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UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

STORY LINE

By Rabbi Meir Orlian

RELATIVELY HONEST

Mr. Samuel was having major renovations done to his house. His architect drafted detailed plans for the contractor, Reuven, who provided a clear estimate and a proper contract for the job.

As is the nature of construction, various modifications to the plans were implemented during the course of work. Reuven was careful to have these changes, with any additional cost, put down in writing and signed. However, one modification was not recorded but remained a verbal agreement. When the work was completed half a year later and final payment was being arranged, a dispute arose between Mr. Samuel and Reuven about the cost of that modification.

Both Mr. Samuel and Reuven were adamant that their recollection was correct. The amount in dispute was significant — $10,000 — and they could not reach a compromise. Reuven felt he had no recourse but to sue Mr. Samuel in a din Torah.

The two came to adjudicate before Rabbi Dayan's beis din. Reuven stated his claim. "Ask anybody in the business," he said. "The $15,000 price I gave Mr. Samuel was already a discount, and I can't accept any less than we agreed upon."

"The entire project was very substantial," Mr. Samuel replied. "We agreed to have this modification done at cost, for $5,000."

"Is there any sort of documentation?" Rabbi Dayan asked Reuven.

"Unfortunately, this one modification was agreed upon informally, so we have no documentation," replied Reuven. "We were at the bris of Mr. Samuel's nephew and were discussing the plans with his relatives. We agreed to this modification while sitting around the table."

"Is there anyone who can testify about the agreement?" asked Rabbi Dayan.

"Mr. Samuel's brother-in-law Rabbi Cohn was there," said Reuven. "Mr. Samuel's younger brother was also there. They clearly heard the amount; they even assured Mr. Samuel that it was a very good price! We can call on them to testify."

"They're relatives of mine, though," Mr. Samuel pointed out.

"Do you expect Rabbi Cohn to lie?" asked Reuven. "He's known as a man of impeccable honesty who wouldn't lie for anything! Anyway, I understand that relatives can't be trusted to testify on your behalf, but I'm calling on them to testify against you. Is there an issue with that?"

"Despite Rabbi Cohn's impeccable reputation of integrity," said Rabbi Dayan, "he is disqualified from serving as a witness, even to the detriment of his brother-in-law" (C.M. 33:3).

"Why is that?" asked Reuven.

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BHI HOTLINE

TORN RETZUOS

A customer gave me his pair of tefillin to examine and I accidentally cut the straps (retzuos). His retzuos were expensive, handmade ones.

Q: Am I obligated to reimburse him so that he can purchase the same quality retzuos, or is it sufficient to reimburse him enough to purchase kosher retzuos?

A: Teshuvas Maharam Mintz (#113, cited by Be'er Heitev, O.C. 656:4) rules that one who damages a beautiful esrog does not have to reimburse the owner the value of a beautiful esrog; it is sufficient to repay the owner the value of just a kosher esrog. Precedent for this position is the Gemara (Bava Kama 78b) which states that one who steals an animal designated for a korban may repay the owner with any sheep, since a sheep, although smaller and less valuable than the stolen animal, fulfills the owner's obligation to offer a korban (see Chacham Tzvi 120, which mandates specifying whether the owner intended to use the esrog personally or intended to sell it).

Many authorities reject Maharam Mintz's position by distinguishing between an animal designated as a korban and an esrog. An animal designated for a korban cannot be sold (Pesachim 89b) and thus has value only in terms of the owner fulfilling his obligation to offer a korban. Therefore, the thief may repay the owner with a smaller animal, since the smaller animal will also discharge his obligation to offer a korban. In contrast, a beautiful esrog could be sold and the damage assessed in monetary terms, so the thief or damager must reimburse the owner according to the value of the esrog (see Chacham Tzvi, ibid; Mishnah LaMelech, Maaseh Korban 16:7; and Shevus Yaakov 2:120).

STORY LINE

"The Shulchan Aruch, based on the Rambam (Hil. Edus 13:15), establishes an important principle," answered Rabbi Dayan. "He writes: 'The fact that the Torah disqualified the testimony of relatives is not because they are presumed to love each other, since they are disqualified from testifying [for their relative] whether for his benefit or his detriment. Even Moshe and Aharon are not qualified to testify for each other. Rather, it is a gezeiras hakasuv (Scriptural decree)'" (C.M. 33:10).

"What does that mean?" asked Mr. Samuel.

"It means that the disqualification of relatives as witnesses is a procedural issue, not a question of honesty," explained Rabbi Dayan. "Even relatives of the greatest integrity, such as Moshe and Aharon, may not serve as witnesses, and it makes no difference in whose interest they are testifying.

"Even so, I'm wondering if there is any way that we could call upon them to testify," said Reuven. "I suspect that Mr. Samuel would accept Rabbi Cohn's word as correct, regardless."

"Although Rabbi Cohn is a disqualified witness," answered Rabbi Dayan, "if Mr. Samuel is explicitly willing to accept him as a witness to testify against him, it is allowed. The acceptance should be confirmed through a kinyan sudar. This is done through having Mr. Samuel take a handkerchief or other item, as a symbolic gesture of committing himself to the outcome of his testimony" (C.M. 22:1).

"Thus," concluded Rabbi Dayan, "Rabbi Cohn — despite his reputation of honesty — and Mr. Samuel's brother cannot serve as witnesses, even to their relative's detriment, unless Mr. Samuel explicitly agrees to accept their testimony as valid."

MONEY MATTERS

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Q: Is there protection in Halachah for reputation and good will (monitin)? Is there recourse for trademark infringement?

A: The reputation of a company is an intangible asset, which is represented by its name, symbol, trademark, packaging, etc. Shu"t Divrei Malkiel (3:157) contains a question about a person who received a license to produce and market purified water, but another person copied the labels and sold the same item under this license. The Divrei Malkiel required the infringer to share in the cost of the license, based on zeh neheneh v'zeh chaser, and upheld the right of the license owner to restrain the competitor from marketing, so as not to damage his reputation and sales.

Moreover, reputation is treated nowadays as an asset that can be evaluated monetarily and sold. When purchasing a company with a good reputation, the cost in excess of other assets (tangible and intangible) is recorded as the value of the company's "good will." Thus, reputation is considered a commodity based on minhag hamedinah (common commercial practice) and dina d'malchusa, so that infringing upon the reputation of another company is considered stealing something of value (see Emek Hamishpat, Zechuyos Yotzrim, intro. 28; ch. 14; Pischei Choshen, Geneivah 8[5],9[26]).

BHI HOTLINE

Some authorities suggest that even Maharam Mintz would agree that one who "borrows" a beautiful esrog is responsible for its full value. Since the borrower has all of the benefit from its use and thus is liable even if it becomes ruined due to circumstances beyond his control (see Tosafos, Kesubos 57), there is no doubt that he accepts to fully reimburse ifor any loss (Shulchan Melachim, p. 341).

Seemingly the same rationale applies to someone hired to repair an object, making him responsible for the full value of the object (see Erech Shai 304:5). However, others equate a borrower with a damager and contend that he may replace the damaged item with one that is kosher and is not obligated to replace it with one that is the same quality as the damaged item (Admas Kodesh 1:64; see also Maharsham 4:47).

Although many Poskim subscribe to the opinion that in the case of an esrog the damager must repay the owner the value of his beautiful esrog (Maharsham 4:47; Aruch Hashulchan 656:5), nevertheless, the damager can claim the halachah accords with the opinion that limits the extent of his liability (Bikurei Yaakov 656:3; see also Pri Megadim, O.C. M.Z. 656:1).

In this case, however, where the customer did not yet pay the sofer for the inspection, he may follow the opinion that maintains that the damager must pay for expensive retzuos rather than simply kosher ones and refrain from paying the cost of the inspection. Moreover, even authorities that subscribe to the view that one may discharge his obligation by simply providing kosher retzuos agree that there is a moral imperative to repay the owner the actual value of the damaged retzuos (Admas Kodesh, op. cit.).

For questions on monetary matters,
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