



BUSINESS WEEKLY

Restoring the primacy of Choshen Mishpat

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UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA



STORY LINE

By Rabbi Meir Orlian

RENTAL BROKER

Mr. Sorscher was a rental broker. His friend Mr. Halperin owned a unit in a bungalow colony that he would rent to families who came on vacation for a week or two.

"I have a potential renter for the last week in August," Mr. Sorscher said to Mr. Halperin, "but he wants a 15-percent discount from the regular rate."

"That's too much," replied Mr. Halperin. "At most I would reduce by 5 percent."

After going back and forth, Mr. Sorscher got the two sides to agree on a 10-percent discount, and they called it a deal.

Two days later, Mr. Sorscher received a phone call from Mr. Halperin. "We're not going to follow through with the rental of that family for the last week in August," he said.

"What do you mean?" asked Mr. Sorscher.

"The family notified me that something came up; they weren't sure they'd be able to come," said Mr. Halperin. "Anyway, I heard of someone who's willing to pay the full price."

"If you're both OK about the cancellation, that's fine," said Mr. Sorscher. "But what about my brokerage fee?"

"I assume that since the rental didn't actualize, there's no brokerage fee!" replied Mr. Halperin.

"Why not?" replied Mr. Sorscher. "I did my job. I found a tenant and brokered the agreement. The fact that you decided not to actualize the rental is not my problem."

"If I don't get any rent, how can you expect me to pay a brokerage fee?" said Mr. Halperin.

"I get paid for doing the job, not for your profit," said Mr. Sorscher.

"If the rental didn't actualize," said Mr. Halperin, "that's not called doing the job!"

The two came before Rabbi Dayan. "I brokered a rental which the sides mutually canceled," said Mr. Sorscher. "Am I entitled to the brokerage fee?"

"A broker is entitled to his fee when he completes the task expected of him," replied Rabbi Dayan. "Usually this means that the agreement has reached a point of legal commitment."

"What is considered legal commitment?" asked Mrs. Sorscher.

"Regarding a *shadchan* (matchmaker),"



BHI HOTLINE

HIDDEN BROKERAGE FEE

I am a broker, and there are times when

it would be awkward to ask the seller for my brokerage fee, e.g., if the seller is a friend or an esteemed member of the community.

Q: May I incorporate my broker's fee into the price that I quote to the buyer so that I don't have to ask the seller to pay my brokerage fee?

A: In a previous issue (Business Weekly 161) we discussed a broker who reports to a seller that he received less from the buyer than he actually received. For example, a seller was looking to sell his house for \$500,000 and the real-estate broker found a buyer willing to spend \$550,000. If a broker tells the seller that he found a buyer willing to pay \$500,000 and then informs the buyer that the seller accepted his bid of \$550,000 so that he can pocket an extra \$50,000, he would be committing an act of theft. In your case you want money that you earned but wish to avoid asking for. Is it permitted to incorporate your fee into the price?

Some authorities write that this practice constitutes theft. Even if you collect what brokers commonly collect for their service, it may constitute theft. Sometimes a seller will negotiate a discounted rate. Accordingly, since there is a range in brokerage fees and you did not discuss your fee with the customer, you may not collect the standard brokerage fee (*Even Yisrael* 9:154).

However, one could argue that there is a set fee and if one were to go to *beis din* he would certainly be able to collect the standard amount (albeit at the lowest market rate). The fact that sometimes brokers settle for even less does not mean that the lower amount is the accurate

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STORY LINE

replied Rabbi Dayan, "the Rema (C.M. 185:10) rules that if the *shadchan* demands the fee at the engagement, upon completing the *shidduch*, whereas the families want to wait until the wedding, it depends on the common practice. Where there is no clear practice, the families can withhold the fee until the wedding. If one side should then retract before the wedding, the *shadchan* is not entitled to his fee, unless he stipulated that his role is simply to broker an agreement between the families."

"That's regarding *shidduchim*," said Mr. Halperin. "What about business deals like a rental?"

"*Shaar Ephraim* (#150) addresses a case similar to ours, in which someone brokered a sale, and after the sale was consummated the two sides mutually agreed to cancel it," said Rabbi Dayan. "*Shaar Ephraim* ruled that the broker is still entitled to his fee, since he completed his job and nothing more is incumbent on him. The decision of the two parties to cancel the sale is not a reason to relieve them of their debt to the broker."

"Is it enough that the sides verbally agreed on the rental?" asked Mr. Sorscher. "Or do they need to sign a lease, take occupancy, etc.?"

"The clear implication of *Shaar Ephraim* is that the broker is entitled to his fee only because the sale was legally binding," replied Rabbi Dayan. "However, if he brokered a price agreement, but the sale was never consummated in a legally binding manner, he is not entitled to the fee."

"*Chikrei Lev* (C.M. #136) suggests, though, with hesitation, that although the broker cannot demand his fee, he would not have to refund the fee if he was already paid" (*Pischei Choshen*, *Sechirus* 14:10-11[16]).



MONEY MATTERS

RENTALS #16

Buying or Inheriting Rental Property

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

Q: I bought a house that is currently rented out. How does this impact the current tenant?

A: One who buys, receives or inherits a rental property has the same responsibility to give the tenants notice as the original owner, since his rights are no greater than the former owner's. If the lease was for a fixed time, you cannot evict the tenant during the term of the lease.

The tenant pays the rent to the new owner. If the renter prepaid a number of months' rent to the original owner, he is not required to pay you again; you should collect it from the previous owner (C.M. 312:1, 13; *Sma* 312:22; *Gra* 312:7).

If the lease had no time frame and the landlord has an urgent need to sell, and the buyer refuses to buy unless the tenant leaves immediately, some say that the tenant can be told to leave without giving the required notice beforehand (Rav Akiva Eiger 312:13, citing *Hagahos Maimonios*, *Sechirus* 6:[7] and *Radbaz* 4:143).



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amount that brokers charge. Therefore, if you roll your fee into the price, it should not constitute an act of theft.

On the other hand, the customer may claim that he would not have used a broker that charges money. Most *poskim*, however, reject this claim and maintain that unless the broker explicitly forgave his fee, the customer remains obligated to pay him. Even if the broker does not protest when the customer declares beforehand his refusal to pay the broker's fee, the obligation remains in force. The broker's silence is not an acceptance of the customer's declaration (*Pischei Teshuvah* 264:3; *Maharash Engel* 3:15). Moreover, even those authorities (*Mahari HaLevi* 2:151) who interpret the broker's silence as acceptance of the customer's declaration agree that if the broker's fee was never discussed, the broker has the right to collect his fee (C.M. 264:4).

However, in this circumstance the issue of theft remains. The purchase price is the amount set by the seller, e.g., \$500,000. Consequently, the additional \$50,000 you will collect from the buyer would be theft from the buyer and cannot be taken to satisfy the seller's obligation to pay the broker. (Even in industries where the buyer pays the brokerage fee, it is still not clear that one may use deception to collect a brokerage fee [*Pischei Teshuvah* 348:1]).

Additionally, allowing the customer to think that the broker worked for free, when in fact he was paid, violates the prohibition of *geneivas daas*. *Geneivas daas* involves misleading someone into thinking that he owes a debt of appreciation when he does not (C.M. 228:6). In this situation, the customer will think that he owes the broker something for having performed this service for free.

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