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CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

PARTIAL PASSAGE

Mr. Schwartz lived just behind the shul; his backyard bordered the shul's property. A fence separated the two properties, but Mr. Schwartz left an opening to enable him to walk directly to shul without having to walk around the block.

Other neighbors took advantage of this shortcut, and Mr. Schwartz allowed them to walk through his yard to shul.

One neighbor, Mr. Mandel, had recently moved into town and lived a few houses away. Unfortunately, he got into a heated argument with Mr. Schwartz when he first arrived, and the relationship between them remained strained.

One day, Mr. Schwartz saw Mr. Mandel walking through his yard on the way to shul.

"Who gave you permission to walk through my yard?" Mr. Schwartz yelled. "This is private property!"

"You allow other people from the block to walk through," replied Mr. Mandel. "I'm no different than anyone else on the block."

"Well, I don't want you walking through my property," replied Mr. Schwartz. "I never gave you permission!"

"But you allowed the shortcut as a public path," replied Mr. Mandel. "You can't single me out!" He summoned Mr. Schwartz to a *din Torah*.

Meanwhile, Mr. Schwartz decided to stop everyone from walking through. His neighbors, though, objected. "You always allowed us to walk through," they claimed. "We've already established our right."

"The fact that I allowed you passage in the past, does not require me to continue allowing you," countered Mr. Schwartz.

"Yes it does," argued the neighbors. "We've been doing this for over three years and have an established *chazakah*!"

The neighbors asked to join the *din Torah* between Mr. Schwartz and Mr. Mandel. They all came before Rabbi Dayan and asked:

"**Can Mr. Schwartz exclude Mr. Mandel from going through his property? Can he stop all the neighbors now?"**

"The *Gemara* (*B.K.* 28a) teaches that if someone allowed usage of his property as a public pathway, he cannot retake it and block the pathway," replied Rabbi Dayan. "The *Gemara* clearly indicates, though, that the public can acquire this right only with his permission, but he can initially stop people from going through his property" (*C.M.* 377:1).

"Even if Mr. Schwartz allowed certain people access, this does not prevent him from refusing others. This is not considered '*middas Sedom*'

DID YOU KNOW?

Allowing your employees buy non-kosher lunch on your company's credit card can entail business (benefit) from Ma'achalos Asuros.

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

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

SECURITY DEPOSIT IN DOUBT

Q: Our father had a tenant who rented an apartment from him for over twenty years. Our father passed away several years ago, and the tenant continued to reside in the apartment after his passing. He recently moved out, and he claims that when he first rented it, he gave our father a security deposit equivalent to two months' rent.

We knew nothing about this security deposit. Are we required to trust him?

A: Obviously, if you do trust the tenant's statement of the facts, you would be required to return the money from your father's inheritance (*Sefer Chassidim, Mekitzei Nirdamim* edition #1381, cited in *Minchas Pittim* 17).

The entire discussion below is only relevant, therefore, if you feel that he may have become fuzzy about the details of the transaction with your father over the course of the years, or that he concocted the entire claim.

The *halachah* in this case would depend on the stage at which his claim is made.

One possibility would be that the tenant hasn't paid rent for the last two months, and he wants the security deposit to cover the outstanding rent. If that is the case, since the tenant is certain (*bari*) in his claim, you, the heirs, cannot insist that he pay rent for those months. The tenant's claim is that the landlord (your father) owes him money against the money he owes for the rent (see *Shulchan Aruch, C.M.* 75:7). Since your father left possessions as an inheritance, his tenant is entitled to withhold the amount equivalent to his security deposit against your father's estate (see *Shaar Mishpat* 107:4 and *Yeshuos Yisrael* 72:22). Certainly if the original tacit agreement between your father and the tenant was that the

CASE FILE

(baseless refusal to benefit others), since passing through his property entails invasion of privacy. Thus, he can refuse to allow Mr. Mandel to walk through.

"Regarding Mr. Schwartz's decision to now refuse passage to everyone, we addressed this issue almost seven years ago, in an article: "Public Passage" (Business Weekly Issue 157). There are several limitations to the *halachah* that precludes blocking a public passage. We cited five reasons why it often does not apply, some of which are relevant here: 1. Some *Rishonim* require explicit permission given to the public. 2. Some require construction to enhance the passage. 3. The degree of public traffic must be such that we would expect the owner to protest. 4. The 'public' must be a large percentage of the people for whom the passage is relevant. 5. If the land is officially registered, we do not presume *mechilah*. Thus, Mr. Schwartz's shortcut is not considered a 'public passage' that cannot be blocked (see *Pischei Choshen*, *Nezikin* 8:32).

"Moreover, even if Mr. Schwartz explicitly granted permission to certain neighbors in the past, many *Acharonim* write that this does not grant them permanent rights, since the owner also uses the property. We consider them as 'borrowers' (*sho'elim*), and the owner can rescind, especially if their passage is not something that would typically evoke the owner's protest" (see *Ketzos* 140:3; *Nesivos* 140:19; *Pischei Choshen*, *Nezikin* 15:24[54]).

"Although some *Acharonim* disagree," concluded Rabbi Dayan, "Mr. Schwartz is considered *muchzak* on his property, so he can refuse passage even to neighbors that he formerly allowed, in accordance with the many *Acharonim* mentioned earlier."

Verdict: Mr. Schwartz can allow passage to some neighbors and refuse others. He can even rescind his permission from those he formerly allowed.

MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS
Mechilah (Forgoing) #2
Waiving vs. Granting of Rights

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

Q: I told my debtor that I forgo his debt and he doesn't have to pay. He immediately responded, "No, I will pay you," but later refused to pay. Is my mechilah binding, notwithstanding, even though the debtor initially rejected it?

A: The *Rishonim* dispute whether to define *mechilah* as waiving of rights, whereby the creditor withdraws his claim, or as granting the rights to the debtor with words alone (*Tosafos Kiddushin* 19a, s.v. *Omer*; *Rama* 203:1; *Ritva Kiddushin* 16a *Ela*; *C.M.* 241:2; *Kehillos Yaakov*, *Sanhedrin* #5).

According to the first approach, waiving of rights, *mechilah* does not require the consent of the debtor, whereas according to the second approach, granting of rights, *mechilah* could require the debtor's consent, since a person cannot be forced to acquire against his will (*Machaneh Ephraim*, *Hil. Zechiah Mei'hefker* #11).

Some *Acharonim* rule that *mechilah* is valid even against the debtor's will (*Avnei Miluim* 93:6; *Sho'el Umeishiv,* vol. IV, 1:23), while others disagree (*Mishmeres Shalom* 209:21, *Imrei Binah, Dayanim* #20; *Sha'ar Mishpat* 22:5).

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security deposit would cover the last two months' rent, he would be allowed to keep the money.

Although there is a rule that when heirs do not know what claims they can make in *beis din*, *beis din* will make whatever claims their father would have made (*taaninan*), *beis din* does so only in order to help the heirs keep whatever is in their possession. For instance, if someone claims that a deceased person owes him money, *beis din* will claim, on behalf of the heirs, that their father already paid him back (ibid. 108:1). But *beis din* does not make claims for heirs in a case where they are the plaintiffs, attempting to retrieve money they think is owed to their father (*Shach* 72:142).

Even if your father would still be alive and would claim that he never received a security deposit, since the tenant is claiming, with certainty, that he gave him the security deposit, if he is only trying to avoid paying the last two months' rent, we would not obligate him to pay. In that case, however, we would require the tenant to take a *shevuas heses* (an oath *Chazal* require a defendant to take if a plaintiff claims with certainty that he owes him money, because it is considered axiomatic that a person does not file a claim against someone unless there is validity to that claim), since the landlord (the plaintiff) is claiming with certainty that the tenant (the defendant) owes him the rent. In your case, however, since you cannot claim with certainty that your father didn't receive a security deposit, the tenant would not be required to take such an oath (see *Shach* 72:142, but cf. *Bi'ur HaGra* ibid. 160).

If, however, the tenant has already paid his rent, and he is seeking to retrieve his security deposit, there would be a difference between the deposit for the first month and the second month.

It is customary, in many jurisdictions, to demand one month's rent as a security deposit. If that was the custom in a specific locale, and a landlord claims that he never received a security deposit, we would not believe him against the tenant's claim to the contrary, and the landlord would be required to return one month's rent. Even though the landlord has a *migu* (alternate claim), because he could have said that he already returned the security deposit, we still don't accept his claim, because we don't accept a *migu* that is at odds with the local custom (*Sma* 82:44).

Regarding the second month's payment, which is not customarily given as a security deposit, we would not obligate the heirs to return the money, because *beis din* would claim on their behalf that their father never received a second month's rent.

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