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לע"נ ר׳ בניהו בן ר׳ יהושע ע"ה, ר׳ שמואל בן ר׳ בנימין ע"ה

CASE FILE

Rabbi Meir Orlian
Writer for the Business Halacha Institute

לע"נ הרב אהרן בן הרב גדליהו ע"ה

REMOTE NON-COMPETE

Mr. Wilner worked for an accounting firm that had branches around the tri-state area. When accepting the job, he had signed a non-compete agreement that limited him from working for a competitor within a 50-mile radius of his "company workplace" for two years after leaving the company.

Mr. Wilner was assigned to an office in Manhattan, but was allowed to work at home twice a week. During the COVID period, much of his work shifted to remote, and he now worked mostly from home.

After eight years with the firm, Mr. Wilner decided to leave. He was offered a new position by a firm on Long Island that allowed him to continue working remotely from home. The new firm was more than 50 miles from his Manhattan office, but only 25 miles from his house.

"I'm concerned about the non-compete," Mr. Wilner said to his wife.

"What's the problem?" asked Mrs. Wilner. "The new firm is more than 50 miles from your Manhattan office."

"The question is: From where to measure?" replied Mr. Wilner. "As you know, I have been working mostly from home recently; even initially I was allowed to work twice a week from home. Is the house considered a workplace? I plan to continue working at home!

"Moreover, the previous firm has a branch in Long Island," added Mr. Wilner, "not far from the new firm. Do I measure from the Manhattan office, or also from the company's other branches?"

"Perhaps consult with Rabbi Dayan," suggested Mrs. Wilner.

Mr. Wilner called Rabbi Dayan, and asked:

"Is the new position in compliance with the non-compete stipulation?"

"The degree to which non-competes are halachically binding depends on their nature, so that the entire agreement must be examined, but usually a person should strive to uphold it," replied Rabbi Dayan. "Regardless, when there is ambiguity in a document, various factors need to be considered.

"One relevant factor is that expressed by the *Rivash* (#207), cited by *Darchei Moshe* (42:3**) and *Sma* (42:28), that we follow the normal usage of language by people in that locale. This follows the *gemara* in *Nedarim* (49a) that says, regarding interpretation of *nedarim* – vows, we follow the normal usage of language. *Rivash* extends this to interpretation of contracts and documents.

"The normal use of 'company' or 'workplace' indicates an office, not one's home, even if the employee typically works remotely. Thus, the

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.

BHI HOTLINE

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

CONTRACTOR CONFUSION

Q: A homeowner hired me as the contractor to renovate his home, using a cost-plus agreement: he would pay for all the building materials and whatever the subcontractors I hired would charge, plus a certain percentage of those prices as a fee for my overseeing the work.

When we drew up the contract, there were two different parts of the job for which I planned to bring in a specific subcontractor. One was demolishing and removing concrete. The second, which the client was not certain he actually wanted to do, was to excavate about two feet to make his basement more inhabitable. If we were to do the excavation, we would first have to tear out all the old pipes. The subcontractor I hired was able to do both the plumbing and removing the concrete.

Unfortunately, I forgot to wait for the client to decide whether he wanted to excavate the basement, and I instructed the subcontractor to rip out the pipes in preparation for the excavation. Then the client told me that he decided not to excavate the basement — and I obviously can't request payment for the subcontractor removing the pipes and reinstalling them.

At an earlier stage, the subcontractor decided that he would forgo payment for removing the concrete, but I have not mentioned that to the client, and he already paid me for that work.

My question is: Am I required to tell the homeowner that the subcontractor decided not to charge for removing the concrete, in which case I will absorb the full loss for the removal and reinstallation of the pipes, or, can I keep the money he paid me, thereby recovering the loss, since the prices are identical?

A: The crux of your question is whether the subcontractor's stating that he won't charge for the concrete removal absolved the homeowner of payment, in which case you may not charge at all for it, because in a cost-plus arrangement, when there was no cost, you can't charge for the "plus."

Before answering your *she'eilah*, we must provide some background information about how *mechilah* (forgoing payment) works.

CASE FILE

requirement to distance a certain radius should be measured from the company's office, primarily where you were assigned, even if you worked from home.

"Furthermore, even if the company has numerous offices in the area, so that perhaps one could interpret the term to mean that the competitor must be 50 miles from any office, this brings us to a second principle, that of *yad baal hashtar al hatachtonah* – that one who claims based on a document has the weaker hand to force the obligating party, unless expressly stated otherwise (*C.M.* 42:5).

"This is because without the non-compete there is no limitation on the former employee. The employer who wants to limit the employee's right to work based on his commitment through the non-compete can limit him only from what the non-compete clearly includes.

"Thus, if there is doubt about what the agreement includes, such as whether to measure from the employee's particular office or from any office, the employer has the weaker hand; we interpret it in the manner curtailing the former employee less.

"This provides a halachic perspective, but is not intended as legal advice," concluded Rabbi Dayan. "It is wise to consult a lawyer, since judicial rulings regarding non-competes vary from state to state, depend on the precise language of the agreement, and are subject to the discretion of the particular judge."

Verdict: Two halachic principles in interpreting contracts are that we follow normal language usage in that locale, and that *yad baal hashtar al hatachtonah* – the one claiming based on the document has the weaker hand. Thus, the radius of the non-compete is measured from the company's office to which the employee was assigned, not his home, even if he works remotely, nor from other offices.

MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS
***Dayanim* (Judges) #32**
Legal Expenses When Vindicated

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

Q: When the defendant initially refused to adjudicate, and the plaintiff incurred legal expenses to force him to beis din – if the defendant was ultimately vindicated, is he responsible for those legal expenses?

A: *Sma* (14:27) derives from the *Rivash* (#475) that the defendant is exempt in this case, even though he initially refused to adjudicate. However, *V'shav Hakohen* (#99) maintains that the defendant is liable for the expenses ensuing from his refusal, regardless, unless he provides sufficient justification for it.

Several *Acharonim* distinguish that if the plaintiff claimed falsely (e.g., in the hope of forcing the defendant to settle with him), the defendant is exempt from the plaintiff's legal expenses. However, if the plaintiff thought in good faith that the defendant owes him, the defendant must pay the legal expenses ensuing from his refusal, since he should not have caused the plaintiff those expenses by refusing. The determination of the plaintiff's intent is subject to the understanding of the *Dayanim* (*Tumim* 14:4; *Pischei Teshuvah* 14:12; *Aruch Hashulchan* 14:10, *Pischei Choshen*, *Nezikin* 3:[67]).

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First of all, *mechilah* does not require a *kinyan* (formalizing act); if someone states that he is willing to forgo payment, he may not renege on that statement (*Shulchan Aruch, C.M.* 12:8; 241:2).

Furthermore, if a person made a firm decision, in his mind, to forgo payment owed to him, his decision might be binding even if he never expressed it to the client. This may depend on when he made that decision.

If he made the decision *before* he did the work, then the client was never obligated to pay that money, and the labor the worker did is deemed a gift (*Nesivos* 52:5).

In such a case, even if the homeowner offers to pay, the worker must inform him that he planned to do this part of the job as a gift. If the client nevertheless wants to pay, that payment is considered a gift.

If he failed to inform the client that he planned to forgo payment and the client pays him, that money is considered stolen, because the client paid him only because he thought he was obligated to pay (*Pischei Choshen, Sechirus* ch. 8, fn. 65).

If the worker decided to forgo payment only *after* he did the work there is a dispute among the *poskim* regarding the *halachah*, based on whether *mechilah b'lev* (forgoing in one's heart) is considered a full *mechilah* from which the person may not renege, or whether *mechilah* is binding only if it was expressed verbally to the client (see *Ketzos Hachoshen* 12:1 and *Nesivos* 12:5).

According to the *poskim* who rule that *mechilah b'lev* is a full *mechilah*, the subcontractor's decision to forgo payment for the concrete removal was binding even though the homeowner never knew about it, and you therefore have no right to accept payment for it.

But even according to the *poskim* who say that *mechilah b'lev* is not a full *mechilah*, we must still consider whether the subcontractor's informing *you* of his intention renders that *mechilah* binding even though the client didn't know about it.

The *poskim* (*Pischei Teshuvah* 241:1; *Mishpat Shalom* 209; *Mishmeres Shalom* 21, based on *Shach, Yoreh De'ah* 173:8) debate whether a *mechilah* that is expressed in the presence of someone other than the client is binding.

Some say that this hinges on a dispute among *Rishonim* regarding how *mechilah* works. *Tosafos* (*Kiddushin* 19a, s.v. *Omer*) write that *mechilah* removes a lien, of sorts, that a person had on money that was owed to him. Therefore, *mechilah* works even if it is not expressed in the presence of the person who owes the money. The *Ritva* (ibid. 16a) writes that *mechilah* is a form of *kinyan*, and it therefore works only if it was expressed in the presence of the person who owed the money (*Erech Hashulchan* 12:5, cited in *Divrei Geonim* 57:1. See also *Machneh Efraim, Zechiyah Mehefker* 11 and *Aruch Hashulchan, C.M.* 241:4).

The predominant opinion among the *poskim* (see *Pischei Choshen* ch. 12, fn. 8) is, however, that *mechilah* is binding even if it was not expressed in the presence of the person who owed the money and he never heard about it. Certainly in your case, where the subcontractor expressed his *mechilah* to you, all *poskim* might consider it binding, even if you never told the client about it. You must therefore return the money he paid for the concrete work.

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