THE WERDIGER EDITION

BUSINESS WEEKLY

RESTORING THE PRIMACY OF CHOSHEN MISHPAT

UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

Issue #579 | Lech-Lecha | Friday, October 15, 2021 | 9 Cheshvon 5782

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

'I REPAID ALREADY!'

Mr. Silver had sued Mr. Kaplan in Rabbi Dayan's *beis din* to collect a $2,000 loan. Mr. Silver presented his loan document, properly signed by witnesses, in *beis din*.

"What do you say about this?" Rabbi Dayan asked Mr. Kaplan.

"Indeed, I borrowed," acknowledged Mr. Kaplan, "but I repaid already. Mr. Silver didn't have the loan document handy to return it to me then; I trusted him."

"What do have to say in response?" Rabbi Dayan asked Mr. Silver.

"When do you claim you repaid?" Mr. Silver asked Mr. Kaplan.

"It was about three months ago," Mr. Kaplan replied.

"What do you have to say in response?" Rabbi Dayan asked Mr. Silver again.

"To be honest, I don't remember clearly," replied Mr. Silver. "We did discuss repaying, but I don't remember whether in the end Mr. Kaplan paid. I assume, though, that since I didn't return the loan document to him, the loan was not paid, but cannot say for sure."

"I am sure that I repaid!" reiterated Mr. Kaplan. "I repaid in cash, though, so I can't provide a clear record of the payment."

"But what about the loan document?" Mr. Silver asked Rabbi Dayan. **"Doesn't Mr. Kaplan have to pay because of it?"**

"When the lender holds a properly signed loan document, the borrower is not believed to claim that he repaid the loan without proof," replied Rabbi Dayan. "This is because the fact that the lender is holding the loan document strongly supports his claim that the loan was not repaid" (*C.M.* 82:2).

"However, if the borrower claims definitively that he repaid and the lender is unsure, the lender cannot collect based on the document alone. Since he is unsure, we cannot collect money from the borrower who claims definitively. If both parties were in doubt, though, the lender could collect based on the document" (*C.M.*, *Sma* and *Shach* 59:1).

Mr. Silver and Mr. Kaplan thanked Rabbi Dayan and left.

A week later, Mr. Silver and Mr. Kaplan reappeared in *beis din*.

"I remember now that Mr. Kaplan did not repay me!" stated Mr. Silver. "He did call and mention that he wanted to repay, but in the end it did not work out. I also checked my records and see that there was no deposit of any substantial cash sum."

"What do you say to this?" Rabbi Dayan asked Mr.

BHI HOTLINE

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

GOLD IN THE GARBAGE

Q: Two years ago, my tenant moved out, and left behind some items of little or no value. I cleaned out the apartment and threw out everything left behind.

My tenant just called to ask me whether I found a gold chain after they left the apartment. I remember clearly throwing out a chain – which I thought was made of a cheap metal – into the garbage with the rest of the leftover belongings. Am I required to pay for it? If yes, how much?

A: Generally, when a lease comes to an end, the tenant is required to leave the rented space empty. If he leaves objects behind, some *poskim* rule that the landlord must warn him that he is going to place his possessions outside, where they might get damaged, before he actually does so. Other *poskim* maintain that this warning is not mandatory, but is *middas chassidus*, going beyond the letter of the law (see *Shulchan Aruch, C.M.* 319 with commentaries).

Although in your case it seems that the chain was left behind inadvertently, since most of the items left behind were of little or no value, you assumed that the tenant was *mafkir* (relinquished ownership of) those objects, and that's why you threw them out. Your actions were clearly done *b'shogeg* (inadvertently), but that doesn't necessarily absolve you from liability.

The *halachah* is that a person is responsible for damage (*hezek*) he inflicts, even if he did so inadvertently (ibid. 378:1 and 421:3). But that is true only if the damage is inflicted directly. If the damage is caused (*garmi*), the *mazik* is liable only if he caused it deliberately, not if it was inadvertent (*Shach* 386:6).

There is a wide-ranging dispute among the *poskim* regarding a case in which someone discards another person's objects. Some *poskim* rule that placing items in a public place where someone might abscond with them or throw them out is considered *hezek*, akin to throwing them directly into a fire (*Nesivos* 25:1, 291:7, and 301:1). Others maintain that even throwing them into the garbage is merely *garmi*, because the objects become irretrievable

CASE FILE

Kaplan.

"I reiterate what I said before," replied Mr. Kaplan. "I repaid Mr. Silver and trusted him about the loan document. Now I regret it!"

He then added:

"How can Mr. Silver change his claim after the case was closed?!"

"If the lender subsequently returns with a claim that he checked his records and remembers that the loan was not repaid, he is believed," replied Rabbi Dayan. "This is because the loan document was never disqualified. The lender simply could not collect with it meanwhile due to his questionable claim" (*Sma* 59:2).

"Nonetheless, had Mr. Kaplan initially demanded that the loan document be returned to him, *Shach* writes that *beis din* should do so, even though the document was not disqualified, since the lender was then not able to collect with it" (*Shach* 59:2).

"Moreover, in that case, *Nesivos* writes that if the lender should subsequently return to *beis din* and claim that he checked his records and is sure that the loan was not repaid, he is no longer believed," concluded Rabbi Dayan. "Once the lender leaves *beis din* after they ruled to remove the document from his possession, he can no longer change his claim, since we are concerned that he received legal advice and was taught to claim so" (*Nesivos* 59:2).

Verdict: A lender who is unsure whether the loan was repaid cannot collect based on his loan document against the definitive claim of the borrower that he repaid. However, the lender can later claim definitively that he was not repaid, unless *beis din* ruled meanwhile to return the document.

MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

BAR METZRA #38

(Bordering Property)

Half-Property: Two Buyers or Sellers

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

Q: A person bought a property from two partners or bought two adjacent properties. Can the bar-metzra take half the property or one of the two? What if two people bought a single property and the bar-metzra wants to take from one?

A: The *bar-metzra* cannot remove the buyer from only half the property, even if the buyer bought it from two people. It is not considered "fair and good" to leave him with half a property. Furthermore, if the *bar-metzra* leaves half, the buyer is now also a *bar-metzra* on account of the other half, even though he acquired it only now (*C.M.* 175:13; *Aruch Hashulchan* 175:9; *Gra* 175:13).

However, if the buyer bought two adjacent properties, the *bar-metzra* can take one or both properties (see *Sma* 175:22 and *Shach* 175:12).

Similarly, if the former owner sold his property to two people, the *bar-metzra* can take from one and leave the other; all the more so if two people sold to two buyers (*Shach* 175:13).

BHI HOTLINE

only once the sanitation workers place them into the dump (*Shu"t Chavos Ya'ir* 165, *Shu"t Imrei Shefer-Kletzkin* 24).

According to the latter approach, since your actions were *garmi* and inadvertent, you are not liable.

According to the former *poskim*, how much would you be required to pay? If the tenant claims that the chain was worth a lot of money, are you required to believe her?

Generally, when the value of damage is unknown, and the *nizak's* (plaintiff) claim that it was expensive seems reasonable, he may swear how much damage was caused, and the *mazik* must pay that amount (see *Shulchan Aruch* 388:1). Nowadays, since we avoid oaths, the two parties should compromise (*Shu"t Igrot Moshe, C.M.* 1:32).

There are two reasons why we would not apply this ruling to your case, however.

First, it is questionable whether *Chazal's* edict that the *nizak* may swear applies to a case of *shogeg* (*Shach* 388:2). In addition, it is unclear whether this decree applies to cases of *garmi*, or only to damage inflicted directly (*Shulchan Aruch* 388:7), and, as mentioned, some *poskim* consider your actions *garmi*.

Furthermore, the *poskim* debate the *halachah* regarding someone who damages a basket, and the plaintiff claims that there were precious gems in it – which is not the normal way to safeguard gems. Some *poskim* say that although we generally would not allow the plaintiff to swear and claim the full value of the gems in such a case because his claim seems to lack credibility, if there are witnesses who testify that there were gems in the basket, the defendant is liable for their full value. This is not a case of *oness* (coerced action), because the defendant should not have damaged the basket in the first place, even if he thought it wasn't worth much (*Rambam*, cited in *Shulchan Aruch* 388:1). Others argue that even if there are witnesses, the defendant is not liable, because it should never have occurred to him that someone would keep something so valuable in a basket (*Tosafos*, cited in *Rema* ibid.).

Applying this to your case, you had no reason to believe that a metal chain left among items of little value was made of gold. There also is no basis to the claim that you should not have discarded it (as in the case of the basket), because considering the circumstances in which it was abandoned by your tenants, throwing it out was a normal thing for you to do. Both sides of the above dispute would concur, therefore, that you are not obligated to pay.

Tying together all we have discussed, it seems that you are absolved from payment for numerous reasons. Even if we follow the approach that someone who throws someone else's possessions in the garbage is a *mazik* (i.e., not *garmi*), you would not be liable, as you had no reason to believe the chain was valuable. Furthermore, it was truly your tenant's job to leave the property clean, and you were entitled to assume that whatever he left behind can be discarded. Therefore, although you were now informed that the chain was actually valuable, you are not required to admit that you discarded it.

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