101301-9

Court of Appeal Cause No. 83104-6-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KEY BANK, N.A.,

Respondent,

v.

GINGER ATHERTON,

Petitioner.

SECOND AMENDED PETITION FOR REVIEW

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I. INTRODUCTION

This Petition should be granted because it concerns the subject matter jurisdiction and authority of the courts to interfere with agreements to arbitrate. The Revised Uniform Arbitration Act's goal is to make the process uniform amongst states and consistent with the Federal Arbitration Act when allocating decision making between courts and arbitrators. Uniformity is fundamental because contract expectations should not be uneven depending on the state the contract is being enforced or whether it involves interstate commerce. As explained in this Petition, the Court of Appeals went astray, usurped subject matter jurisdiction it did not have, and when asked, avoided explaining why it had the authority to defeat the contracting parties' reasonable expectations.

A. IDENTITY OF PETITIONER

Ginger Atherton is the Petitioner. She requests this Court review and reverse the opinion identified in Part B.

B. COURT OF APPEALS DECISION

Petitioner requests this Court review the Washington State Court of Appeals' Unpublished Opinion in *Key Bank, N.A., v. Ginger Atherton,* Case No. 83104-6-I, Washington Court of Appeals, Division One (July 25, 2022) (the "Opinion"),[1] reconsideration denied, August 18, 2022.[2]

C. ISSUES PRESENTED FOR REVIEW

1. ***Do Washington Courts have Subject Matter Jurisdiction to Decide Condition Precedent Issues Involving the Merits of an Underlying Dispute that is Arbitrable?*** No. Article IV, §6 of the Washington Constitution grants courts original "enumerated" and "residual" subject matter jurisdiction. The legislature cannot restrict "enumerated" jurisdiction, but it may restrict "residual" jurisdiction, but only by passing a law requiring a

[1] **Appendix** pgs. A-1 through 11.
[2] *Id*. Pgs. A-12 through 13.

determination be made in an alternative forum. RAP 13.4(b)(3) and (4).

2. ***Did the Court of Appeals Violate the Separation of Powers Doctrine when it Construed Unambiguous RUAA Provisions to Grant it Residual Jurisdiction the Legislature Restricted it from Having?*** Yes. Courts cannot engage in statutory construction or interpretation if a stature is unambiguous. Proceeding to compel arbitration are also unknown to the common law and are entirely statutory. The court's original jurisdiction is, therefore, residual, and the Legislature may limit it by enacting a law requiring determination in an alternative forum. The RUAA clearly requires condition precedent issues to be determined by an arbitrator in an arbitration forum. Likewise, the legislature has also unambiguously prohibited courts from inquiring into the merits of an arbitrable dispute when deciding arbitrability. RAP 13.4(b)(3) and (4).

3. ***Does the Opinion Violate the U.S. Constitution's Supremacy Clause by Determining Condition Precedent Issues Federal Courts Prohibit Courts from Deciding?*** Yes. Conflict Preemption prohibits states from interfering with the Federal Arbitration Act, 9 U.S.C. §1 , *et. seq.* ("FAA"), which requires enforcement of agreements to arbitrate that "involve interstate commerce." The Bank is a national banking association engaging in lending, foreclosing, and real property transactions nationwide. Bank, and the industry it is involved in, broadly impact the economy and are subject to federal control. The FAA's substantial body of federal substantive law applies, but federal courts have decided this issue contrary to the Opinion to such an extent that it is now impossible to comply with both the federal and state acts at the same. The RUAA, therefore, is an obstacle to the FAA accomplishing Congress' full purposes and objectives. RAP 13.4(b)(3) and (4).

4. ***Does the Opinion's RUAA Interpretation Violate Article I, §10 of the United States Constitution and Article I, §23***

of the Washington State Constitution Because it Impairing the Obligations of Contract? Yes. The Opinion's tortured construction of the RUAA weakens the value a party bargains for when agreeing to arbitrate – a speedy and inexpensive determination before an agreed neutral who makes the decision. It is undisputed Key Bank did not comply with the agreement, that the arbitration provision is enforceable, or that the remedy(ies), if any, Atherton may be entitled to are to be arbitrated. Instead, the Bank only challenges the arbitration's timing. Rather than have the timing issue decided by the arbitrator, the trial court interfered, construed the agreement, and determined the condition precedent issue and the arbitration's timing. It obliterated the Bank's obligation to restore Atherton to the pre-agreement position if the agreement was rescinded and it would destroy the Bank's obligation to sell her the home she has been living in because property values have increased. RAP 13.4(b)(3) and (4).

D. STATEMENT OF THE CASE

The action in which arbitration is sought is a judicial foreclosure action regarding two deeds of trust against real property at 721 250th Ln. NE in Sammamish, Washington (the "Property"). CP 137; Op. at 2. Atherton has lived on (and improved) the Property for 9 years. Op. at 2.

On October 18, 2019, the parties executed a "Settlement Agreement" and a "Redemption Agreement." CP 137-153; Op. at 2. The Settlement Agreement contains an enforceable broad agreement to arbitrate[3] and was expressly incorporated into the Redemption Agreement, CP 145.[4] Pursuant to the Settlement Agreement the Bank was to have signed and delivered the two agreements on or prior to October 18, 2019. CP 138, ¶ 2. It did

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[3] "*Any* disputes related to or arising under this Agreement will be arbitrated." CP 139, ¶ 11 (emphasis added).

[4] "If the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract." *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 801, 225 P.3d 213 (2009).

not comply with this obligation because it signed the two agreements two months after the deadline. CP 150, 159. In exchange for its promise, the Bank received stipulations that entitled it to foreclose the deeds of trust on the Property. CP 137, 138. This is why the Bank was able to obtain the Order Authorizing the Sale of the Property.

The Redemption Agreement gave Atherton a "Redemption" that was defined to be the right to purchase the Property from the Bank for $1.6 Million. The Redemption was expressly stated to be "among the consideration" for the promises in the Settlement Agreement." CP 138. The Redemption Agreement also obligated the Bank to credit bid the full amount of the debt, accrued interest, attorney fees, and costs at the sheriff's sale (at least $4.2 million). CP 146, ¶ 7.a; Op. at 3. If the Bank was the successful bidder at the sheriff's sale and acquired title to the Property, then Ginger Atherton could exercise the Redemption. CP 144, ¶ 2; CP 145, ¶ 5. If the Bank did not acquire title, then it was to pay Atherton the amount bid less $3 Million. CP 146,

¶ 7.c. The Redemption expired in accordance with its terms on June 1, 2020. CP 145, ¶3.[5] Every party's heirs *and assigns* were to be bound by the Settlement Agreement. CP 140, ¶ 14.

In April, 2020, the Trust assigned its "right, title and interest" in the Agreements to Ginger Atherton. CP 116, 174; Op. at 3.[6]

On June 29, 2021, the Bank finally filed a Motion for Judgment and Decree of Foreclosure and Order of Sale. CP 23-28; Op. at 3. But this was after real estate values rapidly

[5] The two month delay was material because the Bank had only 7 months to obtain the decree of foreclosure, obtain an order authorizing sale, publish notice, have the Property sold at a Sheriff's sale, obtain a Certificate of Sale, and then obtain a Certificate of Title. Shortening the 7-month period to just 5 months made that difficult task almost insurmountable because the Bank would have had to start the process by February 20, 2020.

[6] At that time, the Trust delivered written notice to KeyBank that it had assigned these rights to Ginger Atherton, CP 116, which the Trust had a right to do without the permission or approval of KeyBank. CP 147, ¶ 9 ("The Trust may assign the Redemption without KeyBank's written consent….") and CP 140, ¶ 14 ("This Agreement will be binding upon and will accrue to the benefit of the Parties, and each of their respective heirs, assigns….").

increased. KeyBank provided no notice to Ginger Atherton. CP 116.

Ginger Atherton filed an emergency motion to compel arbitration on July 13, 2021. CP 115-23. Her motion, among other things, requested :

- The stipulations the Bank received for its promises under the Redemption Agreement be rescinded and declared invalid because the consideration the Bank gave for those stipulations had failed. CP 118, ¶ 12.
- The Court not hear KeyBank's motion to authorize sale because she had not been given notice, in violation of due process. CP 115, ¶ 1; CP 120-21.
- The Court compel arbitration pursuant to RCW 7.04A.070(1),[7] to remedy the Bank's noncompliance with the

[7]"On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. If the refusing party opposes the motion, the court shall proceed

Settlement Agreement by not timely delivering the signed agreements and then not diligently obtaining title to the Property. CP 115, ¶ 2.

- That the pending foreclosure proceedings be stayed pending the court's entry of a final order compelling the parties to arbitration, as is required pursuant to RCW 7.04A.070(5). CP 115-16, ¶¶ 3-4.

The Bank opposed Atherton's motion based on three condition precedent arguments that only affected the timing of the arbitration. CP 124-33; 134-62. The Bank did not dispute there was an enforceable agreement to arbitrate or that the dispute should be arbitrated. CP 125-26. KeyBank argued that it did not have to give Atherton notice because she was not a party. CP 125-26. Instead, it argued Atherton's Redemption had

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summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate." RCW 7.04A.070(1).

not yet sprung into existence because the Bank had to first acquire title to the Property before she could exercise her Redemption. CP 125, ¶ 2. This was the merits of the arbitrable dispute between Atherton and the Bank.

Atherton replied on July 23, 2021 (CP 163-76), wherein she advised the Court she had spent $600,000 to maintain, repair, and improve the Property, relying on the Bank to fulfill its promise to credit bid and acquire title to the Property by June 1, 2020. CP 164, 168-69. Atherton explained that at time of the Settlement Agreement, the likelihood of a bidder offering $4.6 to $4.8 million was not great—in other words, it was unlikely a third party would outbid the Bank. CP 166; CP 187. But because Atherton had made improvements beyond June 1, 2020, and due to the increase in local property values, the fair market value of the Property had jumped to between $5.5 and $6 million. CP 164. If the Bank were outbid, then Atherton would only receive $1.8 million in cash rather than the right to buy her home for $1.6 Million, but was worth $5 - $6 ($3.4 –

4.4 Million in equity). Because the Bank's breach of the agreements was arbitrable, the only way Atherton could remedy the Bank's breach was to arbitrate her claims with the selected arbitrator. CP 168-69.

On August 10, 2021, the trial court entered an Order for Judgment and Decree of Foreclosure and of Sale. CP 180-85; Op. at 4. It also decided the merits of the arbitrable dispute regarding the Bank's condition precedent arguments and the arbitration's timing by denying Atherton's motion to compel arbitration "without prejudice" pending completion of a sheriff's sale. CP 177-79; Op. at 4.

On August 23, 2021, Atherton moved for reconsideration. CP 186-90. She argued RCW 7.04A.070(5) requires that if a party filed a motion to order arbitration, then *the court shall* stay an action until entry of a ***final*** order. CP 188. Further, once the arbitration motion was filed, the trial court should not have considered the merits of the underlying foreclosure until it rendered a final decision on the arbitration motion, citing RCW

7.04A.070(3), and that the court was required to decide the matter summarily. CP 188-89. The court denied reconsideration on August 31, 2021. CP 191-92; Op. at 4.

Atherton appealed. CP 193-206. The Court of Appeals affirmed and then denied a Motion for Reconsideration.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Appellate courts have a duty to determine their subject matter jurisdiction and the extent of appellate review even if the issue is not raised by the parties, and a party may raise the issue at any time, even on appeal. *Barnett v. Hicks*, 119 Wn.2d 151, 154, 829 P.2d 1087 (1992), citing *Dux v. Hostetter*, 37 Wn.2d 550, 555, 225 P.2d 210 (1950). This issue was raised by Atherton in her Reply Brief and is now being raised here. The Court of Appeals did not address the issue, Petitioner requests this Court address this issue.

1. Where there is an agreement to arbitrate, Washington courts have no subject matter jurisdiction to consider the merits of the dispute nor any conditions precedent issues; those are for the arbitrator to decide.

The Washington Constitution, art. IV, § 6, provides courts have original subject matter jurisdiction over all actions, but differentiates "*enumerated"* subject matter jurisdiction from "*residual"* subject matter jurisdiction. The relevant portions of Article IV, § 6 is reproduced below. The enumerated jurisdiction is

in bold, and the residual jurisdiction is in italics. See *Alim v. City of Seattle*, 14 Wn. App. 2d 838, 845–46, 474 P.3d 589 (2020), citing *State v. Posey*, 174 Wn.2d 131, 135-36, 272 P.3d 840 (2012).

The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. *The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor.*

When referring to the courts' residual jurisdiction, The State Constitution provides courts have original jurisdiction to make all matters that were not enumerated "***in which jurisdiction shall not have been by law vested exclusively in some other court***." Clearly

this allows a law to be enacted that vests jurisdiction in another court, or another forum. The legislature cannot, however, restrict the courts original jurisdiction in the enumerated matters.[8]

Private arbitration in Washington is unknown to common law and governed exclusively by statute. *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 236, 236 P.3d 182 (2010); and *Boyd v. Davis*, 127 Wn.2d 256, 268, 897 P.2d 1239 (1995). By adopting the Uniform Arbitration Act (Chapter 7.04A RCW), under Title 7 RCW (Special Proceedings and Actions), the Legislature restricted the courts' original jurisdiction to make certain determination in proceedings seeking to compel private arbitration because it exclusively vested the jurisdiction to the arbitrator to make those determinations. In this one regard the courts are courts of limited jurisdiction.

The difference between the proceedings is crucial to appellate review. Under the former arbitration act that was modeled after the

[8] "Interpretation of constitutional provisions, statutes, and court rules is a question of law, which this court reviews *de novo*." *Optimer Int'l., Inc. v. RP Bellevue, LLC*, 170 Wn.2d 768, 771, 246 P.3d 785 (2011).

Uniform Arbitration Act ("UAA"), it was held that both the trial and appellate court's jurisdiction was restricted and the appellate court could only substantively review the grounds contained in the former act (RCW 7.04.160 –.170). *Barnett*, 119 Wn.2d at 153–54.

When 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. *Hous. Auth. of City of Seattle v. Bin*, 163 Wn. App. 367, 375–76, 260 P.3d 900 (2011). The object of arbitration is to avoid what some feel are the formalities, the delay, the expense, and vexation of ordinary litigation. *Barnett*, 119 Wn.2d at 160. Where there is an agreement to arbitrate, a trial court cannot search the four corners of the contract to discern the parties' intent, as the trial court did here. *See Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). Moreover, Washington courts apply a "strong presumption in favor of arbitrability," and doubts should be resolved in favor of coverage. *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. Of Peninsula*, 130 Wn.2d 401, 414, 924 P.2d 13 (1996).

The RUAA is clear, "An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." RCW 7.04A.060. It is equally clear that "The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established." If the trial court or the Court of Appeals decided either a condition precedent to arbitrability, the merits of the underlying controversy, or that grounds for the claim have not been established, then it exceeded its authority and jurisdiction. The Opinion did one or more of these three things.

The Opinion distinguishes the condition precedent to arbitrability issue by holding the condition "was a condition precedent to Atherton's right to exercise the Redemption and was not a condition precedent to arbitrability." Op. at Pg. 2. But this distinction is irrelevant because even if true, it still inquired into the merits of the underlying controversy, which it cannot do.

> We do not examine the controversy merits, but determine if the grievant has made a claim covered by the CBA. *Id.* We should order arbitration "unless it may be said with positive assurance the arbitration clause is not susceptible of *an* interpretation that covers the asserted dispute." *Id.* (emphasis in original). Doubts should be resolved in favor of arbitration. *Id.* All issues "upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication." *Id.*

Yakima County Law Enforcement Officers Guild v. Yakima County, 133 Wn. App. 281, 285, 135 P.3d 558 (2006).

The Opinion held "under the redemption agreement, the Bank 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." Op. at 7–8. This is also not availing because that means the Court of Appeals determined whether grounds for the claim had been established, which is also prohibited by RCW 7.04A.070(3). In performing its analysis, the Court of Appeals (1) construed the Redemption Agreement, and (2) decided the Bank's condition precedent defense to Atherton's breach of contract claim. In doing so, it exceeded its jurisdiction

and authority granted it by the legislature and overstepped into areas it was prohibited from going.

For example, in *DCK N. Am., LLC v. Burns & Roe Servs. Corp.*, 218 F. Supp. 3d 465, (W.D. Pa. 2016), the Court held that an issue of whether performance was sufficiently complete to fulfill a condition precedent was not a condition precedent to arbitrability. *DCK N*. at 473. Nonetheless the issue was still arbitrable because it went to the merits of the arbitrable dispute. *Id.* at 476.

Finally, federal courts have held that if the condition precedent effects the timing of when the arbitration is to commence, then it is a condition precedent to arbitrability. *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 35, 134 S. Ct. 1198, 1207, 188 L. Ed. 2d 220 (2014). Here, the condition precedent question was undoubtedly about when to bring arbitration and not whether it was arbitrable. The trial court's order stated the denial of the motion to compel was without prejudice to renewing it after the sheriff's sale. CP 177–79.

Most certainly, the trial court's order that allowed Atherton to raise her arbitrability claim after the Sheriff's sale was not a final order. As such, a stay was required pursuant to RCW 7.04A.070(5).

2. The Opinion Violates Separation of Powers under the Washington Constitution

The Court of Appeals' overreach also raises separation of powers issues, which is of substantial, constitutional importance. RAP 13.4(b)(3) and (4). Compelling private arbitration proceedings is unknown to the common law and entirely a creature of statute. 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. RCW 7.04A.060(2). Here, the Bank does not dispute either of these issues. It does not contest the agreement to arbitrate is enforceable, and it does not contest its breach of the agreements is arbitrable. Because these two questions were uncontested, the courts were required to compel arbitration and allow the arbitrator

who had jurisdiction to determine the other issues and make the appropriate decision as to what remedy, if any, Atherton was entitled to for the Bank's breach.

Aside from rewriting important statutory and constitutional law on arbitration, the Opinion creates conflicts in law that this Court should resolve. RAP 13.4(b)(1) and (2); *see also, e.g., Matter of Estate of Anches*, 9 Wn. App. 2d 1078 (2019) ("We conclude that, through the clear and unmistakable language of the LLC Agreement, the arbitrator must decide whether the parties' dispute is arbitrable…The superior court erred by denying the motion to compel arbitration.").

3. The Courts Violated the U.S. Constitution's Supremacy Clause by Refusing to Compel Arbitration of a Dispute Inside the Scope of a Valid Agreement to Arbitrate Within an Agreement that Affected Interstate Commerce.

Conflict Preemption prohibits states from interfering with the FAA, which requires enforcement of agreements to arbitrate that "involve interstate commerce." KeyBank engages in lending, foreclosing, and real property transactions nationwide. Residential

lending has broad impact on the economy and is subject to federal control. The FAA applies, bringing with it a body of federal substantive law of arbitrability. The FAA is construed opposite the way the Court of Appeals construed the RUAA; it is now impossible for the parties to comply with the RUAA and the FAA at the same time. The RUAA, therefore, now stands as an obstacle to the FAA accomplishing Congress' full purposes and objectives and is, therefore, preempted. Thus, review is warranted to ensure Washington law does not violate important preemption principles. RAP 13.4(b)(3) and (4).

"Conflict preemption occurs where (1) it is impossible to comply with both state and federal law or (2) state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 800, 225 P.3d 213 (2009) (internal quotation marks and citations omitted).

"The FAA not only protects freedom of choice with respect to arbitration agreements, *Epic Systems*, __U.S.__, 138 S.Ct. at

1632, it also *preempts* the states from limiting those choices, (citation omitted)" *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1257 (10th Cir. 2018).

In *Satomi*, this Court said, "[T]he FAA preempts or supersedes state laws that require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," 167 Wn.2d at 801, and that the FAA applies to transactions involving an economic activity that, in the aggregate, represents a general practice subject to federal control that bears on interstate commerce in a substantial way, 167 Wn.2d at 799. Here, the Opinion's tortured construction of the RUAA places it in direct conflict with the FAA and complying with both is impossible. As such, the RUAA is constructively preempted by the FAA. Because uniformity in applying the law compelling parties to private arbitration is the goal, having the RUAA apply to those agreements not covered by the FAA, but having the FAA apply to the agreements that involve interstate commerce defeats the goal.

4. The Opinion Unconstitutionally Impinges on the Freedom of Parties to Contract.

Freedom of contract is most often mentioned when it comes to vacating an arbitration award. "Courts do not typically review such arbitration awards because extensive judicial review would weaken the value of bargained for, binding arbitration and could damage the freedom of contract." *Int'l Union of Operating Engineers, Local 286 v. Port of Seattle*, 176 Wn.2d 712, 715, 295 P.3d 736 (2013) (internal quotation marks and citation omitted). The United States Supreme Court has determined the identical separation of powers argument the same way. *Henry Schein, Inc. v. Archer & White Sales, Inc.,* 202 L. Ed. 2d 480, 139 S. Ct. 524, 528 (2019) (""We are not at liberty to rewrite the statute passed by Congress and signed by the President."); and 139 S. Ct. at 531 ("we may not rewrite the statute simply to accommodate that policy concern.")

Per the terms of the Agreements, arbitration was absolute. The Redemption Agreement incorporates the Settlement

Agreement into it, with its very broad arbitration clause. Any disputes related to or arising under the Settlement Agreement had to be arbitrated before Mr. Cogan. CP 139. Thus, when *any* dispute arises, that should be the end of the court's inquiry; the court has no power to decide the issues the legislature reserved exclusively for the arbitrator to decide.

F. CONCLUSION

For the reasons expressed herein, review should be granted and this Court should reverse and vacate the Court of Appeals' Opinion and its fee and cost award to the Bank and vacate the trial court's Order and remand the matter back to the trial court with instructions to enter an order compelling arbitration with costs and fees to be determined by the arbitrator after he determines who was the substantially prevailing party.

SUBMITTED: September 20, 2022.

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By my signature above, I certify that the foregoing document contains 4543 words, in compliance with RAP 18.17.

WWLG

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APPENDIX TO PETITION FOR REVIEW

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KEY BANK, N.A. Respondent, v. GINGER ATHERTON, Appellant, HENRY DEAN, as trustee for the Sharon Graham Bingham 2007 Trust; ESTATE OF SCOTT BINGHAM; KELLY BINGHAM; UMPQUA BANK; OPUS BANK, as successor-in-interest to Cascade Bank; WASHINGTON FEDERAL, N.A., itself and as successor-in-interest to Horizon Bank, WASHINGTON FEDERAL N.A.; WASHINGTON TRUST BANK; FIRST CITIZENS BANK AND TRUST CO., as successor-in-interest to Venture Bank; STATE OF WASHINGTON; DEPT. OF REVENUE; CENTRUM FINANCIAL SERVICES, INC., MUFG UNION BANK, N.A., itself and as successor-in-interest to Frontier Bank; PEARLMARK REAL ESTATE PARTNERS; PEARLMARK MEZZANINE REALITY PARTNERS II LLC; LVB-OGDEN MARKETING, INC., LLC, Defendants.	)	No. 83104-6-I UNPUBLISHED OPINION

VERELLEN, J. — Two issues predominate in Ginger Atherton's appeal from a trial court order denying her motion to compel arbitration and to stay a deed of trust foreclosure pending the outcome of the arbitration. First, Atherton contends the trial court took on a role reserved for an arbitrator by deciding a condition precedent to arbitrability. But the condition she identifies as a right to redeem if Key Bank prevails at a pending sheriff's sale is not a condition precedent to arbitrability. Second, she relies on the mandate of RCW 7.04A.070(5) that the trial court must issue a stay pending a final decision on a motion to compel arbitration. But the trial court here did issue a final decision on the motion to compel arbitration.

We affirm.

FACTS

In 2007, KeyBank loaned Scott and Kelly Bingham[1] $2.5 million. KeyBank's loans were secured by deeds of trust against the property located at 721 250th Lane NE, Sammamish, Washington. The property served as the security to ensure repayment of the loans.

That same year, Scott and Kelly Bingham quitclaimed the property to the "2007 Sharon Graham Bingham Trust."[2] Henry Dean, the trustee of the trust, and his wife, Ginger Atherton, have lived on the property since 2007.

In 2019, after extensive negotiations, the trust and KeyBank entered into a settlement and release agreement and a redemption agreement.

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[1] Because the parties share the same last name, we refer to them by their first names for clarity.

[2] Clerk's Papers (CP) at 137.

The settlement agreement provided that KeyBank and the trust stipulated to judgments of foreclosure in KeyBank's favor, that KeyBank would foreclose on the liens against the property securing the loans, and that KeyBank would credit bid at least $4.2 million at the sheriff's sale.

The redemption agreement provided that if KeyBank acquired the property at the sheriff's sale, the trust could redeem the property from KeyBank by paying KeyBank $1.6 million, but if KeyBank did not prevail at the sheriff's sale, then KeyBank would retain $3 million and pay the trust any additional funds that it received from the sale.

KeyBank and the trust also stipulated that KeyBank's deeds of trust were valid and enforceable, that the liens in favor of KeyBank were superior to any other interests, and that KeyBank was entitled to a final judgment of foreclosure.

In 2020, Dean assigned the trust's "right, title and interest in" the settlement and redemption agreements to Atherton.[3]

On June 29, 2021, KeyBank filed its motion for a final decree of foreclosure. Atherton filed an emergency motion to compel arbitration and to stay KeyBank's foreclosure. Atherton argued that the parties should be compelled to arbitrate the validity of the trust's stipulation that KeyBank obtained from the settlement agreement and whether KeyBank failed to perform under the settlement agreement.

[3] CP at 174.

The trial court granted KeyBank's motion for a final decree of foreclosure and denied Atherton's motion to compel arbitration. The court noted that the ruling on Atherton's motion was "without prejudice, pending completion of a sheriff's sale of the [p]roperty."[4] Atherton filed a motion for reconsideration. The trial court denied Atherton's motion.

Dean filed a $60,000 cash supersedeas to stay KeyBank's foreclosure. KeyBank opposed the supersedeas, arguing that it did not comply with RAP 18.1. The trial court concluded that the $60,000 supersedeas was inadequate to supersede the foreclosure judgment and stop the sale under RAP 18.1. Commissioner Kanazawa rejected Atherton's objection to the trial court's decision.[5]

Atherton appeals.

ANALYSIS

I. Motion to Compel Arbitration

Under the Uniform Arbitration Act (UAA), chapter 7.04A RCW, the legislature has delegated which preliminary issues must be decided by the trial court and which issues are to be decided by the arbitrator.[6]

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[4] CP at 178.

[5] The trial court set the supersedeas amount at $1 million.

[6] See Townsend v. Quadrant Corp., 173 Wn.2d 451, 456-57, 268 P.3d 917 (2012).

RCW 7.04A.060, the validity of agreement to arbitrate statute, provides that a court "shall decide whether an agreement to arbitrate exists or [whether] a controversy is subject to an agreement to arbitrate"[7] and an arbitrator "shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable."[8]

In Townsend v. Quadrant Corp., our Supreme Court noted a comment to the UAA which explains that the provisions of RCW 7.04A.060 are intended to

> "incorporate the holdings of the vast majority of state courts and the law that has developed under the [Federal Arbitration Act] that, in the absence of an agreement to the contrary, issues of substantive arbitrability, i.e., whether a dispute is encompassed by an agreement to arbitrate, are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide."[9]

A condition precedent to arbitrability under section .060(3) contemplates arbitration provisions that have procedural prerequisites that must be satisfied before the trial court compels arbitration. For example, a contract might contain an

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[7] RCW 7.04A.060(2).

[8] RCW 7.04A.060(3) (emphasis added).

[9] 173 Wn.2d 451, 457, 268 P.3d 917 (2012) (quoting UAA § 6 cmt. 2, 7 U.L.A. 24 (2005)); see also RCW 7.04A.901 ("In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."). A trial court may decide the gateway issues such as whether an arbitration clause is invalid. See Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 813-14, 225 P.3d 213 (2009) ("'generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA].'") (quoting Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 302, 103 P.3d 753 (2004)).

arbitration provision that requires a party to wait a certain number of days before compelling arbitration, or a contract could contain an arbitration clause that requires the parties to mediate before a party moves for arbitration.[10]

Atherton insists that by denying her motion to compel arbitration "without prejudice, pending a completion of a sheriff's sale of the [p]roperty,"[11] the trial court took on a role exclusively reserved for the arbitrator by deciding whether a condition precedent to arbitrability had been fulfilled. But KeyBank argued to the trial court that "[a]rbitration [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."[12]

We review a trial court's decision to grant or deny a motion to compel arbitration de novo.[13]

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[10] See Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Grp., Inc., 148 Wn. App. 400, 406-07, 200 P.3d 254 (2009) (the appellate court held that a 21-day time limit in an arbitration agreement was a condition precedent to arbitrability and was therefore an issue for the arbitrator to decide). See, e.g., James Acret and Annette Davis Perrochet, Conditions Precedent to Arbitration, CONSTRUCTION ARBITRATION HANDBOOK § 3:48 (2d ed. 2021) ("No demand for arbitration . . . may be made until . . . the date on which the architect has rendered his written decision of the 10th day after the parties have presented their evidence to the architect or have been given a reasonable opportunity to do so, if the architect has not rendered his written decision by that date"; "notice of a claim must be presented to the board of education within three months after the accrual of a claim before bringing any action or special proceeding against the board." (internal quotation marks omitted) (citations omitted)).

[11] Appellant's Reply Br. at 2.

[12] CP at 132.

[13] Townsend, 173 Wn.2d at 455 (quoting Satomi, 167 Wn.2d at 797).

At the core of this appeal is a disagreement between the parties whether the trial court made a final decision by denying Atherton's emergency motion to compel arbitration and her motion to stay KeyBank's motion for a judgment and decree of foreclosure.

Specifically, the redemption agreement provided,

> If KeyBank is the successful bidder at the sheriff's or trustee's sale following completion of the foreclosure proceedings in the Superior Court Action, then the Trust may exercise the Redemption by delivering written notice thereof to KeyBank (such notice, the "Exercise Notice"), and by concurrently depositing a fully executed copy of this Redemption agreement $1,600,000 USD in immediately available funds ("Redemption Price") to Escrow, on or before June 1, 2020. The Trust's delivery of the Exercise Notice shall be deemed to be an irrevocable election to purchase the Property pursuant to the terms of this Redemption agreement. The Redemption will terminate if the Trust fails to exercise it in the time and manner provided in this Section. Except for the Redemption, the Bingham Parties expressly waive any and all claims or rights in the Property, including any statutory or redemption rights.[14]

And the settlement agreement provided,

> Any disputes related to or arising under this Agreement will be arbitrated before Stew Cogan, or if he is unwilling or unavailable to serve, then selected according to the procedure described in the Prior Settlement. Arbitration will include only the terms of this Agreement, exclusive of testimony or other extrinsic evidence about the Parties' rights and obligations, and will conclude no later than 30 days from submission to the arbitrator or as soon thereafter as the arbitrator's schedule allows. The arbitrator's decision under this Section is binding on the Parties and cannot be appealed.[15]

Here, under the redemption agreement, KeyBank prevailing at the foreclosure sale is a condition precedent to the trust or Atherton exercising the

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[14] CP at 156.

[15] CP at 139.

right to redeem the property from KeyBank for $1.6 million. But this is distinct from the type of condition precedent that section .060(3) contemplates because this condition precedent has no procedural effect on arbitrability. Rather, the condition here solely relates to when or whether Atherton can "exercise the Redemption." Because Atherton's conditional redemption right is not a condition precedent to arbitrability, the trial court did not take on a role reserved exclusively to the arbitrator.

It is not entirely clear how the trial court arrived at the precise language that "the [m]otions are denied without prejudice, pending completion of a sheriff's sale of the [p]roperty,"[16] but our de novo review, coupled with Atherton's narrow arguments, do not persuade us to reverse the trial court's decision denying Atherton's motion to compel arbitration and motion to stay the proceedings.

First, to the extent that KeyBank contends that the foreclosure sale is a condition precedent to any vesting, acquisition, or assertion of Atherton's right to redeem, Atherton provides no authority whether such hypothetical, premature, unripe, or tentative claims are beyond the authority of a trial court faced with a motion to compel arbitration of a dispute that is grounded in the assertion of Atherton's right to redeem.[17]

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[16] CP at 178.

[17] There is no Washington case that addresses the issue of whether the trial court can compel a premature nonjusticiable claim to arbitration. And there does not appear to be a consensus on this issue in other jurisdictions. For example, in Bunker Hill Park Ltd. v. U.S. Bank National Ass'n, a California appellate court held "all a petitioner is required to show before arbitration 'shall' be ordered is the existence of a valid agreement to arbitrate the issue underlying the petition and the

Second, the mere reference by the court that Atherton's motion to compel was denied "without prejudice" until some future developments took place, namely, the sheriff's sale, does not render the court's denial ineffective. We read the trial court's ruling as a clear denial of the motion to compel arbitration that was pending before the trial court.

Third, viewing the trial court's order as a final order denying the motion to compel arbitration is consistent with Atherton's assertion that the court's order is appealable as a matter of right. RCW 7.04A.280(1)(a) recognizes that an appeal may be taken from "[a]n order denying a motion to compel arbitration." A trial court's order compelling arbitration and denying a motion to stay judicial proceedings is appealable as of right under RAP 2.2(a)(3) because the order has the result of discontinuing the action for an arbitration.[18] Consistent with the application of RAP 2.2(a)(3), the court's ruling here that "the motions are denied" had the similar impact of discontinuing the action for arbitration. Therefore, in this

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opposing party's refusal to arbitrate the controversy." 231 Cal. App. 4th 1315, 1329, 180 Cal. Rptr. 3d 714 (2014). But in Lower Colorado River Authority v. Papalote Creek II, LLC, the Fifth Circuit Court of Appeals held that in deciding whether to grant or deny a motion to compel arbitration "we must 'look through' the petition to compel arbitration in order to determine whether the underlying dispute presents a sufficiently ripe controversy to establish federal jurisdiction." 858 F.3d 916, 922 (5th Cir. 2017). It appears that the trial court in rendering its decision here "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. But based upon this record and limited briefing, we decline to further address this issue.

[18] See Herzog v. Foster & Marshall, Inc., 56 Wn. App. 437, 445, 783 P.2d 1124 (1989).

context, the court's order denying arbitration at this point in the litigation was a final decision.

Many of Atherton's arguments focus upon the stay provisions of RCW 7.04A.070(5). Section .070(5) compels a court to impose a stay "until the court renders a final decision" in regard to the motion to compel arbitration. But that provision no longer applies once a final decision is made denying the motion to compel arbitration. And, as discussed, the trial court's denial of Atherton's motion to compel arbitration was a final decision. RCW 7.04A.070(5) has no impact here.[19]

Other than general unsupported assertions about the narrow role of a trial court facing a motion to compel arbitration, Atherton provides no specific argument or authority that compels an arbitrator to decide the issues presented in this unusual setting. And on this record and this briefing, our de novo review leads us to the conclusion that the motion to compel arbitration was properly denied and therefore, no stay is mandated under RCW 7.04A.070(5).

II. Fees on Appeal

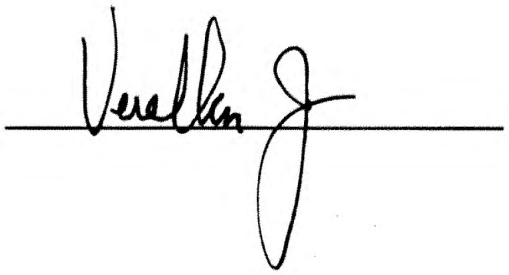
KeyBank requests attorney fees on appeal. As the prevailing party, KeyBank is entitled to reasonable attorney fees based upon the settlement or

[19] Our decision has no impact on the application or enforcement of the supersedeas bond issued by the trial court.

redemption agreement's attorney fee provisions, subject to their compliance with RAP 18.1.[20]

Finally, because Atherton does not prevail here, her request that the parties be ordered to arbitration is denied.

We affirm.



WE CONCUR:

[20] Key Bank's alternate theory for fees on appeal under RAP 18.9(a) for a frivolous appeal is not compelling because Atherton raises some debatable issues. Streater v. White, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980).

A12

FILED
8/18/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

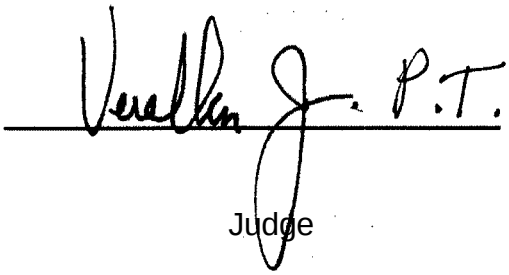
KEY BANK, N.A. Respondent, v. GINGER ATHERTON, Appellant, HENRY DEAN, as trustee for the Sharon Graham Bingham 2007 Trust; ESTATE OF SCOTT BINGHAM; KELLY BINGHAM; UMPQUA BANK; OPUS BANK, as successor-in-interest to Cascade Bank; WASHINGTON FEDERAL, N.A., itself and as successor-in-interest to Horizon Bank, WASHINGTON FEDERAL N.A.; WASHINGTON TRUST BANK; FIRST CITIZENS BANK AND TRUST CO., as successor-in-interest to Venture Bank; STATE OF WASHINGTON; DEPT. OF REVENUE; CENTRUM FINANCIAL SERVICES, INC., MUFG UNION BANK, N.A., itself and as successor-in-interest to Frontier Bank; PEARLMARK REAL ESTATE PARTNERS; PEARLMARK MEZZANINE REALITY PARTNERS II LLC; LVB-OGDEN MARKETING, INC., LLC, Defendants.	)	No. 83104-6-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Ginger Atherton filed a motion for reconsideration of the opinion filed on July 25, 2022. A majority of the panel has determined that the motion should be

denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



Judge

A13

RCW 7.04A.060

Validity of agreement to arbitrate.

(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.

(2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

[**2005 c 433 § 6**.]

A14

RCW 7.04A.070

Motion to compel or stay arbitration.

(1) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. If the refusing party opposes the motion, the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.

(2) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.

(3) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

(4) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under this section must be filed in that court. Otherwise a motion under this section may be filed in any court as required by RCW **7.04A.270**.

(5) If a party files a motion with the court to order arbitration under this section, the court shall on just terms stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(6) If the court orders arbitration, the court shall on just terms stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may sever it and limit the stay to that claim. [**2005 c 433 § 7**.]

WWLG

September 20, 2022 - 8:59 AM

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