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STORYLINE

the missing gift

By Rabbi Meir Orlian

Halacha Writer for the Business Halacha Institute

"Do you realize that it's Shaindy's 30th birthday in a month?" Sara said to Penina. "It's amazing how time flies."

"I would like to get her something special," Penina said. "It's not common that high-school friends are close for so long. We still talk on the phone once a week."

"Great idea," said Sara. "We should also include Bracha. She was her closest neighbor before Shaindy moved away."

"What should we get?" asked Penina.

"I know!" Sara's face lit up. "My neighbor, Mrs. Saffer, makes jewelry. We can choose a necklace for Shaindy."

"Fantastic!" exclaimed Penina. "I'll call Bracha and ask her if she's okay with the idea." The following day, Penina met Sara outside in the park. "I spoke with Bracha and she was eager to participate in the gift. She also

offered to deliver the necklace to Shaindy." The next day, Sara and Penina bought a necklace from Mrs. Saffer. "Shaindy will love it," Sara said. "It's just her taste!"

"I'll give Bracha the necklace next week," said Penina, "so that she can deliver it to Shaindy."

Penina brought the necklace over to Bracha. "It's lovely," said Bracha. "I'll make sure it gets to Shaindy in time for her birthday."

A few weeks later, Sara and Penina were talking. "It's strange," Sara said. "Shaindy never said anything to me about the necklace."

"I know," Penina replied. "I also heard nothing. I finally asked Shaindy if she received the necklace, and she said that she hadn't. I'll ask Bracha what happened."

"I sent the gift with my neighbor, who works with Shaindy," Bracha said. "I'll call her."

Bracha called her neighbor. "Did you ever give that necklace to Shaindy?" she asked.

"I remember that you asked me about bringing it to her," answered her friend, "but you never ended up giving it to me."

Bracha called Penina back. "Somehow, my neighbor doesn't recall that I gave her the necklace to deliver to Shaindy," she said. "It seems there was a mix-up."

Penina called Sara. "Bad news," she said. "Bracha says that she gave the necklace to her neighbor, who works with Shaindy, but the neighbor claims that she never received it."

"What do we do now?" asked Sara. "That necklace cost a lot of money! Bracha was supposed to get it to her."

"I agree," replied Penina. "But she says that she sent it to Shaindy with her neighbor."

"Well, then, it's her neighbor's fault," said

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FROM THE BHI HOTLINE

Submitted by
R. L.

let's make a deal

Yehuda owed me a significant sum of money, but he had many counterclaims. We compromised on a percentage of the amount I claimed and put our dispute to rest.

Q: Is our oral agreement sufficient, or is a kinyan (halachic acquisition) necessary for the negotiation to be binding?

A: The main issue involved in your question is whether a verbal commitment is binding

without a kinyan. Generally, a transfer of one's possessions or rights requires a kinyan. The exception to that rule is mechila (forgiving a debt), which does not require a kinyan (C.M. 12:8, 241:2). The reason is that the one forgiving the debt isn't transferring anything; he is merely forgiving the debt and lien he had on the debtor, whereas the transfer of ownership requires a kinyan.

A mutual compromise raises an interesting question in that it contains two parts:

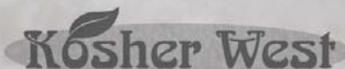
the amount the claimant forgoes from his claim, and what the defendant agrees to pay. Based on the principles stated earlier, some rule that the part the claimant forgoes does not require a kinyan, while the amount that the defendant agrees to pay does require a kinyan (see Nesivos 12:4). Others suggest that although a kinyan is generally necessary for a commitment to be binding, the mutual agreement between the claimant and the defendant in this case makes both of their

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Sara. "Maybe she lost it, or even worse..."

"I don't think Bracha would give the necklace to someone who would steal it," said Penina. "But her neighbor said that she doesn't recall getting the necklace. It's very strange."

"Someone's got to take responsibility for the necklace," said Sara. "The question is: Who?"

"Maybe Rabbi Dayan can help," suggested Penina. "My husband will ask if we can meet with him in his house."

They all met with Rabbi Dayan. Penina related what happened and asked, "Who is responsible for the missing necklace?"

"If Bracha informed you and Sara that she was going to send the necklace with someone," said Rabbi Dayan, "she is not responsible for it, since she followed the arrangement and you trusted that her neighbor was reliable (C.M. 176:10)."

"What about the neighbor?" asked Sara.

"The neighbor is also not held responsible," said Rabbi Dayan, "since she denies ever having received the necklace (121:8)."

"I have to acknowledge," Bra-

cha said with a sigh, "that I never told Sara and Penina that I was going to deliver the necklace through my neighbor."

"In that case, you are responsible for the necklace if you cannot ascertain what happened to it," said Rabbi Dayan. "A person or partner who is entrusted with an item, and certainly one who is asked to deliver it, should not give it over to another, unless the other person is implicitly trusted by the owners. If she does, she carries liability if the item is lost (291:26; Pischei Choshen, Pikadon 4:ftnt. 8)."

"And if we had trusted the neighbor?" asked Penina.

"Bracha is responsible for the necklace in our case even if you had trusted her neighbor," concluded Rabbi, "since Bracha cannot account for it and the neighbor denies having received it."

A week later, Bracha called Penina. "Guess what happened?" she exclaimed. "My cousin, who also works with Shaindy, returned the necklace to me. I forgot that I gave it to her instead and she didn't remember to whom she was supposed to give it!"

respective commitments binding. Here, the claimant's agreement to forgo some of his claim is "payment" to the defendant, making the defendant's agreement to pay binding (Teshuvos Divrei Chaim C.M. Vol. 1 #4, and others).

A third approach takes the opposite perspective. Normally, a mechila is binding because it involves merely forgoing a debt and lien. When there is reason to assume that a claimant agreed to a compromise under duress, even mechila is not binding. This is similar to a case where the claimant agrees that Bais Din should have the authority to issue a compromise. He could later contend that the Bais Din misled him when they advised him to accept their compromise, and it is therefore necessary to confirm his commitment with a kinyan (C.M. 12:7, Sema 15, Shach 12). Similarly, only in a compromise where the claimant voluntarily agreed to forgo

some of his claims is there no need for a kinyan to validate his mechila. However, if the defendant has counterclaims and the claimant agreed to compromise after negotiating with the defendant, there is reason to suspect that the claimant compromised some of his claims due to concerns of the counterclaims. Therefore, although the claimant and defendant agreed to the compromise outside Bais Din, it is necessary that the claimant agree to forgo his claims with a kinyan (Avnei Tzedek Vol. 1 #2).

In summary, in your case, since the defendant had counterclaims against you, the validity of the compromise is subject to the previous dispute. As such, it is best to make a kinyan (C.M. 12:7) or to draw up a document that records each of your commitments and uses terminology that is binding according to all opinions (see C.M. 12:13 and Bais Shlomo #3).

Please contact our confidential hotline with your questions & comments
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MONEY MATTERS

borrowing and lending week #10

Q: I lent my neighbor money. He honestly does not have money to repay me, but he has a house, a car, furniture and clothing. Is he obligated to sell personal assets to repay the loan?

A: In principle, a person is required to repay his loan even from personal assets. Similarly, beis din can collect these assets or sell them to enforce payment.

However, the Torah teaches (regarding a person who pledged to the Temple) that we allow the person to retain a certain minimum amount for his own support. This is known in halacha as siddur nechasin. We allow a borrower, similarly, an amount to cover his own food for a month, clothing for a year, and basic household furniture. We also allow him to retain two of each of his professional tools. This would include

his car, if integral to his profession (C.M. 97:23).

A person is also obligated to sell his house in order to repay his loan, even if the loan is relatively small compared to the value of the house (Shach 97:14; Rama 104:3). However, if he can rent the house, he might not be required to sell it, but can repay from the rental income (Pischei Choshen, Halva'ah 2:22).

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