

# BUSINESS WEEKLY



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

Issue #619 | Matos-Massei | Friday, July 29, 2022 | Rosh Chodesh Av 5782

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

### EARLY TERMINATION NOTICE

The Mandels rented an apartment owned by Mr. Tanenbaum with a two-year lease. The lease contained an early termination clause, which allowed the Mandels to leave early with 60 days' notice.

After a year, the Mandels decided that they wanted to move to a different community, which was more appropriate for them.

They found a house there, which was supposed to be vacated in the summer. Mr. Mandel called Mr. Tanenbaum in May. "Be"H, we will be leaving at the end of July," he notified him.

Meanwhile, Mr. Tanenbaum began showing his apartment to prospective tenants.

Sometime in June, Mr. Mandel was told that the house they expected to move into would not be available until the winter.

He immediately called Mr. Tanenbaum. "I just heard that we will not be able to move into the house until the winter," he said.

"That's not acceptable," said Mr. Tanenbaum. "I am close to signing with a new tenant for a three-year lease at a significantly greater price. I don't think he'll be willing to wait till the winter, and it's hard to find renters then."

"I understand," said Mr. Mandel, "but we also are in a bind. We have no place to go for the few months until the winter. Our lease is till next spring, so we are entitled to stay in the apartment if we want."

"Once you gave notice that you are terminating the rental early," argued Mr. Tanenbaum, "you gave up whatever rights you have in the apartment."

"I disagree," said Mr. Mandel. "Until we return the property to you, we retain the usage rights!"

The two came before Rabbi Dayan and asked:

**"Can Mr. Mandel retract from his notice and continue living in the apartment?"**

"Rivash (*Responsa* #510) addressed a similar case," replied Rabbi Dayan. "Someone signed a rental contract, made a *kinyan*, and paid the rent up front, but the landlord stalled in handing him the premises. Finally, the tenant told the landlord to simply return the money and void the rental. The landlord agreed, but the tenant subsequently recanted and decided that he wanted to uphold the rental.

"Rivash ruled that the renter's rights to the house were not canceled by his request to return the money, since rental is like a temporary acquisition (*B.M.* 56b; *C.M.* 227:35).

### DID YOU KNOW?

Using another person's credit card for your purchase and paying back the cost including the interest accrued can entail *ribbis*.

Ask your Rav or email  
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for guidance and solutions.



## BHI HOTLINE

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

### MAKING A MACHAAH, PART 2

**Q.** In the previous issue, you discussed the case of my neighbor who extended his porch over the boundary onto my property. I explained that I don't want to get into a dispute with him, but I do not want to lose my rights to that portion of my property either. You responded that I should make a halachically valid *machaah*.

I have two questions:

How can I make a *machaah* without it turning into a dispute?

Why is it necessary to make this *machaah*, if I have a deed that outlines the boundaries of my property? Shouldn't the deed alone serve as a *machaah*, given that had I sold or given him that part of my property, the deed should have reflected that change? This seems to be especially true since the deeds are registered with the board of bungalow colony, who would certainly record any changes to the deeds.

**A.** We will pick up where you left off.

The *poskim* discuss whether using a property for three years establishes a *chazakah* nowadays, considering that today, deeds serve as an official record of property ownership.

Some *poskim* rule that even nowadays, if someone uses a property for three years, we consider him to be the *muchzak* (presumptive owner of the property), even if the deed was never transferred into his name in the government records (*Erech Shai* 194:2; *Shu"t Teshuras Shai* 2:1; *Shu"t Maharsham* 3:23).

Some contemporary *poskim* add that the fact that the *muchzak* does not have a contract stating that he purchased the land or received it as a gift does not either prove that it isn't his, because once a person makes a *chazakah* he no longer guards such a contract. As far as it not being registered in the official records, there could be many valid reasons why it was never transferred into his name — for instance, if he was unable to get a mortgage on his own credit, so the property could not be listed as his (see *Beis Aharon v'Yisrael* 188, p.70).

Many *poskim* disagree, however, and rule that in our



## CASE FILE

An acquisition cannot be forgone or undone by speech alone, but must be returned with a counter *kinyan* (*Rema* 189:1). Therefore, the rental remains in force" (Beis Yosef, *C.M.* 312; *Sma* 315:2).

"Machaneh Ephraim (*Sechirus* # 9) disagrees. He maintains that since the property belongs to the owner – when the renter withdraws, the usage rights automatically revert to the landlord, even without a counter *kinyan*.

"Kovetz He'aros (*Yevamos* 53:5) explains that the root of this dispute is the nature of a rental. Rivash maintains that a renter acquires pseudo-ownership of the usage (*kinyan peiros*) for the rental period, so that forgoing does not revoke it without a counter *kinyan*. However, Machaneh Ephraim maintains that the renter merely has usage rights (*shibud*), without pseudo-ownership, so that he can forgo these rights with a verbal statement" (see *Rema*, *C.M.* 333:8).

"Due to this dispute, Emek Hamishpat (*Schecheinim* #1) concludes that the landlord cannot evict the tenants, who currently possess the property; they can retract from their notice and continue living there for the duration of the rental term" (see also *Piskei Din Yerushalayim*, vol. 1, pp. 39-42; see however, *Pischei Choshen*, *Sechirus* 4:[7]).

"If the landlord wants to secure the termination," concluded Rabbi Dayan, "he can stipulate in the lease that early termination notice is irrevocable, or make a *kinyan* with the tenants upon receiving notice. A formal letter of termination, signed by the tenants, could possibly be considered a *kinyan situmta* for this purpose."

**Verdict: A tenant with an early termination clause who gave verbal notice of early termination can retract, unless the lease stipulated that the notice was irrevocable, a *kinyan* was made, or, possibly, the tenants gave formal written notice signed by them.**



## MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

## MONEY MATTERS

*Dayanim* (Judges) #7

Unauthorized

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

### Q: What can beis din do in cases in which non-Semuchim Dayanim are not halachically authorized to adjudicate nowadays?

A: Regarding cases that non-Semuchim *Dayanim* are unauthorized to adjudicate nowadays, the *Gemara* (*B.K.* 15b) states that if the plaintiff grabbed the amount he deserves, *beis din* does not make him return it. This is because, in principle, a person can take the law into his own hands when faced with potential loss of clear, provable monetary rights, and here there isn't a viable legal option. Be"H, we will address details of grabbing in future weeks (*C.M.* 1:5; 4:1).

Alternatively, the *Geonim* write that although *beis din* cannot adjudicate these cases, they place the perpetrator in *nidui* – excommunication – until he appeases the plaintiff with an amount approximate to the amount that *beis din* considers fitting, whether he is appeased by this or not. However, they impose *nidui* only in cases of financial loss, not of fines, and where there is clear proof (*Sma* 1:17-18; *Knesses Hagedolah*, *Hagahos Beis Yosef* 1:9).



## BHI HOTLINE

times, when deeds are recorded accurately, anyone who buys or receives a property makes sure to have the deed registered under his name. If a person has a specific reason not to have the deed registered under his name, he would hire a lawyer to draw up a contract that states that it belongs to him, which he could then use as proof if anyone lays claim to it. Since this is the standard practice nowadays, if someone tries to claim that he owns of a property because he made a *chazakah* by utilizing it, the *chazakah* would not be valid, and there is therefore no reason for the owner to make a *machaah* (see *Shu"t Chasam Sofer* 6:54, cited in *Pischei Teshuvah*, *C.M.* 140:7 [cf. *Tumim*, *ibid.* 8]; *Shu"t Shevus Yaakov* 1:160, cited in *Pischei Teshuvah* 153:3; *Shu"t Maharsham*, *loc. cit.*)

In your case, however, since your neighbor's porch extended onto only a small portion of your property, the general practice might be not to waste all the time, effort and money to register the change in the government records, even had you agreed to the extension. It is possible, therefore, that even the latter group of *poskim* would agree that a *chazakah* of three years would be a valid way of establishing ownership.

On the other hand, since registering the change with the Board of your bungalow colony would not be so difficult, perhaps the fact that he didn't change their registry might constitute a *machaah*. Since there is no clear ruling on this matter (see *Shu"t Minchas Yitzchak*, vol. 6, 170:8, and *Vayishma Moshe* 4:209) — and even civil law recognizes "adverse possession," if someone has used a property for ten years without the original owner laying claim to it — it is best for you to make a *machaah*, which is relatively easy to do.

To make a *machaah*, before the end of every three years period from the time he began infringing on your property, you gather two witnesses (*C.M.* 146:1) to sign on the following declaration:

[Your name], the owner of the property at location [address] appeared before the undersigned witnesses and instructed us, as his agents, to record his protest against his neighbor, [his name], who expanded his porch onto [your name]'s property, and is using it as stolen property.

[Your name] does not grant permission for this unauthorized use of his property, and [his name] may not establish a *chazakah* (presumption of ownership) by use of the property.

[Your name] intends to take [his name] to a *din* Torah regarding the unlawful use of his property.

As proof we affix our signatures today, the \_\_\_\_ day of the month of \_\_\_\_, in the year \_\_\_\_.

All of the above is valid and confirmed.

The witnesses are not required to inform your neighbor that you made the *machaah*, and even if the witnesses notify you that they will not tell your neighbor about the *machaah*, and we know for certain that he has no idea that the *machaah* was made, his attempt to make a *chazakah* is null and void. We must stress, however, that if you tell the witnesses never to reveal to anyone that you made a *machaah*, then the *machaah* is not valid (*Shulchan Aruch*, *C.M.* 146:3).

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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