

BUSINESS WEEKLY



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

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לע"נ הרב יחיאל מיכל בן ר' משה אהרן אורליאן



CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

SHOPPING CART

One morning Mr. Fisher returned home from shul and saw a shopping cart sitting on his sidewalk. "This shouldn't be sitting here!" he exclaimed. "It's an obstacle!"

He moved the shopping cart aside to the curb.

When Mr. Fisher returned home from work, he noticed that the shopping cart was gone. "Does anyone know what happened to the shopping cart?" he asked his family.

"The sanitation department came by," his wife said. "They took it with the trash."

"Oh, I forgot that today is pick-up day for metal recycling," said Mr. Fisher. "The cart wasn't in great condition, so I guess they figured it was also trash."

Mr. Fisher tried to find out whom the shopping cart might belong to. He ascertained that it belonged to a grocery store around the corner.

"You have to speak to them," said his wife. "You may have to pay them for the shopping cart."

"I didn't mean for it to be taken," said Mr. Fisher. "I was just getting it out of the way."

"Still, you should have moved it aside to a safe place," replied his wife, "not at the curb on pick-up day."

"What's the difference?" said Mr. Fisher. "Anyway, someone already removed the cart from the store."

"Then perhaps you should have returned it to the store!" said his wife.

"If they're not careful with their own items, then I why should I have to be?" argued Mr. Fisher.

"Even so," argued his wife, "moving the cart near the curb was not a wise thing to do."

Mr. Fisher decided to call Rabbi Dayan, and asked:

"Am I liable to the store for the shopping cart?"

"One who sees a lost item but ignores it, and it subsequently got lost, is not liable, unless he picked it up and became responsible for it. Some suggest, though, that there may be a moral obligation" (*Gra*, C.M. 348:23; *Mishnah Berurah* 443:12; *Rama*, C.M. 263:3; *Pischei Choshen*, *Aveidah* 1:3[8]).

"However, once a person takes in his hands an item for which he has an obligation of *hashavas aveidah*, with intention to return it, he is liable for it as a guardian. [*Shulchan Aruch* writes that he becomes a *shomer sachar*;

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

UNREQUESTED REALTY

Q. When I listed my house for sale, a realtor called and asked whether he could serve as an agent to sell it, but I told him that I had advertised it myself so I could save the broker's fee. He said that he would charge only the buyer a fee, but I told him that this would reduce my chances of selling, because the total price, including his fee, might be too high for potential buyers. He continued trying to convince me, explaining that if I met with potential buyers myself, they might be able to read whether there are other bids, whereas he can handle such inquiries deftly.

I notified him that I will not pay him under any circumstances, and he should not invest any effort into selling my house. He ignored me and arranged a buyer, and he now wants me to pay him a brokerage fee.

Am I obligated to pay?

A: Generally, when someone derives benefit from another person's work that is usually done for pay; then, even if he never agreed to pay for that service, he is required to pay. He cannot absolve himself by saying, "You did it for free, because I never told you to do it" (*Shulchan Aruch*, C.M. 246:17 and 264:4).

But this is true only if there had never been a discussion prior to the benefactor providing the service, in which case this falls under the rubric of *yored lesoch sdei chaveiro shelo b'reshus*, a person who works in another's field without permission, where *Halachah* dictates that he is required to pay for the work even if he never asked the person to do it (*ibid.* 375:1).

Furthermore, if it is obvious to the beneficiary that the person plans to continue working on his behalf despite his protestations, he must pay for the work, since he ultimately benefited from it. We assume that he protested only to avoid paying, and he knew that the work would be done properly, because the worker enjoys the work and would want to preserve his reputation in that line of work. Therefore, he



CASE FILE

Rama maintains a *shomer chinam*.] If he was subsequently negligent toward the item and left it in an insecure place, he is liable for it" (C.M. 267:16).

"In this case, although moving the shopping cart is an appropriate act of *kinyan* for such an item (*meshichah*), you had no intent to return it or take it, but merely to move it aside. Thus, you did not become accountable for it" (C.M. 198:1; Ketzos 259:1).

"Moreover, there might not be an obligation of *hashavas aveidah*, even in a place where most passersby are Jewish and the grocery store is Jewish owned. This is because some grocery stores allow their customers to take shopping carts outside to load their cars, etc. If the store itself is not careful with their carts, you are not required to return one that becomes stray. This is called *aveidah midaas*. In certain cases Rama considers *aveidah midaas* as *hefker*, but presumably he would agree here with the *Mechaber* that you could not take it for yourself" (see C.M. 261:4; Nesivos 261:1).

"Nonetheless, you moved the shopping cart to a place where it was prone to loss, which could be considered *garmi* (directly caused loss). However, you forgot that it was recycling day and had no intent to damage. According to many authorities *garmi b'shogeg* (unintended *garmi*) is exempt" (*Shach* 386:6; *Pischei Choshen*, *Nezikin* 3:37; 5:[78]).

"Thus," concluded Rabbi Dayan, "moving the shopping cart aside to the curb does not render you liable as a guardian, nor did you intend for it to be taken by the sanitation department, so that that you are exempt."

Verdict: Since you moved the shopping cart aside with no intent to take responsibility for it, nor with intent to damage, so that it is only *garmi b'shogeg* - you are not liable to pay for it.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS Mechilah (Forgoing) #24 Mechilah of an Open Check

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

Q: I lent someone money. He gave me a post-dated, open check, which I sold to someone else. Can I forgo the loan to the borrower?

A: We mentioned last week that a creditor can forgo the loan even if he sold it, but is liable to the buyer for the loss (C.M. 66:63).

If the document states the lender's name "or whoever comes in his stead," *Shulchan Aruch* cites a dispute between the *Rishonim* whether the lender can still forgo the loan (C.M. 66:26).

Some maintain that the lender cannot, since the borrower implicitly obligated himself also to the buyer from the beginning. *Sma* (66:3) sides with this opinion. Others maintain that he can; they maintain that the personal obligation remains to the initial lender unless the borrower explicitly consents now to obligate himself to the buyer. *Shach* (66:87) sides with this opinion.

However, if the loan document was left open to whoever presents the document, *Shach* rules that the creditor cannot forgo the loan once it was transferred (*Shach* 66:10).



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must pay for it (see *Shu"t Yad Elyahu — Lublin* 74, and *Chazon Ish*, B.B. 2:6).

On the other hand, if it is obvious that the beneficiary could have done the work without the other person's help, he is not required to pay him any more than he would have been willing to pay for that help.

In your case, you told the realtor sincerely that you don't want him to try to sell the house and didn't expect him to continue, but you did derive benefit from his efforts (see *Ramban*, B.B. 4b who deliberates about this type of case).

Are you still required to pay?

The *poskim* debate the *halachah* in such cases. Some hold that if the realtor's intention was to demand payment, you must pay him, since you ultimately benefited from his service (*Erech Lechem* 375; *Pischei Teshuvah* 264:3, citing *Teshuvos Pri Tevuah* 58; *Shu"t Maharash Engel* 3:15; *Chazon Ish* loc. cit.).

Others argue that since you specifically protested that you didn't want the realtor to work on your behalf, and he did that work against your stated will, he is not entitled to payment (*Mahariy"a Halevi* 2:151; *Shu"t Dovev Meisharim* 1:42).

But if you initially didn't tell the realtor that you are unwilling to pay his fee, and only later did you say you don't want him to help you altogether, since you initially left the door open for him to find a buyer, it is as though you consented to receive that benefit. Therefore, although you didn't hire him to find a buyer you must pay for the benefit you derived from his effort (*Pischei Choshen*, *Sechirus* ch. 8, fn. 64).

If you contacted the realtor after he started working to find a buyer and told him that you don't want him to do any further work unless he drops his price, he is not required to forgo payment for whatever work he did until that point. Even if he completed the sale after you told him that you would not pay his fee, there are certain instances in which you are not entitled to stop him mid-sale (see *Choshen Mishpat* 333:2 and *Shu"t Igros Moshe*, C.M. 1:49).

But if the realtor knew that you truly had no intention of paying him, and he found a buyer with the understanding that he will not charge you for this service, he has no right to demand his agent's fee after arranging the sale (*Nesivos* 12:5, and BHI issue #400).

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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