KeyBank's right to foreclose. CP 137, Recital D.

The settlement structure was memorialized in the Settlement Agreement and a companion "Redemption Agreement." CP 135-159. These agreements confirmed the procedure for KeyBank to complete its foreclosure: First, the Trust stipulated to a foreclosure judgment in favor of KeyBank; second, KeyBank would obtain a decree of foreclosure and schedule a sheriff's sale of the property; and third, KeyBank would credit bid the full amount of its debt at the sheriff's sale. CP 138 ¶ 1, 3.

Then, if KeyBank acquired the property at the sale, the Trust (or its proper assignee) had the right to redeem the property by paying KeyBank $1.6 million. CP 156 ¶ 5. If a third party outbid KeyBank's credit bid, then KeyBank would

retain $3 million and pay the Trust the surplus proceeds from the sale. CP 157 ¶ 7.b–.c.

C. The trial court denied Atherton's eleventh-hour attempt to stop the foreclosure decree and compel arbitration.

Pursuant to the Settlement and Redemption Agreements, once the COVID-19 foreclosure moratorium was lifted, KeyBank filed a motion for a final decree of foreclosure on June 29, 2021. CP 23. The motion was served on all counsel of record, including Dean's counsel. CP 365-67. Nobody filed a timely objection to the motion.

On the day that KeyBank's motion was noted for decision, Atherton filed an "emergency" motion to compel arbitration and to stay the trial court case and KeyBank's foreclosure. CP 115. Atherton argued that she was entitled to arbitration and a stay of foreclosure under the arbitration clause in the Settlement Agreement. CP 115 ¶¶ 2-4.

In response, KeyBank argued that any right to arbitration under the Settlement Agreement was "premature because the condition precedent to Atherton's option/redemption right—KeyBank's acquisition of the property after the sheriff's sale—ha[d] not yet occurred." CP 132.

The trial court denied Atherton's "emergency" motion and granted KeyBank's motion, authorizing the foreclosure to proceed. CP 177-185. The trial court indicated in its order that its denial was "without prejudice, pending completion of a sheriff's sale of the Property." CP 178. Atherton filed a Motion for Reconsideration, which was also denied. CP 186, 191. Atherton then appealed. CP 193.

D. Atherton attempts to delay the sheriff's sale with a $60,000 supersedeas bond, which the Court rejected and increased to $1,000,000.

During the course of the appeal, Dean and Atherton filed a $60,000 cash supersedeas to stay KeyBank's foreclosure. CP

368-69. KeyBank moved to reject the supersedeas as noncompliant with RAP 8.1 and inadequate, and the trial court granted KeyBank's motion. The trial court required $1 million supersedeas to further stay KeyBank's foreclosure sale. Atherton then filed an emergency motion in the Court of Appeals for review of the trial court's decision to require a $1 million supersedeas bond to stay the foreclosure. On March 2, 2022, a commissioner of the Court of Appeals denied the emergency motion and upheld the $1 million supersedeas bond. Atherton and Dean then posted the $1 million bond, staying the foreclosure sale.

E. The Court of Appeals affirmed the trial court's decision

On July 25, 2022, the Court of Appeals issued an unpublished decision in this case affirming the trial court. *Key Bank, N.A. v. Atherton*, No. 83104-6-I, 2022 WL 2915540 (Wash. Ct. App. July 25, 2022). The Court of Appeals affirmed

that the trial court correctly denied Atherton's emergency motion to compel arbitration and stay the foreclosure. In doing so, the Court of Appeals held that (1) the trial court did not decide a condition precedent to arbitrability, (2) the trial court was not required to stay the case under RCW 7.04A.070(5) because its denial of Atherton's motion to compel arbitration was a final decision. *Id.* at *1.

On the first point, the Court of Appeals explained that while an arbitrator must decide any conditions precedent to arbitrability under RCW 7.04A.060(3), that statutory section "contemplates arbitration provisions that have procedural prerequisites that must be satisfied before the trial court compels arbitration." *Id.* at *2. Because the condition precedent decided by the trial court in this case was not a *procedural* condition precedent to arbitrability, the Court of Appeals held the issue was properly decided by the trial court

(and did not need to be decided by an arbitrator). *Id.* at *3. As explained by the Court of Appeals:

> [U]nder the redemption agreement, KeyBank prevailing at the foreclosure sale is a condition precedent to the trust or Atherton exercising the right to redeem the property from KeyBank for $1.6 million . . . this condition precedent has no procedural effect on arbitrability.

Id.

On the second point, the Court of Appeals held that "the trial court's denial of Atherton's motion to compel arbitration was a final decision" and thus RCW 7.04A.070(5)'s mandatory stay provision "has no impact here." *Id.* at *4.

Atherton filed a motion for reconsideration, which was denied by the Court of Appeals on August 18, 2022.

III. ARGUMENT

The Court should deny the Petition because it does not raise any significant constitutional issues and does not otherwise meet any of the criteria set forth in RAP 13.4(b).

A. The trial court and Court of Appeals had subject matter jurisdiction.

The Petition makes a new[1] and confusing argument that "the Legislature [has] restricted the courts' original jurisdiction to make certain determination in proceedings seeking to compel private arbitration" by passing the Uniform Arbitration Act.[2]

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[1] Atherton admits that she did not raise any subject matter jurisdiction arguments in her opening brief on appeal before the Court of Appeals, although she claims she did so in her reply brief. Petition at 14.

[2] The Petition interchangeably refers to the Uniform Arbitration Act and the Revised Uniform Arbitration Act (the "RUAA"). The RUAA is the applicable state arbitration statute in this case, as it applies to actions filed after January 1, 2006. *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 236, n.2, 236 P.3d 182 (2010).

Petition at 16. This argument boils down to a complaint that the trial court did not follow the RUAA, which somehow deprives the court of subject matter jurisdiction. But Atherton fails to acknowledge that the Washington constitution "grants the superior court original jurisdiction in 'all cases at law which involve the title or possession of real property.'" *Hous. Auth. of City of Seattle v. Bin,* 163 Wn. App. 367, 375, 260 P.3d 900 (2011) (quoting WASH. CONST. art. 4, § 6). This includes judicial foreclosure actions. *See id.* Further, Washington's RUAA (and the Federal Arbitration Act ("FAA") to the extent it applies)[3] provide that the court can and should make certain determinations regarding the applicability of an arbitration provision, including whether there is a valid arbitration agreement and whether a dispute falls within the scope of an arbitration provision. RCW 7.04A.060(2); *Howsam v. Dean*

[3] *See infra* pp. 19-20.

Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (same under the FAA).

Atherton cites *Housing Authority of City of Seattle v. Bin* for the proposition that "[w]hen the Legislature explicitly limits subject matter jurisdiction, and jurisdiction has by law been vested exclusively in another tribunal, a superior court is powerless to act." 163 Wn. App. at 375–76. But the *Bin* court rejected a jurisdictional challenge and affirmed the superior court's subject matter jurisdiction to decide an unlawful detainer action, even where one party alleged the other failed to comply with required statutory procedures. *Id.* at 375–77. The *Bin* court explained that "[t]he instances in which a superior court is powerless to act because jurisdiction has by law been vested exclusively in some other tribunal" are very limited and "typically involve federal matters such as naturalization or patents." *Id.* at 375–76.

Like the unlawful detainer action in *Bin*, this judicial foreclosure action is properly within the scope of the superior court's jurisdiction; while the RUAA dictates that an arbitrator decide issues such as whether procedural prerequisites to arbitrability are satisfied, as explained by the Court of Appeals, the superior court may validly decide other conditions that go to the scope of an arbitration provision and whether when that provision may be properly invoked. Here, the Court of Appeals determined that the trial court did not decide a condition precedent to arbitrability as contemplated by RCW 7.04A.060(3), and thus there can be no argument that the trial court invaded the province of the arbitrator.

Atherton cites a federal decision interpreting a different statute to argue that "an issue of whether performance [is] sufficiently complete to fulfill a condition precedent" is arbitrable. Petition at 20 (citing *DCK N. Am., LLC v. Burns &*

Roe Servs. Corp., 218 F. Supp. 3d 465 (W.D. Pa. 2016)). But the *DCK North America* court held the exact opposite; just like the Court of Appeals in this case, that court held that whether the parties' dispute arose during contract performance and thus was subject to the parties' arbitration provision was not "a procedural precondition to arbitration" to be determined by the arbitrator but was actually a "question[] of arbitrability" for the court to decide. *Id.* at 473.[4]

In sum, the trial court and Court of Appeals in this case had subject matter jurisdiction over this case, including the authority to determine the issue of arbitrability pursuant to RCW 7.04A.060(2).

[4] Ultimately, the *DCK North America* court held that the dispute was arbitrable based on the text of the parties' agreement, but the majority of the opinion is dedicated to explaining why it should be the court—not the arbitrator—who makes that decision. *See id.* at 472-74.

B. The Court of Appeals' decision does not violate separation of powers.

In a rehash of her first argument regarding subject matter jurisdiction, Atherton also argues that the Court of Appeals' decision violates separation of powers. More specifically, Atherton argues that the legislature "has bestowed courts with limited subject matter jurisdiction to decide only (1) whether an agreement to arbitrate exists or (2) a controversy is subject to an agreement to arbitrate" and then inaccurately states that KeyBank "does not dispute either of these issues." Petition at 21. But KeyBank does indeed dispute that the issues Atherton raises are currently subject to the agreed arbitration provision and that is the basis under which the lower courts denied her request for arbitration. There is no separation of powers issue where the courts followed RCW 7.04A.060(2)'s instruction and decided whether a dispute falls within the scope of an arbitration provision.

Atherton also makes a conclusory argument that the decision "creates conflicts in law" and cites without analysis this Court's unpublished decision in *Matter of Estate of Anches*, 9 Wn. App. 2d 1078, 2019 WL 3417100 (2019). The *Anches* decision stands for the uncontroversial provision that the "parties may, by contract, delegate the question of arbitrability to the arbitrator" and therefore avoid RCW 7.04A.060(2)'s mandate that questions of arbitrability should be decided by the court. *Id.* at *2. Atherton has never argued (nor could she) that the parties' contract in this case delegated the question of arbitrability to the arbitrator, and thus *Anches* is inapposite and there is no conflict in law created by the Court of Appeals' decision.

C. The Court of Appeals' decision does not raise federalism concerns.

Atherton next argues that the Court of Appeals' decision violates the U.S. Constitution's supremacy clause. But this

argument relies on a number of unsupported (and incorrect) premises, including: (1) the FAA and interpreting federal case law apply, (2) the FAA "is construed opposite the way the Court of Appeals construed" the RUAA making it impossible for parties to comply with both statutes, and (3) the RUAA now stands as an obstacle to the FAA's purposes and objectives.

First, Atherton has never before argued that the FAA applies. Her belated assertion that federal law now applies has deprived the trial court and Court of Appeals of the opportunity to address this issue. Nor does Atherton adequately support her new argument; instead, she states without citation that "KeyBank engages in lending, foreclosing, and real property transactions nationwide" and that "[r]esidential lending has broad impact on the economy and is subject to federal control." Petition at 22-23. But such unsupported statements are not sufficient to show this dispute is subject to the FAA. To show a

dispute is governed by the FAA, a party must make a threshold showing that "a written agreement to arbitrate exists and that the contract at issue involves interstate commerce." *Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn. App. 354, 358, 85 P.3d 389 (2004), *remanded on other grounds*, 153 Wn.2d 1023, 108 P.3d 1227 (2005). Atherton has not shown that foreclosure of a property in Washington pursuant to agreements negotiated in Washington and specifying Washington law[5] involves interstate commerce. Thus, Atherton has not carried her burden to show this dispute is subject to the FAA.

Second, even assuming the FAA applies, the FAA is construed consistently with the way the Court of Appeals construed the RUAA in this case. Atherton does not describe why or how it is now "impossible" to comply with both the

[5] Both the Settlement Agreement and Redemption Agreement are governed by Washington law. CP 157 ¶ 15; CP 139 ¶ 10.

FAA and RUAA. As shown by one of the opinions cited by Atherton, *DCK North America,* federal courts interpret the FAA consistently with the Court of Appeals' rationale in this case; that is, courts are entitled to decide whether a dispute falls within the scope of an arbitration provision and arbitrators must only decide *procedural* "precondition[s] to arbitration." 218 F. Supp. 3d at 473. Indeed, the Court of Appeals cited a Fifth Circuit decision interpreting the FAA in support of its conclusion that the trial court properly "looked through" Atherton's motion to compel arbitration in determining that a condition precedent, the foreclosure sale, must be met before either a trial court or an arbitrator could reach the merits of her claims. 2022 WL 2915540 at *4, n.17 (quoting *Lower Colorado River Authority v. Papalote Creek II, LLC,* 858 F.3d 916, 922 (5th Cir. 2017)).

Third, given that the Court of Appeals explicitly followed FAA decisions in this case, even if the FAA applied, there is no conflict between the FAA and the RUAA created by the Court of Appeals' unpublished decision in this case. Thus, Atherton's belated (and unsupported) attempt to invoke the Supremacy Clause and preemption principles should be rejected.

D. The Court of Appeals' decision does not impinge on freedom of contract.

Atherton makes one last Hail Marry attempt to invoke constitutional error in the decision below by way of a conclusory, two-paragraph argument that the decision below impinges on freedom of contract. Atherton appears to be arguing that her right to arbitration "was absolute" under the parties' contracts and thus the trial court's denial of her motion to compel arbitration "could damage the freedom of contract." Petition at 25-26. But the only support Atherton provides for this argument are inapposite cases about the limited authority

courts have to vacate an arbitration award. *See id.* Because this argument is new in the Petition and not adequately developed, it is not grounds for review by this Court. *See e.g., Visser v. Craig*, 139 Wn. App. 152, 165, n.8, 159 P.3d 453 (2007) (rejecting freedom of contract argument that was raised for the first time on appeal and was "not supported by argument and legal authority").

Additionally, contrary to Atherton's assertion, the Court of Appeals' decision honors the text and spirit of the parties' contract by requiring that the foreclosure sale contemplated by the contracts be held prior to the Trust (or its purported assignee, Atherton) contesting the foreclosure sale in arbitration. Accordingly, there is no reason to believe the Court of Appeals' decision impinges on the freedom to contract under the Washington or U.S. Constitution.

IV. CONCLUSION

The Court of Appeals' decision in this case does not conflict with precedent, nor does it involve a significant constitutional question or an issue of substantial public interest. The trial court and Court of Appeals both had subject matter jurisdiction to determine the issues in dispute, and did not violate separation of powers or federalism principles in doing so. Further, the decision does not impinge on freedom of contract, but rather is fully consistent with the parties' agreements. Accordingly, the Petition should be denied.

RESPECTFULLY SUBMITTED this 26th day of October, 2022

I certify that the foregoing document contains 3,434 words, in compliance with RAP 18.17.

DATED this 26th day of October, 2022.

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CERTIFICATE OF SERVICE

I, Edgar Y. Rosales, certify under penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On October 26, 2022, I caused delivery of a true copy of the foregoing *Respondents' Answer to Amended Petition for Review* to all parties entitled to notice and the Clerk of this Court through electronic upload through the Court's e-service system.

DATED this 26th day of October, 2022, in Seattle, Washington.

/s/Edgar Y. Rosales
Edgar Y. Rosales, Legal Assistant

MILLER NASH LLP

October 26, 2022 - 4:12 PM

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