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UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

STORY LINE

By Rabbi Meir Orlian

PLAYING IT SAFE

Mr. Adler and Mr. Braun shared a small two-story building. The Adlers occupied the lower floor, and the Brauns lived on the second floor.

One evening Mr. Adler came up holding architectural plans. "I'm planning to add a room to my apartment," he said. "You can extend a room on top. Otherwise you might want to use the roof of the added room as a porch."

"We're not in a position to build on top," said Mr. Braun, "but the porch option sounds like a good idea. I assume this has to be factored in to the architectural planning."

"Of course," replied Mr. Adler. "I'll have to make a flat roof. Also, instead of simply waterproofing with tar paper, you would want a proper floor laid on the roof to be comfortable. It would then be perfect for a sukkah. I'll check with the contractor what the cost differential is."

Mr. Adler gave Mr. Braun a figure of the extra cost for building the roof so it could be used for a porch, which he agreed to pay.

After the construction was completed, Mr. Braun opened a doorway to the porch.

Mr. Braun then turned to Mr. Adler. "There is a mitzvah of maakeh, to build a guardrail around one's roof," he said. "I think it's your responsibility."

"The passuk refers to a roof that is used," objected Mr. Braun. "I don't use the roof at all and don't even have access to it! If anyone is responsible to build a maakeh, you are!"

"I don't think so," replied Mr. Adler. "The passuk clearly states: 'If you build a new house, you shall make a guardrail for your roof' (Devarim 22:8). It's your house, so you should be responsible to build the guardrail."

"Let's consult with Rabbi Dayan," suggested Mr. Adler. The two met with Rabbi Dayan and posed their question.

"A similar question was raised almost 500 years ago," Rabbi Dayan said. "Someone rented out the rights to his roof to another person for laundry and recreation. The Mabit, Rabi Moshe ben Trani, asked Rabi Yosef Karo, mechaber of the Shulchan Aruch, whether there was an obligation of maakeh, and if so, who is obligated" (Mabit 1:110).

"What did Rabi Yosef Karo answer?" asked Mr. Adler.

"His answer is somewhat unclear," replied Rabbi Dayan. "He answered that there would not seem to be an obligation of maakeh, since the obligation of maakeh is only on the roof

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PAYING EXORBITANT PRICES (1)

While preparing a dvar Torah in camp, I asked my bunkmates if anyone had a relevant story. Reuven offered to "sell" me a story for $100, insisting that I prepay him. I told him that I didn't have that amount of money in camp, but I would pay him after we returned. He agreed and "sold" me the story. Now that camp is over he contacted me to pay him.

Q: Since I wasn't really serious about paying that amount, am I obligated to pay him for the story he "sold" me?

A: Although you may have been desperate for a story, $100 is certainly an outrageous amount to pay for one. Therefore, even though if you had already paid for the story you would not be able to recover the money, since you did not pay yet it is likely that you are not obligated to pay him.

The Gemara presents variations of this question. In Bava Kama (116a) the Gemara discusses someone who is escaping from prison and offers a ferryman a large sum to transport him to the other side of the river. The Gemara's ruling is that the escapee can claim that he was not serious when he agreed to pay such a large sum (meshateh ani boch), and is only required to pay the regular fee. Elsewhere (Yevamos 106a) the Gemara rules that if a yavam demands a large sum to perform chalitzah, which will permit the yevamah to marry at will, she is not obligated to pay him that amount afterwards since she can also claim that she was not serious. A third example: a sick person who agrees to pay an inflated sum for medicine ultimately is not obligated to pay any more than the regular price (Y.D. 336:3).

A common denominator in these cases

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of a dwelling, and in this case no one lived there. He adds that if there is an obligation because of the apartment below, the tenant using the roof is obligated" (See B.M. 101b).

"What does this mean?" asked Mr. Adler.

"He takes for granted that the lower dweller has no obligation, even though it's his roof, since he has no use of it," explained Rabbi Dayan. "The only question relates to the upper dweller, who uses the roof. Some authorities understood that Rabi Karo remained in doubt whether there is need for a maakeh. (See Chasam Sofer OC.52, Y.D. 280; Chazon Ish C.M. Likutim 18:7.) Others, though, understood the conclusion of Rabi Yosef Karo to be correct: that the renter is obligated" (Knesses Hagedolah II C.M. 426:11).

"Thus, in our case, the upper dweller would have to build a maakeh, since there is a safek d'Oraisa," added Rabbi Dayan. "Moreover, even if there is not an actual obligation of maakeh, the mitzvah is extended to remove any potential danger (C.M. 426:7-8). If it is not a definitive mitzvah, though, there is no brachah on building the guardrail."

"Our case is not exactly a renter," noted Mr. Adler. "We agreed that Mr. Braun owns the porch."

"That is a valid point," replied Rabbi Dayan. "Some contemporary authorities write that even if a renter is exempt, where the upper dweller owns the roof porch he is certainly obligated in maakeh and needs to make a brachah."

"Who would make a brachah, anyway, considering that the contractor building the guardrail is not Jewish?" asked Mr. Adler.

"Let's leave that for our next discussion," concluded Rabbi Dayan.

MONEY MATTERS

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Q: Can I copy a book that is no longer in print? What about an older version of a computer program that is not sold anymore?

A: If the product is not available, it would seem that there is no concern of hasagas gevul (encroachment). Furthermore, even according to the opinion that halachah recognizes ownership of intangible intellectual property, the creator might not mind copying here; it would be like yei'ush and aveidah midaas (willful abandonment).

On the other hand, if the product is available in a newer version, the old content remains in the new version with additional features. Therefore Harav Y.S. Elyashiv, zt"l, does not allow copying the older version. It also continues to be prohibited based on dina d'malchusa.

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(See Emek Hamishpat, Zechuyos Yotzrim, Intro. 3:38-40:5-9; ch. 35:200.)

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is that the one providing the service is performing a mitzvah. Some Rishonim maintain that the claim of meshateh ani boch is acceptable only when the provider was performing a mitzvah; in a case in which the provider was not fulfilling a mitzvah, the claim meshateh ani boch is not accepted and the customer must pay the agreed-upon amount.

The Shulchan Aruch (C.M. 264:7) applies this principle even to a shadchan who demands an unreasonable payment for a successful shidduch. Some contend that a shadchan also performs a mitzvah, and thus the principle may remain limited to services that involve a mitzvah (Maharib"l 1:100). Others disagree, maintaining that even when the service is unrelated to a mitzvah, as long as the service has a set fee and the customer is compelled to pay an unreasonable amount due to his desperation (according to Nesivos this is when the provider charges at least 1/6 more than his regular fee), the agreement is void (Shach 246:14, Rema 129:22).

Furthermore, it is permitted to commit to pay the exorbitant fee with the intent to later claim meshateh ani bach. Since the provider is out to exploit the customer's desperate circumstance, the amount that he is charging violates the prohibition of onaah (overcharging more than 1/6 over the market range). Although wages are excluded from the parashah of onaah, that exclusion is limited to recovering funds that were already paid or canceling the transaction altogether; however, the prohibition still applies (Nesivos 264:8 as explained by Imrei Yosher 1:91).

The above holds true as long as the customer did not yet pay; if the customer already paid the exorbitant amount, he cannot demand a refund (C.M. 264:8 and Ketzos 227:1).

For questions on monetary matters,
Please contact our confidential hotline at 877.845.8455
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