BUSINESS WEEKLY

under the auspices of
HaRav Chaim Kohn, shlita

BUSINESS HALACHA INSTITUTE

Restoring the Primacy of Choshen Mishpat

ISSUE **#122** / PARSHAS **KI SEITZEI**
FRIDAY, **AUGUST 31**, 2012
13 ELUL 5772

STORY LINE

by Rabbi Meir Orlian
Halacha Writer for the Business Halacha Institute

If Yes, If No

The Brauns were negotiating the purchase of a house. However, the roof leaked in numerous places and needed a thorough sealing. The owner did not want to invest money in the repair unless he had a definite buyer, whereas Mr. Braun was equally insistent he would not buy until the roof was repaired satisfactorily.

"Perhaps we can close the sale," suggested the seller, "and add a clause in the sales contract making the purchase conditional upon repairing the roof within three months?"

"That's acceptable to us," said Mr. Braun.

The lawyers drafted a sales contract, including this clause: "The seller agrees to repair the roof and seal it within three months; both parties acknowledge that this is a material term of the sales contract."

Mr. and Mrs. Braun told their children that they had purchased a house, but it was not final because they had stipulated that the roof be repaired first.

"We just recently discussed with Rabbi Tzedek the proper formulation of legal stipulations," said their son Benjy.

"That's right," said Mr. Braun. "He said that we derive from the stipulations of bnei Gad and Reuven four criteria: It is necessary to spell out both sides of the stipulation — if yes… if no... (tnai kaful); the positive, 'yes,' side must be stated first (hen kodem l'lav); the conditional 'if' clause must precede the transaction statement (tnai kodem l'maaseh); and the condition must be something possible to fulfill (davar she'efshar l'kaymo).

"So I guess," mused Mr. Braun, "that the proper formulation is: 'If the roof is repaired within three months, the sale is valid; if not repaired, the sale is void.'"

That Shabbos, Mr. Braun approached Rabbi Tzedek. "You mentioned that the proper formulation of stipulations is essential for marriage and divorce agreements. Is this formulation also necessary for monetary stipulations?"

Rabbi Tzedek answered, "There is a major dispute on this issue among the Rishonim. The generally accepted halachic ruling is to make reference to it in real estate transactions, although it is likely not necessary nowadays when drafting a legal contract."

"Logic would require it for monetary stipulations," observed Mr. Braun, "since we derive this formulation from the stipulation regarding Gad and Reuven's heritage on the eastern bank of the Jordan!"

"Indeed, the Shulchan Aruch, citing the Rambam (Hil. Ishus 6:14) and Tur, requires

continued on reverse side

Down to Business

FROM THE BHI HOTLINE

Submitted by G. B.

I agreed to sell my house. I would like the contract to state that the buyer must give 10% as a down payment, and if he does not conclude the deal, I may retain the 10% as a penalty.

Q: Is there a way to include that stipulation in the contract so that it should be halachically binding?

A: One of the ways that land is halachically acquired is kinyan kesef - the giving of even a minimal amount of money (perutah) from the buyer toward the purchase of land. This completes the transaction and neither party may retract (C.M. 190:1-2).

Seemingly, when a buyer gives 10% toward the purchase of a house, the kinyan on the house is complete and the buyer may not renege on his agreement to purchase the house.

However, there is a distinction between a transfer of ownership and an agreement to sell property. When a buyer gives a seller money as a down payment, the intent is certainly not to effect the sale of the property. In fact, the intent of signing the contract is to make a binding agreement to sell and transfer the property at the closing of the deal. Although the halachic validity of such an agreement is subject to debate, nowadays it is the accepted rule to consider such

continued on reverse side

STORYLINE CONTINUED

this formulation for monetary matters as well," replied Rabbi Tzedek. "However, the Raavad and other Rishonim disagree and maintain that this formulation is not required for monetary issues where clear understandings generally suffice (C.M. 207:1; 241:12; Gra 241:36).

"In addition," continued Rabbi Tzedek, "the Rosh rules that it suffices to state in the contract that the stipulations are 'in accordance with the stipulations of bnei Gad and Reuven,' or, 'in accordance with the institutions of our Sages' (E.H. 38:3; C.M. 241:12)."

"How do the other Rishonim square their opinion with the case of bnei Gad and Reuven?" asked Mr. Braun.

"They understand that, in principle, we do not follow Rabi Meir, who requires this formulation," answered Rabbi Tzedek. "We only consider his opinion in marriage and divorce stipulations because of their severity (Aruch Hashulchan 207:4)."

"What did you say is the accepted ruling?" asked Mr. Braun.

"The Nesivos (207:1) and other Acharonim cite the practice that we do not require this formulation for movable items," said Rabbi Tzedek, "and to write 'in accordance with the stipulation of bnei Gad and bnei Reuven' for real estate.

"Some authorities suggest, though, that a legal contract nowadays does not require this formulation even for real estate transactions. They maintain that this formulation is needed to strengthen the stipulation and indicate that it is meant sincerely; in a recognized legal contract, the stipulation is clearly meant sincerely.

"In addition, since nowadays the practice is not to use this formulation, but to rely on the legal requirements, it is comparable to the practice mentioned by the Nesivos. Thirdly, perhaps the agreements formulated in a legal contract are binding on the basis of situmta, common commercial practice (Tel Talpiot, vol. 62, pp. 306-309)."

FROM THE BHI HOTLINE CONTINUED

a contract binding. As such, both parties are obligated to follow through with the sale of the property (Nesivos 203:6, Hilchos Mishpat 227:9[33]).

However, the issue in question is the validity of the stipulation that if the buyer backs out of the transaction, he must forfeit the down payment. According to some opinions, such an agreement is an asmachta, i.e., a stipulation that lacks the halachically required level of commitment to validate the agreement (C.M. 207:11).

Since the matter is subject to debate, the principle of muchzak (possession) applies. This principle states that disputed money remains with the one currently in possession of it. Therefore, if the seller has possession of the down payment, he may keep it. If, however, the money is deposited in an escrow account, it is not considered in the possession of the seller; he may not take that money even if secular law allows him to do so (Mishpat Shalom 207:15). In a case where the seller will not suffer a loss (e.g. he has another buyer for the same price), it may be appropriate for the seller to return half the money (Chukos Hachaim, Falagi 47).

In order to avoid any question regarding the validity of the penalty clause, it is advisable to halachically validate the contract by including a clause that removes all asmachta concerns.

PLEASE CONTACT OUR CONFIDENTIAL HOTLINE WITH YOUR QUESTIONS & COMMENTS
877.845.8455 :: ASK@BUSINESSHALACHA.COM

Shomrim: Guardians #22

MONEY MATTERS

Q: I agreed to keep a neighbor's valuable diamond necklace in my safe, but I would now like to return it. The owner, however, refuses to accept it back until it can be moved to another safe somewhere else. Do I remain liable for the necklace?

A: If the necklace was entrusted for a set time, you cannot return it prematurely without consent of the owner. Even if you return the necklace to the owner's property against his or her will, many authorities maintain that you remain liable (C.M. 293:1; Ketzos 293:2; Pischei Choshen, Pikadon 7:1).

If no time was set, or the agreed time was reached, the owner is required to accept the necklace back (293:1). If the owner refuses to take it and you return it against his will, leave it in front of him, or return it to your house and say, "Come take it whenever you want," you are no longer liable, even for negligence (see 120:2; Shach 120:4; P.C., Pikadon 7:5).

Similarly, if you inform the owner that you refuse to watch it any longer, you are no longer liable - even for negligence - even if the item remains in your house (Sma 120:11).