

BUSINESS WEEKLY



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

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לע"נ הרה"ח ר' נחמיה בן הרה"ח ר' שלמה אלימלך ווערדיגער ז"ל נלב"ע - י"ב כסלו, תש"ע



CASE FILE

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Writer for the Business Halacha Institute

לע"נ הרב אהרן בן הרב גדליהו ע"ה

NOT ENOUGH!

Avner was hired for the year to work on weekends as a waiter for the caterer in his shul, Mr. Essen. Their wage agreement was \$300 for a full Shabbos, which included setting up before Shabbos and cleaning up on Motzoei

Shabbos.

One Tuesday evening, towards the end of the year, Mr. Essen called Avner. "I want to confirm that you're available this Shabbos," he said. "There's a *sheva brachos*."

"I'm considering stopping," Avner said. "\$300 is no longer enough. I've been working with you for ten months already. I hear that some friends make more."

"I pay all the waiters \$300," said Mr. Essen. "From what I know, that is fair payment for a Shabbos, perhaps even on the generous side."

"I don't want to commit," said Avner. "Some classmates talked about possibly visiting this Shabbos."

"I could get a different waiter," said Mr. Essen, "but I really would like you to continue. You are experienced and I enjoy working with you. I'll do something for you."

"All right," said Avner. "I'll come."

When Shabbos was over, Mr. Essen started cleaning up with his waiters. He called over Avner. "You can go home now; I'll finish cleaning up with the other waiters."

"What about payment?" asked Avner.

Mr. Essen took out \$300 and gave it to him.

"I told you that \$300 was not enough," Avner said with surprise. "You said that you would do something for me."

"That's why I'm sending you home early," said Mr. Essen. "I never agreed to add to the salary, though."

"I'd like to hear what Rabbi Dayan has to say about this," said Avner.

The following day, the two approached Rabbi Dayan and Avner asked:

"Does Mr. Essen have to add to my salary?"

"The *Gemara* (B.M. 77a) teaches that if someone hired workers at a certain wage, but during the work the going rate rose, so the workers balked or expressed displeasure, and the employer appeased them so that they continued working - he does not have to add to their salary. The workers cannot insist that they agreed to continue only with the intention that the employer should add, since he can claim that he intended to improve work conditions with extra food or the like.

DID YOU KNOW?

Vendor agreements can have clauses that may be ribbis but can often be corrected with halachic guidance.

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



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

MONEY-BACK GUARANTEE? PART I

Q: Reuven needed \$6,000, and the administrator of a *gemach* agreed to give a loan on condition that Reuven find two *areivim* (guarantors) to guarantee the loan, which he did.

Just a few months after taking out the loan, Reuven passed away, and the *gemach* administrator approached one of the *areivim* to collect the loan they had guaranteed.

The *areiv* contacted us, sharing the document they signed, and asked whether he can demand that the *gemach* administrator approach Reuven's heirs first, and demand payment from him only if the heirs don't repay.

A: Before we examine this *she'eilah*, we will note that the loan document the *areivim* signed contained only three lines of text, and was written in a way that may make it nearly impossible to collect the loan. We therefore caution anyone entering any commercial transaction that requires documentation to seek guidance from someone experienced in drafting documents to ensure that they are halachically enforceable.

Depending on the terminology used when committing himself as the guarantor of a loan, an *areiv* can be either an *areiv stam* or an *areiv kablán*. The difference between the two is that an *areiv stam* is not required to repay the loan he guaranteed unless the borrower defaults. The lender is therefore required to try to collect the loan from the borrower first, and only if the borrower cannot pay may he then approach the *areiv* and collect from him (*Shulchan Aruch*, C.M. 129:8).

An *areiv kablán* commits that if the lender gives a loan to the borrower, the lender may collect from the *areiv* without even trying to approach the borrower first (*ibid.* 15).

If the loan document from the *gemach* states that the *areiv* is an *areiv kablán*, the *gemach* is certainly entitled to collect the loan directly from the *areiv* without approaching the borrower's heirs, and the *areiv* may then go to the heirs and try to receive compensation from their inheritance.

But if the *areiv* was an *areiv stam*, (or they only used



CASE FILE

The same is true in the opposite case, if the going rate dropped and the employer balked" (C.M. 332:5).

"Some *Rishonim* write that even if the worker stated that he is willing to finish the work only for a defined higher price, e.g. \$350, but could not retract without compunction (such as if it were not easy to get a replacement) – if the employer appeased him without explicitly agreeing to the raise, he can still pay the original wage. Nonetheless, some qualify that this is only if the employer indicated objection to changing the salary when appeasing, while others maintain that even if he placated the worker to continue without indicating objection, it does not express his consent to change the prior stipulation" (Taz 221:1; Aruch Hashulchan 332:15,16).

"However, if the worker could retract without compunction, as in this case, that Mr. Essen could easily get a replacement waiter, when the employer appeased him to continue without refusing to the new sum, he would have to pay the higher wage stated by the employee. In such a situation, we consider the former employment agreement as void, so that the continuation is considered a new employment with consent to the current salary stipulation" (Rema 332:5; Shach 333:30).

"Certainly, if the employer consented to the higher salary when appeasing – when the worker continued, it is under the new condition" (Ketzos 333:12; Nesivos 333:11; Chazon Ish, B.K. 23:32).

"In our case, though," concluded Rabbi Dayan, "since Avner did not mention a new sum, Mr. Essen is not required to add to the stipulated salary."

Verdict: A worker or employer who expressed displeasure about continuing work at the set wages, and the other side appeased him so that he continued to work without agreeing to a new price, the wages remain the stipulated amount.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS Dayanim (Judges) #23

Compromise When Suspecting Deception

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

Q: What is the place of compromise when one side is being deceptive or evasive?

A: In cases where it is not possible to clarify the *halachah* or facts properly, or if the *Dayan* strongly senses that the defendant is being deceptive, the *Dayan* cannot leave the case open. He should mediate or rule a compromise according to his understanding. However, if he senses that the plaintiff is being deceptive – he should excuse himself from the case (C.M. 12:5, 15:3-4; Gra 15:24; Nesivos, Chiddushim 12:6; Aruch Hashulchan 12:4).

A person who owes money is not allowed to evade his creditor or use other tactics to pressure the creditor to compromise with him. If the debtor did so, he does not fulfill his Heavenly obligation unless he pays what he owes (C.M. 12:6).

However, if a defendant knows that he does not owe, but his claims are not believed, he can try to evade the plaintiff, but not in a manner that makes him wicked in the eyes of the *Dayanim*, such as by refusing to come to the sessions or forging documents (Nesivos 12:3).



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the term 'guarantor,' without specifying *kablan*) the *gemach* must first approach the heirs and try to collect from them, and only if their father did not leave an inheritance may the *gemach* collect from the *areiv* (see *ibid.* 110:3, with *Sma* 8, for a case in which the heirs are minors).

There are two reasons why it would be hard to collect payment from an *areiv stam*:

1. Before an *areiv stam* can be approached for payment, the borrower must swear that he has no assets and that he has not repaid the lender (*ibid.* 129:9; if the *areiv* acknowledges that he is required to pay, the borrower is not required to take that oath [*Knesses Hagedolah, Hagahos Tur* 52]). Nowadays we do not take such oaths, which should indemnify the *areiv*.
2. When a lender tries to collect from the borrower, he is required to allow the borrower to keep any assets he needs for basic life necessities. This will generally include a 30-day supply of food, a twelve-month supply of weekday clothing, a bed, linens, and the equipment he needs for his job. The lender is not required to leave those necessities for his wife and his minor children (see C.M. 97:23-26). The borrower is required to sell his home, his furniture, and all other possessions in order to repay the loan.

As long as the borrower's possessions have not been sold, the *areiv* is not required to guarantee the loan. Some *poskim* write that even if all the borrower's assets besides the basic necessities listed above were sold, the lender may still not demand that the *areiv* repay the loan, since the borrower still owns those possessions (see *Knesses Hagedolah, Mahadura Basra* 97, *Hagahos Tur* 1, and see *Imrei Binah, Geviyas Chov* 3, and *Pischei Choshen*, ch. 14, fn. 30).

Contemporary *poskim* write, however, that since nowadays, nearly everyone owns furniture, a car, and similar assets, if we enforce these two rules as written above, then an *areiv's* guarantee of a loan is meaningless. We must therefore assume that when guaranteeing a loan today, an *areiv* agrees to guarantee the loan even if the borrower retains some of his assets (see *Mishpat Haareiv* 17, based on *Nesivos* 39:10).

Beis din must first ascertain, however, that the borrower truly does not have money or other assets that even a contemporary *beis din* can force him to sell before obligating the guarantor to repay the loan (see *Emek Hamishpat, Arvus* 14, and *Hayashar V'hatov* vol. 4, p. 8).

It is therefore recommended that lenders insist that a guarantor on a loan agrees to serve as an *areiv kablan*. Even so, however, if the borrower claims that he repaid the loan, the *areiv* would not be required to pay (see C.M. 129:15 and *Shach* 32). To forestall that possibility, the loan document should state that the loan is being granted on condition that the lender will be believed if he claims that the loan has not been repaid (*ibid.* 129:13).

If an *areiv stam* paid off a loan he wasn't required to repay, there is a dispute among the *poskim* whether he can collect from the borrower or his heirs. He should therefore not pay off the loan until he secures a promise from the borrower or his heirs that they will later repay him (*ibid.* 130:2).

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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