

BUSINESS WEEKLY



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

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CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

WE DID BORROW!

Reuven, Shimon and Levi had transferred to a new yeshivah and took over a nearby apartment previously occupied by Mr. Lewis. They arranged

with Mr. Lewis to jointly buy some of the furniture that was in the apartment for \$600 cash.

A month after the three moved in, Mr. Lewis called Reuven. "You still owe me \$600 for the furniture that I left you," he said.

"You're right; I know," apologized Reuven. "I'll speak with Shimon and Levi and we'll arrange to pay you immediately."

That evening, Reuven told his apartment mates: "Mr. Lewis asked me for the \$600."

"Indeed, I was wondering about the payment," Shimon said. "I would like to close with him already."

"What are you talking about?" Levi piped up. "We already paid Mr. Lewis for the furniture when we moved in!"

"No we didn't," said Reuven. "Mr. Lewis allowed us to pay him after we settled in."

"That's how I remember it, also," agreed Shimon. "I never gave money for the furniture."

"But I remember that we did pay," said Levi. "We all chipped in and paid Mr. Lewis up front. He wouldn't have left us the furniture otherwise."

"I'll check again with Mr. Lewis," said Reuven, "but to the best of my knowledge, we didn't pay. Shimon also remembers it that way."

Reuven called Mr. Lewis. "Are you sure that we didn't pay?" he asked. "One of the roommates claims that we paid when we moved in."

"Absolutely not!" replied Mr. Lewis adamantly. "We talked about the possibility, but you never paid."

"I spoke with Mr. Lewis," Reuven said to Levi. "He also claims that we didn't pay."

"Well, I'm sure that we paid," insisted Levi. "I'm not paying again!"

Reuven called back Mr. Lewis. "We'll pay you the \$400 that Shimon and I owe," he said. "Levi insists that we paid, though."

"I sold the furniture to you jointly," replied Mr. Lewis. "It's not my issue how you divide the payment, but I expect the full \$600 from you! You and Shimon even agree that I wasn't paid."

Reuven decided to turn to Rabbi Dayan, and asked:

"What do we do about the remaining \$200?"

"Partners who borrow together, are considered as borrowers on their proportional share, and guarantors on the remainder," replied Rabbi



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

IS POWER OF ATTORNEY BINDING?

Q: Reuven wants to rent out his property to Shimon. The two parties drew up a rental contract, but Reuven had to leave the country and cannot sign the agreement. He gave his son, Levi, power of attorney to sign in his name.

Is the agreement signed between Shimon and Levi binding, or is Reuven allowed to renege on his agreement to rent the property to Shimon?

A: If Reuven will deny that he gave his son Levi power of attorney, then Shimon will have a hard time enforcing the agreement. But it is likely that even if Reuven admits that he authorized Levi to rent out the property and sign on his behalf, the contract would not be binding.

Before we explain the *halachos* that relate to this case, we must first establish that among the several types of *shtaros* (contracts) that exist, two are relevant to this discussion:

1. *Shtar kinyan* - a contract used to transfer ownership. The *kinyan* happens when the seller gives the buyer a contract that states, "My field is sold to you" (*Shulchan Aruch, C.M. 191:1*).
2. *Shtar hischayvus* - this is a *kinyan* in which a person obligates himself to do something by committing himself to it in writing and giving that written contract to the other party (*ibid. 40:1*).

A rental contract can be either of these two *shtaros*, depending on whether the language implies transferring the usage rights to the tenant (see *Kovetz Teshuvos 53* and *BHI Issue 491*) or whether the language relates to the obligations of the rental.

Some *poskim* rule that just as a person can appoint an agent (*shaliach*) to make a *kinyan*, he may also appoint an agent to sign a contract on his behalf, and it will be as valid as a *shtar* he signed on his own (*Shach ibid. 45:8*). Others maintain that documents signed by a *shaliach* are not valid (*Ketzos ibid. 2*).

Some commentators explain that the latter opinion follows the view of the *poskim* who write that a *shtar* that was written on media that can be forged is not valid even if witnesses signed it, and even if the other party admits that he gave it to the recipient,



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Dayan. "Thus, if the lender cannot collect from one of the partners, he can collect the missing amount from the other partners" (C.M. 77:1).

"As you know, a person's admission obligates him (*hodaas baal din k'meah eidim dami*), but he cannot obligate others through his admission. Thus, the two partners who admit become liable, but cannot obligate the third party through their admission" (C.M. 77:5; 176:31).

"Furthermore, since the third partner denies the loan and the lender cannot collect from him, the remaining two parties who admit to the loan are liable for the third part as guarantors" (C.M. 37:4; *Shach* 77:12).

"Although the *halachah* is that when the borrower is exempt, the guarantor is also exempt – so that seemingly Reuven and Shimon should be exempt as guarantors – but they admit that Levi is liable, although he denies it. Thus, Levi is not considered 'exempt' vis-à-vis them, and they remain liable" (see *Pischei Teshuvah* 37:3; *Ketzos Hachoshen* 49:9; *Aruch Hashulchan* 37:18).

"Moreover, although Reuven and Shimon state that Levi also owes, so that seemingly there are two witnesses against him – Reuven and Levi are not believed as witnesses, because they now have a vested interest in the testimony, since otherwise they will have to pay Levi's share out of their own pockets" (*Sma* 37:16).

"Thus," concluded Rabbi Dayan, "the two partners that admit, Reuven and Shimon, have to pay the full \$600, and they cannot obligate Levi to pay \$200 through their admission or testimony."

Verdict: A partner or partners who admit a loan of the partnership cannot obligate another partner who does not acknowledge the loan, and they are liable also for his share as guarantors.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

BAR METZRA #20
(Bordering Property)
Payment of Bar-Metzra

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

Q: When a bar-metzra exercises his rights and takes the property from the buyer, must he pay the buyer what he paid or the market value?

A: Chazal instituted that the buyer be considered as the *bar-metzra's* agent (*shaliach*) to buy the property for him. Therefore, when the *bar-metzra* takes the property, he must reimburse the buyer whatever he paid for the property, even if the property's value rose or dropped meanwhile (C.M. 175:6).

If the buyer paid less than market value, had the seller sold to anyone at that price, such as if he was pressed for money, the *bar-metzra* needs to pay only that amount. However, if the seller gave the buyer a discount specific to him, the *bar-metzra* must pay the buyer the full market value. If the buyer claims it was a specific discount and the *bar-metzra* claims that the seller would have sold to anyone at this price, the burden of the proof is on the *bar-metzra* (C.M. 175:7).



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because it's not evident from the *shtar* itself that its contents are authentic (*Bach* 191:1 and *Ketzos* 42:1).

In contrast, the former opinion contends that a *shtar* written on forgeable media is valid, because when it comes to financial contracts, it does not have to be evident from the *shtar* itself that the contents are authentic (*Sma* 191:1; *Shach* 42:2; *Nesivos* 42:1).

Returning to our case, if an agent signs on behalf of a landlord, there is no proof in the *shtar* that he represents the landlord, and the validity of the *shtar* would theoretically be subject to the above dispute.

In truth, however, in our case the *shtar* is invalid according to all opinions.

A *shtar* works when proof that the transaction occurred is reflected in one of four elements in the *shtar*:

1. Witnesses sign to the details directly in the *shtar*.
2. Witnesses testify that they saw the contract being handed from one party to the other (*Shulchan Aruch* 40:2).
3. The obligating party signs the *shtar*.
4. The *shtar* is handwritten by the obligating party, even if he didn't sign it (*ibid.* 69:1).

If a *shtar* does not contain one of these elements, it has even less validity than a *shtar* written on forgeable media, which some *poskim* consider binding if the obligating party admits that it is not forged. A *shtar* without at least one of these elements, is not considered a *shtar*, even if the obligating party admits that its contents are authentic. Furthermore, even if witnesses testify that the obligating party appointed an agent to sign the *shtar* in his name, it is still worthless and may not be used for a *kinyan* (*Tumim* 68:8, cited in *Nesivos* 36:10 and 45:2; *Mekor Chaim* 448:9, cited in Rabbi Akiva Eiger 191:1)

Some argue that only a *shtar* used for a *kinyan* must be considered a valid *shtar*, but if someone wrote a *shtar hischayvus* to concretize his intention to do something, we consider the act of writing a *shtar* adequate proof that he is firm in his decision (*Tosafos, Kesubos* 102a s.v. *Aliba*). This would work even if the contract was signed by an agent (*Erech Shai* and *Nachal Yitzchak*). Therefore, if the rental contract was written in the format of obligation, it would be binding according to this approach.

Nevertheless, since there are opinions (*Ketzos* cited above and *Nesivos* 45:2) that even for this sort of transaction the *shtar* must have one of the above four elements, and contracts are sometimes written as a *shtar kinyan* (not *hischayvus*), one should be sure to set up the transaction in a manner that is binding according to all opinions.

If there is a prevailing custom to verify a contract through the signature of an agent, and the landlord drafted a power of attorney document appointing the agent to handle the matter, it is binding (see *Shulchan Aruch* 45:5 with *Nachal Yitzchak*).

Some *poskim* write that this works according to all opinions, even those who maintain that the admission of the obligating party or testimony of two witnesses does not help, because the combination of two documents – the contract and the power of attorney – prove that the transaction is valid (see *Sdei Chemed*, entry for *Chametz Umatzah* 9:6).

If there is no way for the parties to set up an official power of attorney, it would be best if the agent would simply hand over a *prutah* (small amount of money) to create a *kinyan*, because a *kinyan kesef* works even through an agent (see *Shulchan Aruch* 182:1 and 195:9; and *Pischei Choshen, Sechirus* ch. 4, fn. 3).

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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