

BUSINESS WEEKLY



RESTORING THE PRIMACY OF CHOSHEN MISHPAT UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

Issue #550 | Vayakheil-Pikudei | Friday, March 12, 2021 | 28 Adar 5781

Sponsored by Anonymous In Appreciation of the BHI



CASE FILE

Rabbi Meir Orlian
Writer for the Business Halacha Institute

לע"נ הרב אהרן בן הרב גדליהו ע"ה

LEAKY PORCH Moshe owned a penthouse in a condominium, with a spacious porch that overlooked the ocean. Below him lived Yehuda, whose living room was situated directly under Moshe's porch.

Toward the end of the winter, after a heavy snowstorm, Yehuda began seeing moisture on his ceiling. As the snow melted, the ceiling began dripping. The paint peeled in a few places, and after a few days there were signs of mildew.

Yehuda called Moshe. "The ceiling in my apartment began leaking!" he exclaimed.

"Oh, really?" said Moshe. "Where?"

"In the living room, under your porch," replied Yehuda. "Could you please come down and have a look?"

Moshe immediately came down. "When the house was built, a professional roofer sealed the porch," he noted.

"It's possible that the sealant is getting old and needs to be redone," Yehuda said. "I'd like you to have the roofer reseal the porch."

"Have you had a problem until now?" asked Moshe. "Did it leak earlier in the winter?"

"No, just this last storm," replied Yehuda.

"Then it's possible that the very heavy rain and snow was too much," said Moshe. "Even proper sealant has a limit to its capacity."

"Regardless, the damage to the ceiling came from your porch," insisted Yehuda. "I'm going to have to call a painter in. I consider you liable for the damage."

"You're welcome to hire one, at your own expense," said Moshe. "The rain and snow is not my problem."

"It was sitting on your porch, so it is," countered Yehuda. "Anyway, since the porch is yours, you are required to keep it in proper shape with sealant."

"In my opinion," said Moshe, "since the porch was sealed properly, even if it is developing cracks, I shouldn't have to pay for the repair."

The two came before Rabbi Dayan. Yehuda asked:

"Is Moshe responsible for resealing the porch?"

"The *Gemara* (B.M. 117a) addresses the case of an upper and lower tenant, who had cracks in the floor/ceiling between them," replied Rabbi Dayan. "When the upper tenant washed his hands, the water leaked on the tenant below. There is a dispute who has to fix the cracks, and the *halachah* depends on the degree of the cracks" (C.M. 155:4).

REMINDER
Utensils that
were not *toiveled*
last year due to
COVID need to be
toiveled.

Ask your Rav or email
ask@businesshalacha.com
for guidance and solutions.



BHI HOTLINE

לע"נ ר' שלמה ב"ר ברוך זצ"ל מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

LOST CONTRACT

Q: I borrowed money, and when it came time to repay, the lender told me that he couldn't find the loan contract (*shtar*). May I refuse to repay until he gives me the contract, or am I required to pay at this point and allow him to return the contract when he finds it?

The reason I'm loath to repay is because he made me sign a contract that states that I trust his word, and I will not be permitted to claim that I repaid the loan as long as the contract is in his possession. Therefore, if I pay now and he later shows up with the document and demands payment, I will be required to pay.

When I explained my misgivings to him, he countered that he would give me a receipt (*shovar*) for the payment. But this still leaves me with two concerns: (1) It places the onus on me to guard the receipt to ensure that it doesn't get lost. (2) We don't remember the date of the loan. Is a *shovar* for a loan repayment valid if it doesn't state the date of the loan?

A: The *halachah* is that if a lender loses a loan document, the borrower must repay the loan, and the lender writes him a *shovar* stating that it is paid (*Shulchan Aruch*, C.M. 54:2).

It would be unreasonable to allow a borrower to keep the money he borrowed just because the lender lost the contract. Although it is true that this places the onus on him to safeguard the *shovar* to prevent the lender from trying to demand payment a second time, the concept of *eved loveh l'ish malveh* (a borrower is a slave to the lender) applies to this situation, and places the lender in the stronger halachic position (B.B. 171b).

Even if the contract is related to a transaction in which *eved loveh l'ish malveh* does not apply, such as a *kesubah* (see issue #209), the indebted party is still required to pay the amount due and accept the *shovar*, rather than delay payment until the missing



CASE FILE

"In a case similar to ours, where an extending roof served as a ceiling to the tenant below, Rivash (#517) differentiates between water poured by the upper tenant, for which he is responsible when the cracks are significant, and rain, which falls on its own and for which the tenant who owns the roof is not responsible at all" (*Rama ibid.*).

"*Acharonim* note that this ruling seemingly contradicts other rulings of the *Rashba* and *Rosh*, that an upper tenant is responsible for any repairs of the roof above, and that a person may not drain rain from his roof in a way that damages another" (*Sma* 155:15; *Rama* 153:9, 155:10; 164:1).

"Some differentiate that in the Rivash's case the roof was inherently intact, but would leak from excess rain. However, if the roof is faulty, the owner is responsible to repair it even from rain" (*Bach* 155:7; *Be'er Heitev* 155:13; *Pischei Choshen*, *Nezikin* 13:6[15]).

"Others explain that although a person is not liable for the rain, when the various tenants are partners, they have mutual responsibilities, and are bound to the common practice. The practice was that the upper tenant was responsible for the roof, and the owner of a penthouse is responsible to keep his porch properly sealed" (*Nesivos* 164:2; *Chasam Sofer* 155:4).

"Thus," conclude Rabbi Dayan, "if the porch sealant is intact, but leaked due to heavy rain, Moshe is not liable for the damage, but he is responsible to repair the sealant if it is faulty" (see *Emek Hamishpat*, *Hilchos Shechinim* #29).

Verdict: Moshe is responsible as a partner in the condominium to repair the porch sealant if it is faulty, but is not liable for damage of excessive rain if it is intact.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

BAR METZRA #10
(Bordering Property)
Mortgaged Properties

לע"נ ר' יחיאל מיכל ב"ר חיים וזוג' חי' בת ר' שמואל חיים ע"ה

Q: Do the rights of bar-metzra apply also to mortgaged properties?

A: If a lender collected the borrower's property, the *bar-metzra* can possess it from him. However, if the property was a classic "*mashkanta*" (an arrangement in the *Gemara* whereby the lender would use the borrower's property for an extended time in lieu of his repaying the loan), the lender is considered a high-priority *bar-metzra*, since he is already dwelling in the property (*C.M.* 175:20, 57).

Chasam Sofer writes that in a mortgage, whereby in civil law the lender has priority rights in a property so that it cannot be sold to another, his rights are even stronger than the case of "*mashkanta*," so the *bar-metzra* cannot possess the property from the lender after he forecloses it for the loan (*Pischei Teshuva* 175:25).

However other *Acharonim* write that the rights of a mortgage lender are no different from those of other lenders, and only in the classic "*mashkanta*" case, where the lender actually used the property, is he considered like a *bar-metzra* (*Minchas Pittim*, *Erech Shai*, and *Mishpat Shalom* 175:57).



BHI HOTLINE

contract is found. The primary reason why the borrower is required to accept the *shovar* is that it is unreasonable to release him from payment on the unlikely chance that the creditor will try to demand payment twice, especially since the creditor has no idea whether the borrower still has the *shovar* and he would risk his reputation by demanding further payment. Furthermore, once *Chazal* enacted this rule requiring the acceptance of a *shovar*, they didn't differentiate between different types of contracts (*Rashba*, *Kesubos* 16b; see *Tsafos s.v. Kosvin*).

But these *halachos* apply only to cases in which the contract might no longer exist altogether. If the lender says, however, that he has the contract, but that it's far away and he will eventually retrieve it and bring it to the borrower, we do not force the borrower to repay immediately and accept a *shovar* as interim proof. The same applies to a contract that is lost among the creditor's other paperwork. In both of these cases, the *halachah* is that the lender must find the contract and present it to the borrower at the time of repayment (*C.M.* 54:3; see *Minchas Pittim* (*ibid.*) and *Meromei Sadeh*, *Sotah* 7b).

Some *poskim* write, however, that if the lender needs the money, and *beis din* determines that he is not plotting a deception, then we do force the borrower to pay, as long as the lender agrees to return the contract by a certain deadline (*Aruch Hashulchan* 54:8).

The *poskim* imply that there is no difference whether the original contract was signed by witnesses or whether it was handwritten by the borrower (see *C.M.* 69:2); even in the latter case, the borrower can claim that he is not willing to pay until he receives his handwritten document (*Pischei Choshen*, *Halvaah* ch. 2, fn. 87). Similarly, a *shovar* is valid even if it is handwritten by the lender; it need not be signed by witnesses (*Nesivos* 70:4; see *Nachal Yitzchak* *ibid.* 2).

In regard to your last question, the *shovar* will generally state the amount of the repayment and the date of the original loan, so that if there are other loans between the same two parties, this *shovar* cannot be used to deny payment of a different loan. If you don't remember the exact date, you should at least put in some identifying data – either the week or the month of the loan, or the agreed upon repayment date – so it will be obvious which loan has been repaid. At minimum, even if only making a partial payment, the *shovar* should include the full amount of the loan, as an identifying characteristic (see *C.M.* 43:24).

For questions on monetary matters, arbitrations, legal documents, wills, ribbis, & Shabbos, Please contact our confidential hotline at 877.845.8455 or ask@businesshalacha.com

To subscribe send an email to subscribe@businesshalacha.com or visit us on the web at www.businesshalacha.com

WOULD YOU LIKE THE ZCHUS OF SENDING THIS NEWSLETTER TO YIDDEN WORLDWIDE?

CALL 718-233-3845 X 201. OR EMAIL : OFFICE@BUSINESSHALACHA.COM

DISTRIBUTION IN LAKEWOOD IS

לעילוי נשמת ר' מאיר ב"ר ישראל ז"ל