

# 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

## OPPOSING CLAIMS

Reuven had lent Shimon \$5,000 two years ago. Reuven asked him to pay numerous times, but Shimon brushed him off time after time. Finally, Reuven sued Shimon in *beis din* for the \$5,000.

On the day of the hearing, Shimon came half-an-hour before the appointed time. He submitted an opposing claim against

Reuven for work he had done last year, suing him \$8,000 for labor and parts.

The two then entered the session before Rabbi Dayan about Reuven's claim.

"Shimon owes me \$5,000," Reuven claimed, "money that I lent him."

"What do you have to say about the loan?" Rabbi Dayan asked Shimon.

"That Reuven is not honest..." replied Shimon.

"Do you have any evidence of the loan?" Rabbi Dayan asked Reuven.

"I have a formal loan document, signed by witnesses and notarized," replied Reuven. He presented the loan document.

"Reuven has clear evidence of the loan," Rabbi Dayan said to Shimon. "Did you ever repay the loan?"

"No, I didn't repay it," said Shimon.

"Then you have to pay," declared Rabbi Dayan.

"Well, I did work for him worth \$8,000," argued Shimon. "He owes me for that! Although I owe him, he owes me more!"

"Do you have evidence?" Rabbi Dayan asked Shimon.

"No, we never drafted a contract," replied Shimon, "but Reuven knows that I worked for him."

"What do you claim about the work?" Rabbi Dayan asked Reuven.

"I remember that we discussed the possibility of his doing work," replied Reuven, "but I don't remember whether Shimon ended up doing it."

"If you have no evidence," Rabbi Dayan said to Shimon, "and Reuven claims that maybe you never did the work, we cannot require him to pay."

"That does not seem fair," Shimon said. He asked Rabbi Dayan:

**"Why did you rule in each case as you did? Furthermore, should we not look at the two cases together?"**

"Regarding your claim of work for Reuven," replied Rabbi Dayan, "when the plaintiff does not have evidence and the defendant questions whether he owed in the first place — the defendant is exempt, based on the rule of *hamotzi mei'chaveiro alav hareaya* (the burden of proof is on the



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

## OVERPRICED REALTOR (PART II)

Q: I engaged the services of a realtor to help me buy a house. He told me that since a particular seller had his own realtor, he would get paid only by me, so he

would have to charge me a higher fee for the deal. I was in a rush when he told me this, so I agreed to the fee without looking into whether the amount he was asking was fair.

When I actually bought the house, he charged me 3% of the sale price, and told me that the balance would be due later.

I now found out that the total he charged me is way above the standard realtor's fee.

Am I required to pay him the balance?

**A:** In the previous issue, we determined that the concept of *hashta'ah* (absolving yourself by claiming that you were joking when you committed to pay a higher fee) does not apply to your case, because you clearly were not joking when you agreed to pay the real estate agent's higher fee.

We now move onto another possible reason that you might not be obligated to pay: *ona'ah* (exploitation).

The Torah (*Vayikra* 25:14) forbids taking advantage of another person by overcharging him when selling him an object. *Chazal* set limits on how much the seller would have to overcharge in order for the buyer to demand a refund of the difference between the sale price and the actual value, and how much the difference would have to be in order for him to void the sale (see *Shulchan Aruch Choshen Mishpat* 227:1-4, as explained in *BHI* #606).

*Chazal* derived from a *passuk* that *ona'ah* does not apply to real estate or an *eved* (slave). This doesn't mean that the seller is allowed to overcharge for them; it means that the buyer may not demand a refund or void the sale if he was overcharged (*Pis'chei Teshuvah* 227:29). The *Poskim* deliberate whether there might be *ona'ah* even in these cases if the seller overcharged by 50% or more.

There are two types of work arrangements: a *poel* and a *kablan*. The *Poskim* deliberate what the difference between them is. Some say that a *poel* gets paid by

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## CASE FILE

plaintiff (C.M. 75:10).

“On the other hand, regarding Reuven’s loan to you, when the lender holds a formal loan document, the borrower is not believed that he repaid without evidence. Nonetheless, if the borrower were to claim definitively that he already repaid, he can demand an oath from the lender before paying now. Therefore, if the lender is unsure whether he was repaid, he cannot collect with his document against the borrower’s definitive claim, since the lender cannot swear. (C.M. 82:2)

“However, you don’t claim that you repaid the loan, even though you have an opposing claim that you worked for Reuven.

“Indeed, if we were to view the two cases as one and view your supposed work for Reuven as payment of his loan, you could then demand an oath of Reuven; since he is unsure, he could not swear and collect.

“However, *Ketzos* (59:2) and *Nesivos* (59:1) rule that when each claim is presented independently, and you never indicated that your claim of work for Reuven is considered as payment of his loan to you, we rule each case independent of the ruling in the other case. This is the principle of *zeh goveh v’zeh goveh* — each one collects separately (*Kesubos* 110a; C.M. 85:3).

“Thus,” concluded Rabbi Dayan, “since Reuven questions whether you ever did work for him, he is exempt. On the other hand, since you never claimed that you repaid the debt to Reuven, you are liable to pay. We do not say that since Reuven is unsure whether you worked, it is like he is unsure whether his loan was repaid, in which case he could not collect.”

**Verdict: When two litigants submit opposing claims and do not indicate that they want their claim to be considered as payment towards the other’s claim, we rule each case independently.**



## MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

## MONEY MATTERS Minhag Hamedinah

Common Commercial Practice #3  
Communal Regulations

לע"נ ר' יחיאל מיכל ב"ר חיים זוגו' ח'ל' בת ר' שמואל חיים ע"ה

### Q: What status do communal regulations have as minhag hamedinah?

A: The *Poskim* attribute special significance and authority to communal regulations regarding taxes and other essential communal matters, even if these regulations deviate from Torah law. *Terumas Hadeshen* (#342) explains that if every case were subject to halachic legislation, there would be constant strife in the community, so that the community members mutually forgo their halachic rights and accept the communal regulations that they establish (*Rema C.M.* 163:3).

He compares this to partners whose conditions and stipulations with each other are mutually binding even without a *kinyan* (*Rema* 176:3; C.M. 231:27-28).

This implies that communal regulations need to be established initially with the agreement of the entire community. However, Chazon Ish (B.B. 5:4) writes that the community has power equivalent to that of *beis din*, so that the consensus of the majority of the community suffices. Furthermore, the regulations are binding even if they are substandard, because this is still preferable to constant conflict.



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the hour, while a *kablan* is paid for the full job (*Shach* 333:20). Others say that a *poel* is a worker who must work at specific hours, while a *kablan* may choose which hours he does the work he agreed to do (*Sma* 227:59 & 66. See *Mishpitei Hachoshen* 333:21).

According to both opinions, a real estate agent is a *kablan*, because he gets paid for completing the sale, not an hourly wage, and he may also work whenever he chooses.

Because a *poel* and an *eved* are similar in that both must work when the boss demands that they work, *ona'ah* does not apply to a *poel* who overcharged for his work (*Choshen Mishpat* 227:33). But a *kablan* is similar to a seller because he “sells” his work. The *Shulchan Aruch* (227:36) therefore rules that *ona'ah* does apply to a *kablan*. But some *Poskim* rule that *ona'ah* does not apply to a *kablan* either (see *Chiddushei R' Akiva Eiger* *ibid.*, in the name of *Ramban* and *Rashba*).

Some say that *ona'ah* will apply only to a *kablan* who produces something new, such as a tailor hired to sew a suit, because that is similar to a sale, where *ona'ah* applies. But if he is not producing an object — such as in the case of a *shadchan* — his service is dissimilar to a sale, so *ona'ah* does not apply (*Shut Maharit, Choshen Misphat* 19). But many *Poskim* disagree with this distinction (see *Terumas Hadeshen* 318; *Machaneh Ephraim* on *Rambam, Mechirah* 13:18; *Shu"t Shvus Yaakov* 3:157).

Returning to your case, because a real estate agent is a *kablan*, according to the *Shulchan Aruch*, *ona'ah* applies to him; therefore you are not obligated to pay the remainder of the fee he demanded. Although the *Maharit* limited the *halachah* of *ona'ah* to a *kablan* who produces something concrete, and the real estate agent did not do that, we can rely on the *Poskim* who do not limit *ona'ah* to that type of *kablan*, so you do not have to pay the rest of the fee. If, however, you already paid, you may not demand that he return the additional fee, because he can rely on the *Maharit's* position and on the opinion that even a *kablan* is exempt from *ona'ah*.

(Although we mentioned earlier that *ona'ah* does not apply to real estate, that pertains only to the sale of a property [and perhaps to work done on a property (*Choshen Mishpat* 227:34)], not to the work of a real estate agent arranging such a sale.)

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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