



# BUSINESS WEEKLY

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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

### ALREADY PAID

Shimon Stein knew better days. He had been a successful real-estate developer, but the market crash had brought him to near poverty. He had to sell off asset after asset, including

his own home, to cover his mounting debt.

One debt was a \$100,000 loan from Reuven Rosen. When the loan was due, Mr. Rosen turned to Mr. Stein for payment.

"I have no way of paying you back in the near future," said Mr. Stein. "I have no more assets to sell."

"I know that you recently presented in *beis din* a document that you lent your brother, Levi, \$100,000 some years ago," said Mr. Rosen. "If you collect that loan, you will be able to pay me."

"That loan was repaid a while back," said Mr. Stein. "I didn't bother returning the loan document to my brother; he trusted me."

"Do you have any record of payment?" asked Mr. Rosen. "A check or bank statement?"

"No," said Mr. Stein. "He paid me in cash installments."

"What about a receipt?" asked Mr. Rosen. "Does your brother have a receipt of payment?"

"No, we didn't bother writing a receipt," replied Mr. Stein. "Levi trusted me."

"Why didn't you destroy the loan document after your brother repaid?" asked Mr. Stein.

"The document was filed away and I didn't have a chance to destroy it," answered Mr. Stein.

"This whole story sounds very fishy," said Mr. Rosen.

"Regardless, Levi borrowed from me," said Mr. Stein. "I admit that he repaid the loan, so there's nothing more to do."

"In the end, though, your 'admission' is harming me!" argued Mr. Rosen. "Your statement is very suspect."

Mr. Rosen sued in Rabbi Dayan's *beis din* to make Mr. Stein collect the loan from his brother Levi so that he could pay his debt.

"Is Mr. Stein to be believed that the loan was repaid?" asked Mr. Rosen.

"The *Gemara* (*Kesubos* 19a) teaches that a lender who has no other assets is not believed if he says that a loan document of his is *amana* (for show only; invalid) when he owes others," replied Rabbi Dayan. "This is because of the law espoused by Rabi Natan that if Reuven lent Shimon who lent Levi, a



## BHI HOTLINE

### REPAIRING AND REZONING

Reuven sold his house to Shimon and assured him that he

could remodel it into a three-story home. After the closing, Shimon discovered that the municipal code does not permit three-story homes. Reuven acknowledged this but is endeavoring to change the code.

**Q: May Shimon cancel the sale? Or perhaps since Reuven claims that the code will be changed shortly, must Shimon allow Reuven to change the code?**

**A:** There are numerous approaches in the *Poskim* concerning this issue. We will present some of the primary approaches but will refrain from issuing a definitive ruling since each case must be considered in light of its details and is subject to the discretion of each Dayan to weigh the relevant factors.

*Shulchan Aruch* (C.M. 232:5) discusses the sale of a house when the buyer later discovers that it requires repairs. Even if the buyer wishes to cancel the transaction, the seller may be allowed to make the repairs to uphold the sale. However, this is true only when the repairs are to nonessential parts of the house, e.g., repairing windows, rather than to essential parts of the house, e.g., repairing a shaky wall.

Some *Poskim* explain that the difference is the effort involved in making the repair. Simple repairs may be done by the seller to uphold the sale, but when the repair is difficult, the buyer may void the sale (*Perishah* 232:5). Others explain that the difference is the nature of the repair. Repairs that are so extensive that it is as if something new was constructed (*panim chadashos*) the buyer may void the sale, since the new construction was not part of the original sale (*davar shelo ba l'olam*). If the repairs are minor and cosmetic, the seller may make the repair and uphold

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## STORY LINE

direct obligation is formed from Levi to Reuven. Thus, Shimon's admission that his loan document is invalid is not accepted to negate Reuven's rights to collect from Levi. The rule: *'hodaas baal din k'meah eidim dami* — a person's admission is like a hundred witnesses,' is accepted only if it is to one's own detriment, not to the detriment of others" (C.M. 47:1). "What about an admission that the loan was repaid?" asked Mr. Rosen. "Is that the same as admitting that the 'loan' was only for show?"

"Some *Rishonim* differentiate and say that Shimon is believed, since a loan is intended for repayment," replied Rabbi Dayan. "However, *Shulchan Aruch* rules that it is the same, so that Mr. Stein is not believed" (*Beis Yosef*, C.M. #47).

"I assume that Shimon's admission would be valid, though, regarding himself," said Mr. Rosen. "If he ended up paying Reuven, Shimon would not be able to collect from Levi, after admitting that the loan was repaid."

"Shimon's admission is disregarded entirely in this case," said Rabbi Dayan. "Shimon can claim that he admitted that the loan was paid only to evade his creditors and was not sincere. Since his admission was not accepted regarding Reuven, it is disregarded also toward Levi."

"However, if Shimon admitted *before* being sued by his creditors that the loan was repaid (or, according to some, if he admitted in the presence of the borrower), he cannot collect from Levi," concluded Rabbi Dayan. "He cannot claim then that his admission was insincere. Of course, if Levi knows that the loan was not actually paid, he can pay" (*Sefer Haterumos*, 51:2:2-3; *Pischei Choshen*, *Shtaros* 11:27-28[66]).



## MONEY MATTERS

### RENTALS #11

#### Repairs

(Adapted by Rabbi Meir Orlan from the writings of Harav Chaim Kohn, shlita)

**Q: I rented a car for a month, but it became unusable. Is the owner obligated to provide an alternate car?**

**A:** This depends on whether you rented a specific car (*zeh*) or merely a certain model or size (*stam*). If you rented a specific car (e.g., from a private person or by license plate number), the owner has no further responsibility to provide an alternate car; you pay for the time that you used it (C.M. 310:1-2; 312:17).

However, if you rented a model or size and the car provided becomes unusable, the owner is responsible to provide an alternate one, even out of pocket. According to some authorities, the rental itself obligates him in this way; some maintain the owner is responsible only if there was also a *kinyan sudar* or signed contract (*situmta*); others say it is only if the owner wants his payment. There are many details involved (see *Pischei Choshen*, *Sechirus* 3:5-7.)

Of course, this issue depends on the stipulated terms of the rental and the local practice (*Rema* 314:2).



## BHI HOTLINE

the sale (*Nesivos Chiddushim* 5; this is also the intention of *Mishpat Shalom* 227:39; cf. *Pischei Choshen Onaah* 13:[6]).

Some maintain that the seller may uphold the sale only when it is in his control to make the repair (*Ulam Hamishpat* 232:5). If it is not in his control, e.g., he needs approval from others, he cannot uphold the sale even if he manages to get their approval. Others reject this distinction (*Shaar Hamishpat* 232:3).

According to some authorities, if the buyer stipulated that something should be intact and the seller violated that stipulation, the seller may not make the repair to uphold the sale. The allowance to make repairs is limited to where a repair is necessary and there was no previous stipulation about this defect (*Magen Avraham* 437:7). Others reject this distinction (*Shaar Hamishpat* 232:3).

In circumstances where the defect cancels the sale, even if the seller makes the necessary repair, he may not insist on upholding the sale. This is because the sale was invalid at the time of the closing (C.M. 227:39; *Sema* 72). However, there are authorities who maintain that if the seller makes the repair before the buyer realizes that the repair is necessary, the sale is upheld (*Shaar Hamishpat* 232:3).

In your case, there are a number of factors that point towards canceling the sale:

Changing the code often involves great effort.

Even if the code is changed, it would seem that it is comparable to something new (*panim chadashos*) since permission to build a three-story home did not previously exist.

It is not in the seller's control to change the code.

Since the buyer stipulated that he wants to build a three-story home, when the seller cannot deliver on that requirement the sale is voided.

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