

BUSINESS WEEKLY

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HaRav Chaim Kohn, shlita



Restoring the Primacy of Choshen Mishpat

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STORY LINE

by Rabbi Meir Orlan

Halacha Writer for the Business Halacha Institute

Buy!

Mr. Scher tracked a number of stocks. One was TorahTech, a start-up that specialized in harnessing new technology to disseminate Torah.

The company showed promise, but its marketing efforts hadn't succeeded yet. Mr. Scher considered the stock overpriced at \$6 a share, but worth grabbing if its price dropped significantly. He instructed his portfolio manager, Mr. Gelber, to buy 10,000 shares if the price dropped to \$4.

Rumors of a significant second-quarter loss — but a fresh product line aimed at the new Daf Yomi cycle — set the stock on a volatile course. For two weeks it oscillated between \$4.50 and \$7 a share. When the quarterly report was finally issued, the stock descended to \$4 for a few days.

A month later, though, TorahTech's new Daf Yomi products began selling big. The stock

began a steady climb, eventually hitting \$8 a share six months later!

Mr. Scher gave instructions to sell the 10,000 shares of TorahTech, anticipating earning 100-percent profit on the sale.

Mr. Gelber checked the account. "You don't have any shares of TorahTech," he said.

"What do you mean?" Mr. Scher asked. "I instructed you to buy 10,000 shares when the price dropped to \$4!"

"Let me check," said Mr. Gelber. He reviewed the account and acknowledged, "Somehow, I missed that order."

"That's \$40,000 lost!" exclaimed Mr. Scher. "I've been following that company for months."

"I'm sorry," said Mr. Gelber. "I usually enter orders immediately so that the purchase is made automatically."

"You should compensate me for the loss,"

said Mr. Scher. "The failure to execute was sheer negligence on your part."

"That seems extreme," replied Mr. Gelber. "It's not even a loss, just a missed opportunity for profit. I'm willing to take it up with Rabbi Dayan, though. Let's talk with him." They related the details to Rabbi Dayan.

"Mr. Scher does not have to pay for the lost \$40,000 in this case," ruled Rabbi Dayan.

"The Tosefta teaches that an investor who gave money to an agent to buy merchandise and sell it for a shared profit, but the agent didn't buy — has only a complaint against him (C.M. 183:1).

"Similarly, the Yerushalmi writes that mevatel kiso shel chavero — a person who restrained his friend's money and prevented him from earning profit — has only a complaint. This is, at most, a form of potential grama (see Shach 61:10; 292:15; Pischei

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Seized by Security

Submitted by S. T.

A friend of mine was traveling to Eretz Yisrael, and I asked him to purchase a tub of a particular mineral lotion for me from the Dead Sea. I said I would pay him upon his return. He purchased the tub and placed it carefully in his carry-on, but airport security removed the tub and discarded it.

Q: Am I obligated to reimburse him for

the lotion?

A: The first point that requires clarification is who owned the lotion. You asked your friend to purchase it for you, but he bought it with his own money and you never took possession of it. According to Halacha, purchases take place between the merchant and the owner of the money (the baal hama'os). If Reuven purchases something for Shimon using his own money, and he

does not notify the seller that the purchase is being made for his friend, it belongs to Reuven, since it was his money that effected the transaction (Shach, C.M. 183:2). Nevertheless, if Shimon asked Reuven to purchase the item, it belongs to Shimon even though Reuven used his own funds and didn't notify the merchant of the arrangement. In this case, it is considered as though Reuven loaned the money to Shimon and it is Shimon's money that ef-

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Choshen 12:[36]).

"Are there cases in which a person has to cover lost profits?" asked Mr. Scher.

"The Mishnah (B.M. 104a) teaches that a farmer who undertook to work another's field and share the crop, but left the field fallow, must pay whatever the field was expected to produce," answered Rabbi Dayan. "This was a generally stipulated condition that became standard (328:2).

"Furthermore, the Gemara (B.M. 73b) discusses the case of a person who gave money to an agent to buy wine for him during the market season. Some authorities derive from this that if the loss is clear, the agent has to pay (Nesivos 183:1; Chasam Sofer, C.M. #178)."

"How is it different from the original case in the Tosefta?" asked Mr. Gelber.

"Nesivos (306:6) explains that the Gemara deals with a contracted worker (kablan) or partner, who pays even for a lost profit opportunity (306:3),"

answered Rabbi Dayan. "The Tosefta refers to an agent who was not paid, or a salaried worker (po'el) who was entitled to back out from the job."

"Why shouldn't Mr. Gelber have to pay, then?" asked Mr. Scher. "He's a contracted broker."

"A number of authorities disagree with the Nesivos and Taz," replied Rabbi Dayan. "They maintain that the agent is required to cover lost profit only if he stipulated so beforehand (see Pischei Choshen, Pikadon, 12:[38]; Nachalas Zvi 292:7).

"However, as with many issues of workers, we must consider minhag hamedinah, the current practice of brokers (331:2). FINRA* rules and most broker contracts require that cases of stockbroker misconduct, such as failure to execute, be settled through arbitration. The broker would likely be required to pay part of the loss."

*FINRA is the largest securities regulating firm in the USA.

affected the transaction. This is based on the principle of arev — lit.: guarantor, a commitment to reimburse someone's expenses (see C.M. 190:3). When Reuven spends his own money in compliance with Shimon's request, Shimon is obligated to reimburse Reuven. This being so, the transaction is between Shimon, who is considered the baal hama'os, and the seller. At that point even if Reuven wants to keep the object for himself, he would not be permitted to do so (Shach ibid., Ketzos 4, and Nesivos 2. However, see also Igros Moshe, C.M. 1:48).

Therefore, in your case, since you asked your friend to make the purchase for you, it was your tub that was discarded

and you must reimburse your friend for the money he spent to purchase the tub.

There is another factor, however, that exempts you from repaying your friend. Your friend, acting as your agent, is, by definition, a custodian (C.M. 187:1). Although your friend was an unpaid custodian, he is liable for negligence (C.M. 291:1). It is common knowledge that airport security does not permit people to travel with bottles of liquid, gels, or creams, and he should have put the tub into his suitcase rather than his carry-on. Since he was negligent, he owes you money for the tub. Although you owe him money for the purchase, the two debts cancel each other.

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Shomrim: Guardians #13

Q: A shomer chinam (unpaid guardian) is not liable for theft and loss. Does that mean that if I misplaced an entrusted item, I am exempt? What is meant by "loss"?

A: If the guardian does not know where he left the entrusted item, this is considered p'shia (negligence), not aveida (loss). Even a shomer chinam is liable; he must pay

immediately and cannot demand time to search for the item (291:7; Nesivos 291:14). The same is true if he put the item in a pocket that had a hole, or in a shirt pocket, where it can easily fall out (Pischei Teshuva 291:5,8; Chasam Sofer C.M. #97). Examples of "loss" for which a shomer chinam is exempt and a shomer sachar is liable include: items lost in regular mail, items tied properly to the roof of a car that fell

off, or items blown away by a strong gust of wind; an animal that wandered out of an enclosure and got lost (RA"E 303:2, based on 396:1,8) or that went up a cliff and fell off (291:11). If the loss was through uncontrollable circumstances — e.g. fire, hurricane, sudden flooding, etc. — this is considered oness, for which even a shomer sachar is exempt and only a shoel is liable (303:3; 340:1).

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