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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

GUARANTOR LIABILITY

Mr. Samuel had retired years ago with minimal savings. Unfortunately, he had no family to help support him, and sustained himself meagerly from tzedakah that he collected.

When collecting was slow, Mr. Samuel would ask his neighbor Mr. Judah for small loans, which he usually repaid several months later when collecting picked up. One of Mr. Samuel's friends, Mr. Weiss, graciously agreed to serve as guarantor for these loans.

One loan of $750 was already long overdue. "I'm aware of the $750 debt," Mr. Samuel acknowledged in a message to Mr. Judah. "I'm trying to raise money for it."

A few months later, Mr. Samuel passed away, leaving minimal assets that were quickly claimed by the bank and other creditors.

Mr. Judah turned to Mr. Weiss to pay the $750 loan, and a more recent, but overdue, $250 loan.

"Maybe Mr. Samuel repaid you?" asked Mr. Weiss. "Do you have proof that he didn't repay?"

"Because the sums were small, we didn't draft loan documents," replied Mr. Judah. "We relied on text messages when I lent him, and when he repaid I would text a confirmation message. I'm sure, though, that Mr. Samuel did not repay. I can show you that there is no confirmation of paying."

"That doesn't prove much," replied Mr. Weiss. "Maybe you simply forgot or neglected to send him a message."

"Very unlikely," replied Mr. Judah. "Anyway, regarding the $750 loan, I even have a message from three months ago that the loan is overdue and outstanding."

"He could have paid meanwhile," said Mr. Weiss.

"He didn't," replied Mr. Judah.

The two came before Rabbi Dayan. Mr. Judah asked:

"Is Mr. Weiss liable to pay the two loans?"

"Regarding a loan without official documentation, i.e., before witnesses or with an informal IOU, the borrower is believed (with a light, *heses*, oath) that he repaid," replied Rabbi Dayan. "However, if he is unsure whether he repaid

BHI HOTLINE

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

FINDER SHLEPPER?

Q: I found an object that had a name and phone number on it. I called the owner, and he said that I should bring it to him, because that would be a complete fulfillment of the mitzvah of hashavas aveidah. Am I actually required to bring it to him, or can I ask him to collect it from me?

A: Both a *gazlan* (thief) and a *shomer* (guardian) are obligated to return an object to its owner. Some *poskim* differentiate between the two obligations, however. A *gazlan*, about whom the Torah states, "*veheishiv,* he shall return the object," is obligated to bring the stolen item to the owner. A *shomer*, on the other hand, whom the Torah does not command to return the object entrusted to him, is merely required to relinquish the object to its owner upon request, so he may tell the owner to come and retrieve it at his convenience (see *Ketzos* 198:5, 340:4, among other places, but cf. *Nesivos* 86:1 and 340:3).

The *Acharonim* discuss whether a person who is obligated to perform *hashavas aveidah* is comparable in this regard to a *gazlan* or a *shomer*.

Some say that since the Torah states *hasheiv teshiveim* (similar to the verb *veheishiv* stated regarding a *gazlan*), the *mitzvah* is to bring the object to the owner (*Imrei HaTzvi, Bava Kamma* 57a, 8:3).

Other *Acharonim* write, however, that the finder of an *aveidah* generally has more exemptions on how he can return the object he found than a typical *shomer* (*Choshen Mishpat* 267:1 with *Sma* 1), and it is therefore enough for him to simply inform the owner that the object is available for him to retrieve at his convenience. The act of informing the owner where the lost object is — which he had not known until that point — is a fulfillment of the *mitzvah* of *hashavas aveidah*, since the object is no longer lost. Furthermore, even according to the opinions that a *shomer aveidah* is a *shomer sachar* and is liable for theft (*Choshen Mishpat* 267:16), if a reasonable amount of time passes and the owner does not retrieve the object, the finder is no longer responsible for safeguarding it beyond the level of a *shomer chinam*, which means that he would be liable only for negligence in guarding it (see *Shaarei Ziv, Nezikin* 13; *Dibros Moshe, Bava Metzia* 31:53; *Pis'chei Choshen, Aveidah* 7:2; *Chazon Ish, Choshen Mishpat* 5:16, among others).

In truth, even the *poskim* who compare the finder to a *gazlan* due to the obligation of *hasheiv teshiveim,* acknowledge that

— *aini yodea im prasicha* — he is liable" (*C.M.* 75:9).

"However, if the guarantor is unsure whether the borrower repaid — he is not liable. Only if the borrower admitted that he did not repay, but is unable to pay or no longer present, is the guarantor liable (*C.M.* 129:12).

The *Acharonim* discuss why the guarantor is liable on account of the borrower's admission. After all, we do not rely on his admission to collect from property that the borrower sold to others.

"*Ketzos* (39:5) explains that because the guarantor accepted a clear liability, when he does not know whether the loan was repaid he remains liable, as *aini yodea im prasicha*, even if we are suspect of the borrower's admission (*C.M.* 75:9).

According to this approach, we need to explain that the guarantor is not liable when the borrower does not admit because then we claim (*ta'ninan*) on behalf of the borrower who is not present that perhaps he repaid and is exempt. Hence, the guarantor is also exempt, even though he does not know whether the obligation was settled (*Gra* 129:39).

Bach (129:15), however, maintains that a regular guarantor (as opposed to a *kablan* guarantor) does not have a clear liability, and is considered *aini yodea im nischayavti*, because he is liable only if the borrower didn't pay.

Furthermore, *Kovetz Shiurim* (*B.B.* #654) maintains that we claim on behalf of the guarantor, as we do on behalf of a buyer. If so, the question returns, why do we hold the guarantor liable when the borrower admits?

Nesivos (39:10) and *Kovetz Shiurim* explain, instead, that the guarantor initially commits and accepts liability whenever the borrower is liable, even based on his own admission, and even if in truth the borrower could have exempted himself or was exempt.

Responsa Veshav Hakohen (#42) adds that even if some time passed after the borrower admitted, and perhaps he paid in the interim, the guarantor remains liable. Because the borrower is already held liable, based on his admission, the guarantor is also liable (*Pischei Teshuvah* 129:9).

"Thus," concluded Rabbi Dayan, "Mr. Weiss is halachically liable to pay the $750 loan that Mr. Judah admitted, but not the $250 loan, unless he trusts Mr. Judah."

Verdict: For an undocumented loan, the guarantor is liable when the borrower admits that the loan is unpaid, but not liable if there is no such admission and the borrower is not present.■

MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS
Yei'ush – Abandonment
#12
Personnel

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

Q: I found something in a mall where most customers are Jewish, but the vast majority of personnel are gentile. Can I presume the owner's yei'ush?

A: Although we previously mentioned that we follow the majority of people who pass through, whether Jewish or gentile, when there are regular workers present in a consistent manner, we follow them rather than the passersby (see *Rema C.M.* 259:8).

Thus, in a place that the workers are Jewish, we do not presume that the owner has *yei'ush*, even if the overall area is gentile. Conversely, in a place where gentile workers are present consistently, we presume *yei'ush* even if most people going in and out are Jewish.

Thus, in a public place such as a wedding hall, hotel, or mall, even where most people going in and out are Jewish, if the regular personnel who would find lost items are mostly gentile, we presume *yei'ush* if reasonable to assume that the owner was aware of the loss.

[If there are surveillance cameras, so that the workers are afraid to take something not theirs, perhaps the *halachah* would be different.]

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the matter is the subject of a dispute. The *Shulchan Aruch* (*Choshen Mishpat* 367:1) states that someone who stole something and wants to return it, is not obligated to bring it to the owner; he is allowed to inform him that he has it and may hold onto it until he comes to retrieve it. Only someone who swore falsely that he did not steal is obligated to seek out the owner of the stolen property and return it. But someone who stole and did not swear falsely, only needs to notify the owner (see *Rema* ibid., *Shach* 3 and *Ketzos* 1) and may hold onto the item until the owner retrieves it.

The reason a *gazlan* is not obligated to bring the stolen object to the owner is a matter of dispute. Some write that the *chachamim* made a decree (*takanas hashavim*) allowing him to wait until the owner comes to him out of fear that if he were required to track down the owner, he might decide not to return it altogether (*Sma* ibid. 1&4).

Because that *takanah* does not apply to a case of *hashavas aveidah* (*Nesivos* 232:10), it is possible that the finder of a lost object is required to bring it to its owner.

Others write, however, that even without a *takanah,* a *gazlan* is not obligated to bring the stolen object to the owner, even *latzeis yedei Shamayim* (to avoid judgment in Heaven; *Shach* ibid. 1; cf. *Nesivos* 76:10). According to this approach, the finder of a lost object is obviously not required to bring it to the owner even when *hashavas aveidah* is compared to a *gazlan*.

Returning to your question, based on the above, contemporary Acharonim rule that you are not obligated to bring the object you found back to its owner (see Dinei Mishpat 1, pp. 408-409), but it would be a mitzvah of gemilus chassadim to do so.n