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Restoring the primacy of choshen mishpat

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UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

STORY LINE

By Rabbi Meir Orlian

LARGER THAN LIFE

Yoram Stein was moving and put up his house for sale. Mr. Rubin arranged to come see it.

Yoram took Mr. Rubin around the house, showing him each room.

"How large is the house?" he asked.

"The original house was 2,000 square feet," Yoram replied. "We added three rooms with another 600 square feet."

"Which rooms?" Mr. Rubin asked.

"We extended the east side," Yoram said. "These are the additional rooms."

"We are seriously considering buying," Mr. Rubin said, after seeing the house. "We will be in touch after Shabbos, iy"H."

The Rubins decided to purchase the house, and after some bargaining the sides signed a purchase agreement for $300,000 and set a date for the closing.

At the closing, Mr. Rubin said: "I discovered that the additional rooms are not 600 square feet, only 500. I'm not willing to pay more than $275,000 for the house."

"But we agreed on the price of $300,000," objected Yoram. "You saw the rooms and knew exactly what you were getting."

"But you misled me," argued Mr. Rubin. "You told me that the total area is 2,600 and it's smaller than that."

"You had ample time to verify that," said Yoram. "You can't raise the issue now. I made a mistake. I didn't remember clearly."

They decided to consult Rabbi Dayan.

"Yoram overstated the size of his house," said Mr. Rubin. "What recourse do I have? Can I deduct from the purchase price?"

"The answer depends on the terms of the purchase agreement and local custom," replied Rabbi Dayan. "The Mishnah and Gemara (B.B. 103b–107b) differentiate between various formulations of sales agreements."

"What, for example?" asked Yoram.

"If a person sold a property middah b'chevel (as measured), any discrepancy must be made up or refunded," explained Rabbi Dayan. "If he said, 'hein chaser hein yaser — more or less, approximately,' or simply mentioned the size and the buyer saw the property, a variance of 1/24 (4%) is considered acceptable;

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CANCELLATION

I scheduled a carpenter to come to my house to build some cabinets and shelves, and we agreed on a price. Before the scheduled date I found a handyman who charged less. I forgot to contact the first carpenter to cancel and he came on the scheduled date and wants to be paid in full what I was going to pay him.

Q: Am I obligated to pay his claim? Would there be a difference if I had called in advance and canceled?

A: Generally, canceling a scheduled service call involves the issue of mechusar amanah — not keeping one's word. In a circumstance in which the worker assumes that he will perform the scheduled job, the homeowner violates the prohibition of mechusar amanah. The one exception is if circumstances change, e.g., if someone who charges less has an unexpected opening, in which case, according to some Poskim, one may cancel the scheduled worker (C.M. 204:11). When canceling violates the prohibition of mechusar amanah, one must appease the worker for canceling (Kesef Hakodashim). Even when mechusar amanah is not applicable, the worker may bear resentment (tar'omes) toward the homeowner for canceling (C.M. 333:1, Sma 333:1).

Whether the homeowner is liable for the cancellation and what amount he must pay is subject to numerous factors. We will first address the question that arises when the homeowner cancels after the worker started the job or even just traveled to the work site.

If the carpenter can find another job (and could not have done both jobs simultaneously [Nesivos 333:7]), the homeowner is not liable, unless the

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more than 1/24 must be made up or refunded. If he clearly demarcated the borders and the person saw the property, even a variance of 1/6 (16%) is considered acceptable. If the property was advertised and sold based on its size without the buyer seeing it, some maintain that any discrepancy is grounds to invalidate the sale, while others maintain that it is only grounds for a percentage refund" (see C.M. 218:7-15; Sma 218:27, 232:2; Pischei Choshen, Kinyanim 14:[141]).

"Shulchan Aruch concludes, however," added Rabbi Dayan, "that where there is a clear local custom and terminology, we follow that rather than these default rules" (C.M. 218:19).

"How would all this be applied nowadays?" asked Yoram.

"Nowadays, the size of the property is often not mentioned at all in the sales contract, or is mentioned as 'approximately,'" replied Rabbi Dayan. "Instead, the contract specifies the property's address and the buyer sees it. This could be comparable to demarcating the borders, so that even a variance of 16% would not be cause for claim. Of course, this does not allow the seller to mislead the buyer and exaggerate the size (C.M. 231:1, 18). Furthermore, the dimensions of the property are easily verifiable through a survey or property tax records. The common practice is to require due diligence on the part of the buyer. Many contracts even state 'as is,' at least if claims are not stated during the contingency period.

"Thus, size inaccuracy would rarely be basis for a claim nowadays," concluded Rabbi Dayan. "At best, the buyer might be entitled to a proportional adjustment of the cost."

MONEY MATTERS

Adapted from the writings of Harav Chaim Kohn, shlita

BEIS DIN AND CIVIL COURT #15

Mediation (ADR)

Q: Is mediation (Alternative Dispute Resolution) included in the prohibition against adjudicating in civil court?

A: Mediation (ADR), even with a gentile mediator, is not included in the prohibition, since the mediator is not authorized to issue a legal decision but rather guides the parties to mutual agreement. Therefore, when a person is sued in civil court he should prefer to settle through mediation rather than through a court ruling. Even so, court-ordered mediation is not ideal, since the mediation is initiated through filing a lawsuit and carried out under the shadow of a pending judicial trial.

Private mediation is certainly acceptable; it is even recommended to resolve the conflict through compromise. Although not required, the ideal is to seek a mediator who will try to guide the parties to a settlement close to Halachah (see C.M 12:1; Pischei Teshuvah 12:3).

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second job is worth less, in which case the homeowner would have to pay the difference (C.M. 333:2). If the second job does not involve the same exertion as the first job, the homeowner reduces the amount he owes the carpenter in proportion to the decreased exertion (Ketzos 333:4).

If the carpenter could have done both jobs, even if the homeowner had not canceled, or if the carpenter cannot find alternative employment, the homeowner must pay the carpenter the agreed amount (Nesivos ad loc.). The reason for this is that the commencement of a job is considered a kinyan for the employment agreement (see Nachal Yitzchak 39:17 for an explanation). Furthermore, even simply traveling to the work site is considered a kinyan for this purpose, and thus the homeowner is contractually obligated to pay the agreed-upon remuneration (see Avnei Nezer, C.M. 52[4], which seems to limit the kinyan of traveling to an employee who is paid for traveling time; however, others reject this distinction).

Generally the homeowner's obligation is to pay the worker k'poel batel — the amount of an out-of-work employee (Ulam Hamishpat 335:1, cf. Ketzos 316:1). This amount is calculated by determining how much the repairman/worker would be willing to accept to not have to work. A standard amount is half of the anticipated salary (Taz 333:1, Maharsham 2:207), but each situation must be considered independently (Mishpat Shalom).

Next week, iy"H, we will discuss whether there is any responsibility if one cancels in advance.

For questions on monetary matters,
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