

BUSINESS WEEKLY



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

Issue #554 | Tazria-Taharah | Friday, April 16, 2021 | 4 Iyar 5781

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CASE FILE

Rabbi Meir Orlian
Writer for the Business Halacha Institute

לע"נ הרב אהרן בן הרב גדליהו ע"ה

FIRST OFFER

The Millers were planning to sell their house at the end of the year but had already begun showing it to people.

First to see the house were the Adams. After seeing the house, the Adams said that they were very interested in it but didn't make a concrete offer.

Following the Adams, the Borensteins came to see the house. They called back the following day, with an offer of \$350,000.

"We're still in the midst of showing the house to people," said Mrs. Miller. "We are not ready to close and finalize a price."

The following week, the Cutlers came to see the house. "We're willing to offer \$330,000," they said on the spot. "What do you say?"

"We already received an offer \$20,000 higher from someone else," Mr. Miller said.

"Then we're willing to raise our offer to \$360,000," said Mr. Cutler.

"We'll consider your offer," said Mr. Miller, "but we're not ready to commit to that price."

Shortly afterwards, the Adams called back. "We're still very interested in the house," they said. "We'd like to make a concrete offer. We're willing to pay \$360,000 for the house."

"Someone else already offered that amount," said Mrs. Miller. "At that price, he should come first."

"But you said that we were the first to see the house," said Mr. Adam. "If we're willing to match their offer, we should have priority."

"We'll consider that," replied Mrs. Miller.

Meanwhile the Borensteins called back and asked whether their offer was accepted. "Someone topped your offer by \$10,000," Mr. Miller answered.

"That's no problem," said Mr. Borenstein. "We're willing to match that offer."

That evening Mrs. Miller discussed the issue with her husband. "At this point, all three couples are offering \$360,000" she said.

"Well, who was first?" asked Mr. Miller.

"It's hard to say," Mrs. Miller laughed. "The Adams saw the apartment first; the Borensteins made the first concrete offer; the Cutlers were the first to offer \$360,000. So all three couples were 'first' in one way or another."

The Millers decided to call Rabbi Dayan, and asked:

"Which couple should be given priority?"

"Halachah addresses various levels of



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

CONFUSED CONFESSION

Q: Someone asked me to transport a suitcase for him. I didn't check what was inside the suitcase, and it ended up getting lost due to my negligence. Am I required to pay the full amount the sender claims the suitcase and its contents were worth?

A: If you trust the sender's claim, and if it's plausible that someone would send items of that value in a suitcase, then, since you accepted responsibility to safeguard the package, you are liable for the full value of the contents (see *Shach, C.M. 72:40; Sefer Chassidim, Mekitzei Nirdamim*, edition 1381; *Minchas Pittim 17:8; Nachal Yitzchak 75:5*).

If you suspect that he is exaggerating the value, then the *halachah* depends on several factors.

When a *shomer* (guardian) does not return the *pikadon* (item placed in his care) and claims that he is exempt from payment, he is required to take a Torah-level oath (*Shulchan Aruch, C.M. 294:2*).

This is true, however, only in cases in which the value of the *pikadon* is known and the question is how it was lost or damaged. If we do not know whether the *shomer* was aware of the full value of the *pikadon* when he accepted it, then he is not obligated to take the aforementioned oath. Rather, it is a case of *modeh b'miktzas* (partial concession), and a different Torah-level oath must be taken (*ibid. 75:2 and 87:1*).

Yet *modeh b'miktzas* applies only if the claim and the concession relate to specific amounts, weight, or quantity. If the claim or the concession relate to unspecified amounts, the *shomer* is not obligated to swear (*ibid. 88:23-24*). Some *poskim* maintain, however, that if the *shomer* is conceding that he owes a minimum of a *prutah*, and the only question is how much more than that he owes, it is considered as though he confessed to owing a *prutah* and denied the rest, in which case he is required to swear (*Shach 72:50*).

Another relevant halachah is that *modeh b'miktzas* applies only when the partial concession relates

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commitment,” replied Rabbi Dayan. “Although a transaction requires a formal act of acquisition (*kinyan*) to be halachically binding, an upright person is expected to honor also his verbal commitments, unless changed circumstances warrant otherwise” (C.M. 204:11).

“A person who does not uphold his verbal commitments is termed untrustworthy, *mechusar amana*, and the Sages are not pleased with him” (C.M. 204:7).

“Nonetheless, the *Rishonim* indicate that only if the parties already set a price is there an issue of *mechusar amana*. Some add that also other terms of sale were finalized” (C.M. 204:6; *Meiri*, B.M. 48a; *Pischei Choshen*, *Kinyanim* 1:2[4]).

“Moreover the *Gemara* (B.B. 86a) indicates that even if the parties made a *kinyan* before there was an established price, it is not halachically binding, since without a set price there cannot be a firm commitment (*gemirus daas*), since the parties might not agree on the price” (C.M. 200:7).

“Thus, before agreeing on a price, there is no commitment to one another, not even a moral commitment on the level of *mechusar amana*. Thus, you are free to sell to whomever you want, or to whoever will upgrade to a better offer, even if one couple saw and expressed interest first.

“In general,” concluded Rabbi Dayan, “the concept of ‘first come, first served,’ is a social concept, rooted primarily in the common practice of implicit agreement between people, to enable fair social orderliness (see *Chashukei Chemed*, *Sanhedrin* 8a). In the specific context of a private person selling his house it is less applicable, but if you have no reason to prefer one offer over the other, it can provide a default guideline.”

Verdict: Even if two parties expressed general agreement to sell one to another, until they set an agreed price, there is not even a moral obligation of *mechusar amana*.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

BAR METZRA #14
(Bordering Property)
Potential Loss to
Seller

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

Q: An outsider made a better offer for my property than the bar-metzra. Must I sell to the bar-metzra anyway?

A: *Bar-metzra* rights are based on doing what is “fair and good.” Therefore, if the seller faces potential loss by selling to the *bar-metzra*, he can sell to outsiders (*Rama* 175:23).

Thus, if an outsider offers a higher price, better terms of payment, or a preferable currency than the *bar-metzra*, *bar-metzra* rights do not apply (C.M. 175:23).

Similarly, if the payment is on credit, the seller can say that he trusts the outsider more than the *bar-metzra*, unless the *bar-metzra* is willing to pay everything up front or the seller relies on him. However, the seller may not circumvent the *bar-metzra* by false claims of possible loss (C.M. 175:8,28).

When a *bar-metzra* comes to take the property from an outsider buyer, there is a dispute whether he must pay him the same currency that the buyer paid the seller (*Sma* 175:38; *Taz* 175:23).



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to the item claimed by the plaintiff (*hodaah mimin hataanah*). If the plaintiff claimed the *shomer* owed him one thing, and the *shomer* admits to owing something else or says he has no idea what item he owes, he is not required to take an oath (*Shulchan Aruch* 88:17).

If someone is required to swear as a *modeh b'miktzas* and he cannot do so because he himself does not know the truth, then he must pay the full value of the claim (ibid. 75:13). But some *poskim* write that this is true only if the *shomer* should have known the item's value; if there is no expectation that he knows its value, then he is not required to pay (*Raavad*, cited in *Sma* 87:1 and *Rema* 388:1).

Others maintain, however, that even if he is not expected to know the value, if it is plausible that he does know, he is required to pay if he claims not to know (*Rambam* cited in *Shulchan Aruch* 298:1; *Shach* 72:51).

We can now turn to answering your *she'eilah*.

If the suitcase was misplaced due to your negligence, and you have no idea what was in there and how much it was worth, you are conceding that you owe money for the suitcase but are expressing doubt as to how much you owe for the contents. The *halachah* depends on the aforementioned dispute regarding whether a person who cannot swear is required to pay if there is no expectation that he knows the value of the *pikadon*. (Also, see *Ketzos* 72:17 with *Nesivos* 88:8).

If the sender is not demanding compensation for the suitcase itself because it is not worth much, or because he is willing to forego that claim, and he wants compensation only for the contents, then your claim that you don't know what is in the suitcase is a confession that is not *mimin hataanah*, and you are not obligated to swear or pay.

Some *poskim* write that when a guardian doesn't know the amount lost, *Chazal* allowed a *mafkid* to swear in order to extract money from the *shomer* (C.M. 90:10; see *Shach* 16), but other *poskim* disagree (*Sma* 298:1).

Either way, nowadays, considering the severity of swearing, we distance ourselves from oaths as much as possible (see *Shu"t Chasam Sofer* 5:90), and it is best to negotiate a compromise that takes the above *halachos* into account. If there was no expectation that you know what's in the suitcase, or the concession does not relate to the same object as the sender's claim, or the concession is not for a specified amount then you are less liable. But if you did inspect the suitcase and then forgot what was in it, you are expected to know its value. And if the *hodaah* is *mimin hataanah*, because the suitcase is part of the claim and you concede that you owe money for it, then you would be required to pay even without the sender swearing. *Beis din* should obviously consider the plausibility of each side's claims in configuring a compromise (see *Shu"t Divrei Malkiel* 2:133 and *Shu"t Igros Moshe*, C.M. 1:32). We reiterate, however, that if you trust the sender, you should compensate him for the full amount of his claim.

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

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