

# BUSINESS WEEKLY



RESTORING THE PRIMACY OF CHOSHEN MISHPAT UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

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In honor of Ari Amsterdam's aufruf



## CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

### LOST KETZOS

Yisroel and Shimon learned together in Israel last year. Shimon returned to the U.S. for Pesach but didn't come back because of COVID travel restrictions.

Yisroel and Shimon continued learning over the phone despite the distance. One day Yisroel said to Shimon: "I still have your *Ketzos* with footnotes that I borrowed last year. What do you suggest I do with it?"

"See if someone you know is flying home," suggested Shimon. "Maybe he can bring it back."

Yisroel heard that Shimon's neighbor, Mr. Markowitz, had come to Israel for Sukkos, and would be returning shortly.

"Mr. Markowitz is here, and will be flying next week," Yisroel said to Shimon when they learned that night. "I can send the *Ketzos* with him."

"That's great!" said Shimon. "Send it with Mr. Markowitz."

Yisroel gave the *Ketzos* to Mr. Markowitz to take back with him. However, when Mr. Markowitz landed, his suitcase never came out. He filed a lost-baggage claim with the airline.

A month passed and the airline did not locate the luggage. They notified Mr. Markowitz that the luggage was officially "lost" and that he was entitled to compensation. However, the compensation was limited to \$3,500, which did not cover the reported value of the suitcase.

Mr. Markowitz informed Yisroel that the suitcase was declared "lost" but that he would not receive sufficient compensation to cover the *sefer*.

"I'll have to pay you for the *Ketzos*," Yisroel said to Shimon that night.

"It's not your fault that it got lost, though," replied Shimon. "You were not responsible; it's the airline's fault."

"I borrowed the *Ketzos*, though," said Yisroel. "I'm liable for it regardless of how it was lost."

"I told you to send it with Mr. Markowitz, though," argued Shimon. "I'm not sure that you're still responsible."

"I don't see why not," insisted Yisroel. "Until you receive it, I remain the borrower!"

"Check with a *posek*, first," suggested Shimon.

Yisroel called Rabbi Dayan and asked:

**"Am I liable for the borrowed *sefer* that was lost with the luggage?"**

"The *Mishnah* (B.M. 98b) teaches that if a lender sent his cow with an agent, the borrower is



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לע"נ ר' שלמה ב"ר ברוך וזוג' מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

### DEFERRED ... AND DELAYED

**Q:** I lent a large sum of money to my friend, but even after the deadline for repayment had long passed, he claimed that he did not have money to return. After several *askanim* got involved, we agreed to a payment plan that would allow him to pay me back over the course of five years. Recently, I incurred several unexpected large expenses, and I want to void the agreement and demand that he return the entire sum immediately.

Am I allowed to renege on the payment-plan agreement? And did the fact that he initially didn't keep to his side of the deal, because he was late on the first two payments according to the plan, automatically terminate the agreement?

**A:** When a person lends money for a specific amount of time, the borrower is entitled to the money for the full loan period, even if he did not make any additional *kinyan* (action to make an acquisition), and the lender may not demand that the borrower repay the funds before the date set for repayment (*Shulchan Aruch, C.M. 73:2*).

Furthermore, if the lender seized funds from the borrower during the loan period, we require him to return the money to the borrower (*Tumim 67:16*; see *Pischei Choshen, Halvaah, ch. 3, fn. 2*). When the payment date arrives, the borrower is required to **return the funds (see C.M. 100:2, with Shach 1) as soon as the lender demands payment (Ketzos Hachoshen 104:2; cf. Nesivos 1 who writes that even if the lender does not demand payment, the borrower is required to pay him when the loan is due for repayment)**.

This is only true, however, if the repayment date was set at the time of the loan, in which case we consider the transfer of the funds from the lender to the borrower to be a *kinyan* cementing the payment agreement they made.

Some *Acharonim* discuss what would happen if the two parties agreed, after the money was

### Did You Know?

Vendor agreements can have clauses that may be ribbis concerns but can often be corrected with halachic guidance.

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## CASE FILE

not responsible until it comes into his possession," replied Rabbi Dayan. "However, if the borrower instructed the lender to send the cow with the agent, he is liable once the agent took it. The *Mishnah* concludes that the converse is true when *returning* the cow.

Thus, if the borrower returns the item with an agent of his own accord, he remains liable until it reaches the lender. [Nonetheless, if the time frame of the loan ended, or the item was lent with no time frame, the borrower is exempt from *ones* once he hands it to the agent, since he no longer has use of the item, but he remains liable for loss as a *shomer sachir* (C.M. 340:8; *Pischei Choshen, Pikadon* 9:[78,80]).]

However, if the owner instructed the borrower to return the item with the agent, the borrower is no longer liable once he hands it to the agent, since the agent received it on behalf of the lender.

The *Rishonim* interpret this to include even if the owner instructed to return the item with a minor (who cannot function as an official "agent"), since the borrower sent the item based on the lender's instructions, the borrower is not liable (C.M. 188:3; *Pischei Choshen, Halva'ah* 5:[56]).

Furthermore, the lender does not have to appoint the agent directly or with witnesses. If he simply wrote to the borrower, "Return the item with so-and-so," the borrower is no longer liable, or even if the borrower notified the lender of his intention to return it with someone and the lender said, "Send it," he is not liable (C.M. 121:1; *Sma* 121:5).

"Thus, you are exempt," concluded Rabbi Dayan. "Mr. Markowitz is also exempt, since he is only an unpaid guardian (*shomer chinam*), who is not liable for theft or loss" (C.M. 291:1).

**Verdict: When the lender instructs the borrower to return the item with someone, the borrower is no longer liable after handing the item to the agent.**



## MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

### APOTROPUS #20

FIDUCIARY GUARDIAN

### Minors Who Matured

לע"נ ר' יחיאל מיכל ב"ר חיים וזוג' ח"י בת ר' שמואל חיים ע"ה

**Q: Does the responsibility of the apotropus automatically cease when the minors mature?**

A: It is mentioned that *beis din* does not appoint an *apotropus* for mentally capable adults (C.M. 285:2). Similarly, when *beis din* appoints an *apotropus* for minors, his authority and responsibility ceases when they mature. Halachically, this is when they become bar (bas) mitzvah, even if they're not yet financially responsible. Nonetheless, *beis din* should guide them in the proper path (C.M. 290:26; *Rivash* #468-469; *Mishpat Shalom* 235:8[5]).

However, if the father appointed an *apotropus* and instructed that the assets not be handed to the children until they are older and worthy, we follow this.

Some suggest, similarly, that *beis din* who appointed an *apotropus* for minors and see that they are unable to manage the assets upon maturing, should retain them in the *apotropus's* hand. Others apply this even to an *apotropus* on whom the orphans relied of their own accord. All the more so nowadays, when minors under 18 are legally restricted from many financial activities (*Aruch Hashulchan, C.M.* 290:45; *Pischei Choshen, Yerushah* 5:[10]).



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already borrowed, to change the repayment date. Is this new verbal agreement binding? Or, since the borrower already agreed to return the money at the original date, must he now make a new *kinyan* to acquire the right to retain those funds for longer (*Sma* 73:7; *Perishah, C.M.* 73:18)? The *poskim* rule that if the lender agreed to extend the loan period, his verbal agreement is binding without a *kinyan*, because it's considered as though he was *mochel* (forgave) the loan for that extra period, and *mechilah* works without a *kinyan* (*Shach, C.M.* 73:5 and *Ketzos* 1).

[If, however, the change in the agreement is to *shorten* the loan period, which means that the borrower is committing to repay early, that new commitment does require a *kinyan* (*Nesivos* 39:1; cf. *Nesivos* 199:2 where he writes that the borrower's commitment might also be viewed as a *mechilah* that does not require a new *kinyan*; see *Mishkan Shalom* 3:10, fn. 6).]

Returning to your question, since you agreed to forego the original payment deadline in favor of the five-year payment plan, following the majority opinion of *poskim* who rule that *mechilah* works without a *kinyan*, you may not renege on the agreement.

Regarding whether the borrower's failure to make the first payments on schedule voided the deal: Some *poskim* write that the deal is voided only if the agreement included a clause stating that it is valid *on condition* (*b'tnai*) that the borrower make the payments on schedule (*Shu"t Chavos Ya'ir* 119). Others imply that even if it is not spelled out that the deal is conditional upon payments being made on time, the deal would still be invalidated if the borrower fails to keep to the schedule, because the lender agreed to the payment plan only as long as the borrower keeps to his end of the deal (*Maharach Ohr Zarua* 252; *Knesses Hagedolah* 12, *Hagahos Beis Yosef* 13, based on *Shu"t Mabot* 1:32-33).

Some say that there is no dispute between these *Acharonim*, because they were discussing two different cases. If the borrower refuses to make payments at all, then the deal is invalidated. But if he is delaying for specific reasons, and he does plan to pay, then the deal remains in force unless there was a clear clause conditioning the deal upon timely payment (*Minchas Pittim* 12:10).

Others seem not to differentiate and maintain that regardless of the reasons for the delay, the deal is invalidated (see *Shu"t Maharsham* 3:335, 4:110 and 7:159. See, however, *Taz, Yoreh Deah* 236:13, cited in *Pischei Teshuvah, C.M.* 207:2).

For questions on monetary matters, arbitrations, legal documents, wills, ribbis, & Shabbos, Please contact our confidential hotline at 877.845.8455 or ask@businesshalacha.com

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