At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of October, 2013.

P R E S E N T:

HON. MARK I. PARTNOW,
Justice.

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In the Matter of

JOSEPH SCHON,

Petitioner,

- against - Index No. 502720/12

ELI RAKOWER, CHANI (NAN) RAKOWER-ROSENBAUM, and RABBI GAVRIEL STERN,

Respondents.

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The following papers numbered 1 to 9 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4 5-8
Opposing Affidavits (Affirmations)	6-8
Reply Affidavits (Affirmations)	9
Affidavit (Affirmation)	
Other Papers Petitioner's Memoranda of Law	

Upon the foregoing papers, Joseph Schon (petitioner) moves, via order to show cause, for an order, pursuant to CPLR article 75, (1) declaring that no dispute exists that respondent Rabbi Gavriel Stern (Rabbi Stern)[1] holds the power to arbitrate and staying Rabbi Stern or

[1] Sometimes referred to as "Rabbi Gabriel Stern."

respondents Eli Rakower (Rakower) or Chani (Nan) Rakower-Rosenbaum (Rakower-Rosenbaum) (collectively, the Rakower respondents) "from exercising jurisdiction over, commencing or continuing any purported arbitration proceeding involving claims among the parties," (2) declaring that Rabbi Stern lacks jurisdiction over petitioner's rights and, again, staying any arbitration among the parties, (3) declaring the Rakower respondents' claims time-barred and, again, staying any arbitration among the parties and (4) granting petitioner leave, pursuant to CPLR 408, to conduct discovery of Rabbi Stern and the Rakower respondents (collectively, respondents) concerning communications and negotiations among them. Respondents cross-move for an order (1) dismissing, pursuant to CPLR 3211 (a) (1) and (a) (7), this petition and (2) compelling petitioner, pursuant to CPLR 7503 (a), to proceed with arbitration.

Background And The Parties' Contentions

(1)

This proceeding arises out of the Rakower respondents' purported claim against petitioner.[2] Petitioner and the Rakower respondents apparently met with Rabbi Stern in the first half of 2012[3] to explore the possibility of mediating or arbitrating the dispute. Petitioner admits that he signed a "short form Rabbinical Arbitration form," written in Hebrew, at that

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[2] The parties' submissions fail to clarify the exact nature of the underlying dispute. It apparently stems from a breached obligation of non-party Eli Weinstein (Weinstein) to Rakower-Rosenbaum or her deceased husband, Israel Rakower, which petitioner guaranteed.

[3] The parties' recollections of the date of this meeting range from February to June 2012.

meeting (the First Arbitration Form).[4] The substantive portion of the First Arbitration Form reads, according to the English translation supplied by petitioner,[5] in its entirety, *verbatim et literatim*:

> "We, the litigants who signed below with the signature of our hands, acknowledge that we have undertaken to sort out our claims in our dispute under the auspices of Rabbi [HW:] Gavriel Stern.
>
> "He shall decide in our dispute whether by legal decision or by compromise at his discretion, and we accept and undertake to obey the court decision that he will provide, and even if there is an error, whether an of discretion or other (provided he does not revokes, and if he revokes, we undertake to obey the latest ruling), without any omission or appeal whatsoever.
>
> "We grant the aforementioned Rabbi a three-fold power [of attorney], for the laws of admission, for taking evidence, and the authority [lit. trust] over anything we say, anything evidenced before him as well as with regard to the court ruling." (Alterations in original.)

At a subsequent meeting, the Rakower respondents' counsel proposed that the parties sign an arbitration agreement, written in English, but petitioner refused to do so. Other proposed arbitration agreements were exchanged, which petitioner also refused to sign.[6] Rabbi Stern, in September 2012, attempted to compel petitioner to appear for arbitration.

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[4] As discussed below, petitioner urges that he did not intend to bind himself to arbitration, that he was coerced into signing the First Arbitration Form and that numerous factors render that document unenforceable.

[5] Respondents do not contest the veracity or accuracy of this translation.

[6] The timing and circumstances of these exchanges remain unclear.

Petitioner, in turn, commenced the instant proceeding to stay arbitration pursuant to CPLR article 75 and made the instant motion for the relief detailed above. The Honorable Carl J. Landicino issued a September 11, 2012 short form order, which enjoined arbitration pending further order of the court.

(2)

Petitioner primarily contends that no valid and enforceable arbitration agreement exists between the parties. He urges that arbitration agreements are assessed under the rules of contract law and that a party may not be compelled to arbitrate absent an express and unequivocal commitment to do so. The parties herein, petitioner argues, never reached a meeting of the minds sufficient to create a binding arbitration agreement. Petitioner contends that he signed the First Arbitration Form as a result of fraudulent inducement by respondents, because they told him that it was the only way to avert a lawsuit and that he need not have the form translated or reviewed by an attorney. He claims that he thus signed the form believing that it was merely "a platform for the parties to continue discussions regarding alternative dispute resolution mechanisms."

Petitioner also urges that the Rakower respondents never signed the First Arbitration Form, or that, if they did, it occurred after he revoked any offer to arbitrate. He thus argues that the Rakower respondents never communicated an acceptance of that form, and, in fact, rejected it by offering other arbitration agreements that petitioner refused to sign. Indeed, petitioner alleges that the Rakower respondents' counsel characterized the First Arbitration

Form as worthless and non-binding when attempting to convince petitioner to sign subsequent proposed arbitration agreements.

Petitioner argues that the First Arbitration Form and all subsequent proposed agreements omit essential terms, including the nature and scope of the dispute to be arbitrated, the parties to the dispute, the law and rules governing the arbitration, the arbitration's costs, any manner of memorializing the proceeding, any process for reviewing the arbitrator's compliance with CPLR article 75, the arbitrator's ability to hire professionals and any discovery procedures. He asserts that no enforceable contract can exist when these essential terms are lacking.

Petitioner contends that the underlying dispute concerns transactions between him and Israel Rakower, who was Rakower's father and Rakower-Rosenbaum's husband, now deceased. Accordingly, petitioner urges that the Rakower respondents, in their individual capacities, lack standing to pursue a claim on behalf of Israel Rakower's estate. Petitioner also argues that disputes pertaining to a decedent's estate are not arbitrable, even if the parties fully consent to arbitration, as they fall solely within the jurisdiction of the Surrogate's Court.

Petitioner additionally argues that any purported arbitration agreement herein is both procedurally and substantively unconscionable and consequently unenforceable. He claims that respondents concealed the Rakower respondents' representation by counsel and deterred him from obtaining his own representation. Petitioner alleges that Rabbi Stern told him the

First Arbitration Form "would simply allow the parties to continue discussions on whether arbitration could serve as an appropriate alternative dispute resolution mechanism." He further alleges that the Rakower respondents have had ex parte communications with Rabbi Stern and that they chose Rabbi Stern to arbitrate the dispute because of his bias in their favor. Petitioner argues that the purported arbitration agreements' failure to (1) require a transcript of proceedings, (2) set out specific procedures, (3) provide for an explanation of any decision's basis or (4) allow for judicial review would deprive petitioner of due process and result in substantive unconscionability.

Finally, petitioner argues that the default on the obligation that he guaranteed, which apparently underlies this dispute, occurred in 2004 and that the statute of limitations thus bars any recovery by the Rakower respondents. Petitioner also requests leave to conduct discovery of respondents.

Petitioner's counsel submits an affirmation in support of the motion in which he avers, among other things, that he sent a letter to respondents' counsel, in July 2012, that explicitly revoked any purported offer to arbitrate.

(3)

Respondents cross-move for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the petition and, pursuant to CPLR 7503 (a), compelling petitioner to proceed with arbitration. They contend that petitioner signed the First Arbitration Form and that, even accepting his allegations as true, respondents' actions would not amount to fraudulent

inducement. Moreover, respondents urge that the Rakower respondents did, in fact, sign the First Arbitration Form and that any subsequent offered arbitration agreements thus served merely as proposed modifications that did not affect the original's validity. They contend, in any case, that a signature is not required to form a binding arbitration agreement. Respondents' counsel denies that he characterized the First Arbitration Form as worthless. Respondents, instead, contend that the First Arbitration Form "contains all essential terms and does not violate public policy in any way."

Respondents argue that the limitations period for the Rakower respondents' claim had not expired as petitioner wrote them a signed note, dated March 26, 2008, which acknowledged his obligations relating to the guaranty. They also urge that the underlying dispute relates to a transaction between petitioner and Rakower-Rosenbaum, not Israel Rakower, and is thus not an estate matter. Consequently, they argue, neither standing nor subject matter present any obstacle to arbitration.

Rakower submits an affirmation in support of respondents' cross motion and explains that the underlying dispute stems from petitioner's guaranty of Weinstein's obligation to Rakower-Rosenbaum (*see* n 2, *supra*). Rakower alleges that petitioner willingly signed the First Arbitration Form and asserts that "[m]y mother [(Rakower-Rosenbaum)] and I (who was acting as my mother's representative in the dealings with the Beth Din) each signed the arbitration agreement as well, although I cannot presently locate a copy of the document with our signatures."

Rabbi Stern also submits an affirmation in support of respondents' cross motion and asserts that he did not pressure petitioner to sign the First Arbitration Form or attempt to dissuade him from having it reviewed by an attorney. Instead, he claims, petitioner "is a sophisticated businessman who has had experience with business disputes in the past." Rabbi Stern alleges that petitioner requested the first meeting between petitioner and respondents be considered part of the arbitration proceeding. Rabbi Stern also urges that he engaged in no improper ex parte communication.

(4)

Petitioner, in reply and opposition, reiterates his arguments that no meeting of the minds ever occurred between himself and the Rakower respondents, that the Rakower respondents never signed the First Arbitration Form, that the Rakower respondents, in any case, rejected the First Arbitration Form and that the First Arbitration Form lacks "numerous essential terms." Petitioner urges that the parties herein never commenced any arbitration proceedings. Finally, petitioner argues that his March 2008 note does not acknowledge an intent to pay a debt sufficiently to have restarted the period of limitations under General Obligations Law § 17-101.

(5)

Respondents, in reply to petitioner's opposition, reiterate that the Rakower respondents agreed to and signed the First Arbitration Form, and they urge that this agreement must be enforced. They contend that petitioner's participation in the arbitration

process and his conduct generally also demonstrate an intent to arbitrate that contradicts his present motion. Respondents again argue that petitioner's March 2008 note is sufficient to restart the limitations period for the underlying dispute.

Discussion

(1)

Determining whether to stay or compel arbitration permits examination of three threshold issues: "(1) whether the parties made a valid agreement to arbitrate; (2) if so, whether the agreement has been complied with; and (3) whether the claim sought to be arbitrated would be time-barred if it were asserted in State court" (*Matter of Smith Barney, Harris Upham & Co. v Luckie*, 85 NY2d 193, 201-02 [1995], *rearg denied* 85 NY2d 1033 [1995], *cert denied sub nom. Manhard v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 516 US 811 [1995]; *see also Matter of Town of Orangetown v Rockland County Policemen's Benevolent Assn.*, 105 AD3d 861, 861 [2013]; *Da Silva v Savo*, 35 AD3d 647, 647 [2006]).

New York generally favors arbitration, but "'a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes'" (*Shah v Monpat Constr., Inc.*, 65 AD3d 541, 543 [2009], quoting *Matter of Waldron (Goddess)*, 61 NY2d 181, 183 [1984]; *see also God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006]; *Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 49-50 [1997]). Arbitration agreements are treated as contracts and consequently

interpreted under contract law (*Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith*, 85 NY2d 173, 182 [1995]; *Matter of Cowen & Co. v Anderson*, 76 NY2d 318, 321 [1990]).

(2)

"To sustain a claim for fraudulent inducement, there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury" (*Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [2002]; *see also Jo Ann Homes at Bellmore v Dworetz*, 25 NY2d 112, 118-19 [1969]). A party, even if misled as to a document's contents, "is under an obligation to read a document before signing it, and cannot generally avoid the effect of the document on the ground that he or she did not read it or know its contents" (*Financial Servs. Veh. Trust v Saad*, 98 AD3d 1077, 1078 [2012] [internal quotation marks omitted]; *see also Scott v Fields*, 85 AD3d 756, 758 [2011]; *Reznikov v Walowitz*, 63 AD3d 1134, 1135 [2009]).

Respondents' conduct, as alleged by petitioner, in pressuring him to sign the First Arbitration Form fails to rise to the level of fraudulent inducement. Furthermore, even if respondents did misrepresent the contents of that form to petitioner, he was obligated to read it and know its contents before signing. Consequently, petitioner's signature on the First Arbitration Form cannot be considered void or voidable.

(3)

A party need not sign an arbitration agreement to be bound by it, so long as the intent to be bound is clear (*see God's Battalion of Prayer Pentecostal Church*, 6 NY3d at 374;

Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7501:2). Here, petitioner contends that the Rakower respondents never signed or manifested their assent to the First Arbitration Form, whereas respondents contend that they did. These contrary assertions present questions of fact and credibility that cannot be resolved purely on the parties' submissions.

(4)

A party establishes the existence of a binding contract by showing an offer, an acceptance of the offer, consideration, mutual assent and intent to be bound (*see Matter of Civil Serv. Empls. Assn., Inc. v Baldwin Union Free School Dist.*, 84 AD3d 1232, 1233-34 [2011]). An offer must be definite as to material matters (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 590-91 [1999], *rearg denied* 93 NY2d 1042 [1999]; *Knight v Barteau*, 65 AD3d 671, 672 [2009]). The Court of Appeals, in *Joseph Martin, Jr., Delicatessen v Schumacher* (52 NY2d 105 [1981]), emphasized that "before the power of the law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained[;] [o]therwise, a court, in intervening, would be imposing its own conception of what the parties should or might have undertaken" (*id.* at 109).

Here, the First Arbitration Form, which respondents urge the court to enforce as a valid arbitration agreement, lacks essential terms. Most crucially, the First Arbitration Form offers no indication of the nature and scope of the dispute to be arbitrated, instead referring

only to "our claims in our dispute."[7] This omission renders the First Arbitration Form unenforceable, as resolving a motion to stay or compel arbitration requires determining whether the subject dispute falls within an arbitration agreement's scope (*see Sisters of St. John the Baptist, Providence Rest Convent v Geraghty Constructor*, 67 NY2d 997, 999 [1986] ["(i)t is of course for the court in the first instance to determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement"]; *Matter of R. H. Macy & Co. (National Sleep Prods.)*, 39 NY2d 268, 270 [1976] ["a party may not be required to submit to arbitration matters which he has not agreed to arbitrate"]). Consequently, neither the First Arbitration Form, nor any of the other putative arbitration agreements herein can be interpreted as a valid or enforceable contract, and petitioner's motion to stay arbitration must be granted.

The finding herein that no valid arbitration agreement exists between the parties renders unnecessary any determination concerning the parties' standing to litigate the subject claim or whether the claim's period of limitations has run. It similarly moots granting petitioner discovery against respondents. Accordingly, it is

ORDERED that the petition and motion via order to show cause are granted to the extent that (1) the court declares that the parties' submissions demonstrate no valid

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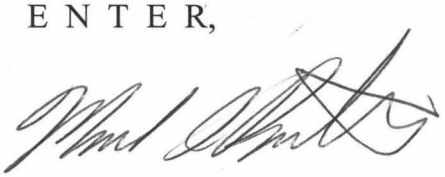
[7] The First Arbitration Form also seems to leave the parties to the arbitration in question, as it defines them merely by the phrase "the litigants who signed below with the signature of our hands." The copy of the First Arbitration Form submitted by respondents bears only petitioner's signature, and leaves the identity of other potential parties to the arbitration undefined.

arbitration agreement and (2) arbitration is permanently stayed, and the petition and motion are otherwise denied; and it is further

ORDERED that respondents' cross motion is denied as moot.

This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

HON. MARK I. PARTNOW J.S.C