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UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

STORY LINE

By Rabbi Meir Orlian

WEAR AND TEAR

The Metzgers lived on the corner of a fairly busy street. They decided to build a nice picket fence around their property to provide privacy. The fence was built adjacent to the sidewalk, but pulled an inch inside the property line to be on the safe side. Over the years, a nail became loose, and started to jut out of the fence.

On Shabbos morning, Noach Simon strutted to shul for his bar mitzvah, wearing a brand new suit. The family walked in a throng to shul. As they turned the corner, Noach squeezed by, brushing up against the fence.

Noach felt a tug, and then heard a rip! His jacket had caught on the nail, and the beautiful suit developed a large tear!

"Oy, vey! You can't go to shul like this," Mr. Simon said. "What a shame! Run home and change into another suit." Noach ran home and put on his old suit.

After Shabbos, Mr. Simon contacted Mr. Metzger. "We were walking by your property this morning," he said. "My son Noach was wearing a brand-new suit for his bar mitzvah and brushed up against your fence. A nail jutted out and ripped his jacket. We paid $300 for the suit."

"Mazel tov on the bar mitzvah," Mr. Metzger wished him. "I'm terribly sorry about the jacket, but I wasn't aware of the nail sticking out. Anyway, we pulled the fence an inch inside our property, so even if the nail stuck out a little, I'm not liable because it was still within my property and not sticking out over the sidewalk."

"What!" exclaimed Mr. Simon. "But your nail posed a hazard and caused damage! I think you owe us for the suit."

"I'm not convinced," said Mr. Metzger. "Noach should have kept to the sidewalk and not brushed up against the fence. Check it out with Rabbi Dayan!"

"I most definitely will," said Mr. Simon. "I'll call him right now!"

Mr. Simon called Rabbi Dayan. "Mr. Metzger's fence had a nail sticking out," he related. "My son walked by and the nail caught his suit and tore it. Is Mr. Metzger liable for the suit?"

"A person must be careful that his fence does not jut out into a public domain in a manner that can damage," replied Rabbi Dayan. "The Mishnah (B.K. 30a) teaches that if a person grew a fence of thorns that stuck out and damaged those passing by, he is liable; it is included in the category of bor (pit)."

"But the nail didn't jut out over the

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BINDING AGREEMENT

I met with a diamond wholesaler and after discussing the types of diamonds that I wanted to buy and we negotiated a price we wished one another "Mazel uvrachah" and shook hands.

Q: Do I already own the diamonds so that if something happens to the diamonds before I receive them, the loss is mine? Am I allowed to retract the agreement?

A: Generally, in business, a handshake is not intended to be nor does it constitute an oath (Y.D. 234:2). However, an act that merchants traditionally use to complete a transaction is recognized as binding in Halachah (kinyan situmta). A modern example of such an act is clicking the "confirm" button when ordering something on-line. [There is a debate whether this type of transaction is Biblical (Pischei Teshuvah 201:1) or only Rabbinic (Nesivos 201:1).]

Authorities disagree whether a simple verbal confirmation when considered by merchants to be a kinyan rises to the level of a kinyan or not. Some maintain that verbal confirmation is not binding (Teshuvas HaRosh 12:3), whereas others contend that even a verbal confirmation could constitute a binding and irrevocable kinyan (Radvaz 1:278; Minchas Pitim 176:3), and this is the position adopted by many Poskim (Maharshag 3:113). In the diamond and precious gems industries a verbal commitment is considered binding and all

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sidewalk," objected Mr. Metzger. "It was still inside my property line."

"In that case the Gemara (ibid.) teaches that the property owner is not liable," replied Rabbi Dayan. "The reason is that people don't generally rub up against walls at the very edge of the sidewalk, so that one who deviated is responsible for his own damage (Rashi, B.K. 29b s.v. l'hischakech). Nonetheless, it is morally proper to remove potential dangers even within one's own property (C.M. 415:1, 3).

"Moreover, even if the nail stuck out over the sidewalk, Mr. Metzger is legally exempt from damage to the suit for two other reasons," continued Rabbi Dayan. "First, if the fence was made properly and Mr. Metzger did not know about the loose nail, he is not liable until he becomes aware of it (C.M. 410:4, 22).

"Second, we mentioned that the nail sticking out of the fence is included in the category of bor. The Torah limits the liability of bor significantly and excludes damage to inanimate objects, such as clothing" (C.M. 410:21).

"There's no responsibility whatsoever for damage to clothing?" asked Mr. Simon incredulously.

"There is a dispute among the Acharonim whether there is a chiyuv b'dinei Shamayim (strong moral obligation)," replied Rabbi Dayan. "In practice, it is recommended to pay partially" (see Minchas Shlomo, B.K. 29:4; Pischei Choshen, Nezikin 1:[1]; 9:[53]).

"Nonetheless, if the law of the land requires payment also for damage to inanimate objects," concluded Rabbi Dayan, "it would have halachic consequence, since this is morally proper also according to Halachah" (see C.M. 259:7; 356:7).

MONEY MATTERS

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Q: A tradesman (carpenter, seamstress, contractor, etc.) drafted professional plans for me. Can I take those plans to a cheaper tradesman to do the work?

A: It is clearly prohibited to ask an expensive tradesman to draft plans with the initial intention of taking them to a cheaper tradesman to make the item. You are availing yourself of a designer's services for free, against his will and his intention to secure the job.

Moreover, even if you asked the first tradesman to draft the plans in good faith, and considered having him make the item, it is often prohibited for another tradesman to use the plans and make the item, on the basis of hasagas gevul, minhag hamedinah, dina d'malchusa, etc.

However, if the seamstress already made the dress, the carpenter made the bookcase, etc., and someone wants to show it to another tradesman to make an additional item, copying the original, it is permissible (unless the design entailed some special ingenuity). In this case the design was already sold to the customer, and the tradesman knows that he has no way of preventing others from copying it (Emek Hamishpat, Zechuyos Yotzrim, intro., 6:1-10, 22-23; ch. 36:22, 26, 28).

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authorities may agree that it is binding (Pischei Choshen, Kinyanim 10 [3] and Teshuvos V'hanhagos 1:803). In your case, since the verbal commitment was accompanied by a handshake, it certainly takes effect.

Nevertheless, in this case it seems that the seller remains responsible for the diamonds until the customer actually receives them. The custom in the industry is that the handshake obligates the buyer and seller to follow through with the transaction, but the stones remain the seller's. Consequently, if the diamonds were lost or damaged before the buyer received them, the seller would be responsible to bear that loss.

Although there is a debate whether situmta is effective to bind parties to a commitment rather than an actual kinyan (Kesef Hakedoshim 201), the fact that a guarantor can commit to guarantee a loan by situmta (C.M. 129:5), even though it is a commitment rather than a kinyan that conveys an object to another party, leads the consensus of Poskim to the position that situmta binds the two parties to their commitment (Mishpat Shalom 201:2; Maharshag, Y.D. 1:87).

The above is true when there is a clear and definitive custom that a verbal declaration constitutes an actual kinyan or at least a binding commitment. If such declarations are considered no stronger than a declaration of intent to make a transaction in the future, either party may retract, subject to the laws of mechusar amanah (C.M. 204).

For questions on monetary matters,
Please contact our confidential hotline at 877.845.8455
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