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CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

HOME PARTNERS

Mrs. Tamar was widowed while still young but had never remarried. She had one married daughter, who lived in another city, and a son, Shimon, who had never found his *bashert* (destined spouse) and lived with his mother.

After renting for decades, Mrs. Tamar decided to invest in a home, to have a roof over her head that she could call her own till the end of her days. Shimon was also happy to invest his money in a home, rather than paying rent.

After looking around, Mrs. Tamar and Shimon decided on a house that cost $500,000. They discussed how to fund the purchase, which would require taking out a mortgage.

"I have money saved away, and you are still working," Mrs. Tamar said to Shimon. "I'd like to suggest that I provide a down payment of 300K, and you cover the mortgage over the years. We would own the house jointly."

"That arrangement is fine with me," agreed Shimon.

The two drafted a document stating that Shimon would cover the mortgage and that they would own the house 50/50.

Years passed, and Mrs. Tamar passed away. As her children were financially established, she left her assets to a Torah institution in her will. The institution's director came to settle ownership of the house with Shimon.

Meanwhile, the house had appreciated significantly and tripled its initial value.

"Although the agreement was to own the home 50/50," the director said, "since Mrs. Tamar's down payment was 60% of the cost, we should get 60% of the appreciation."

Shimon claimed, though, that since the arrangement stated that the house was owned 50/50 they should share the appreciation equally.

"At least, you should pay the excess 50K of the down payment," argued the director.

"But my mother agreed that the house should be owned 50/50," claimed Shimon. "I shouldn't have to pay you anything."

The two came before Rabbi Dayan and asked:

"How should the value of the house be divided? "

"When two people buy something together, even if they provide different amounts of capital, sometimes the profits or increased equity is divided equally, barring a common practice otherwise," replied Rabbi Dayan (*C.M.* 176:5; *Nesivos* 176:10; *Pischei Choshen*, *Shutfim* 3:18).

"The capital remains each person's, though, so that if the partners disband, each is entitled to

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

SHREDDED!

Q: A young man, Reuven, asked his parents for permission to use their new lawnmower to cut the grass surrounding their house. When they acquiesced, he got to work, energetically running to and fro in the garden overrun by high grass and weeds that also hid "treasures," such as plastic cups and bags left by his younger siblings.

What Reuven did not realize is that one of his neighbor's children, who had recently come to play, had left behind a bag with clothing in it. He noticed the bag in the weeds, but he thought it was just another empty bag left behind by his siblings and figured it would find its way into to the trash receptacle of the lawnmower. By the time he realized that the blade had cut into something other than plastic, it was too late; the article of clothing was shredded.

Is Reuven obligated to pay for destroying it?

A: The *Gemara* (*B.K.* 26a) rules that a person is always liable for damages caused by his actions, even if the damage was inadvertent, and even if he was sleeping and caused the damage through involuntary movement. This rule is codified in *halachah* (*Shulchan Aruch, C.M.* 421:3 and 378:1). The *Shulchan Aruch* adds that even if the damage was caused through an *oness* (circumstance beyond the person's control), he is still liable. The *Shach* (378:1) points out that the *Shulchan Aruch* follows the ruling of the Ramban (*B.M.* 82b) that a person is liable for all cases of *oness*.

The Rema (ibid.) cites *Tosafos* (*B.K.* 27b, s.v. *U'Shmuel*) and the *Rosh* (ibid. 3:1) who rule that a person is not liable in a case of *oness gamur*, a circumstance in which there was no reason for him to have exercised more caution to prevent the damage from happening.

What is considered an *oness gamur* for which *Tosafos* would not consider the person liable? *Tosafos* explain that a case of *oness* similar to *aveidah*, loss

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receive back his capital in accordance with his investment" (*Pischei Choshen*, *Shutfim* 3:16[35].

"Regardless, if the partners stipulate how the profits should be divided, whatever arrangement they made is binding, since in monetary matters the Torah validates whatever arrangement parties make between themselves (when it doesn't involve prohibitions)" (*C.M*. 225:5).

"Moreover, if the partners agreed that the ownership itself in the partnership should not be according to the capital provided, the stipulation is binding. We view the party who provided more as granting the other a gift.

"On this basis, many rule that if two *mechutanim* buy a home for their children who are getting married, and the home is registered jointly in the children's names, they share equal ownership, even if one family provided more than the other, although some disagree" (see *Kovetz Teshuvos Harav Eliyashiv* 2:145).

"In our case, since the agreement was that Mrs. Tamar and Shimon should be 50/50 owners in the home, even though she provided 300K capital, their arrangement is binding; we consider the excess 50K that she paid as a gift to her son. The converse would be true if the mortgage was more than the down payment; the excess taken would be considered a gift from Shimon to his mother.

"Since the home is owned equally, the subsequent appreciation should also be shared equally," concluded Rabbi Dayan, "so that half of the current value is owned by the son, and half by the mother's estate, to which the Torah institution is entitled."

Verdict: Partners who provided unequal capital, but stipulated that the partnership be equal, divide the profits and/or capital equally according to their agreement.

MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

BAR METZRA #22
(Bordering Property) Bar-Metzra and Gentiles

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

Q: If a gentile bought a property from a Jew, or a Jew bought a property from a gentile, can the *bar-metzra* exercise his rights and possess the property from the buyer?

A: If a Jew sells his property to a gentile, the *bar-metzra* does not have rights to take the property from the buyer, since the primary obligation to honor the *bar-metzra's* rights is on the buyer, who, in this case, in not obligated in the Torah's command: "*v'asisa hayashar v'hatov*" (*C.M.* 175:39).

Similarly, if a Jew buys a property from a gentile, *Chazal* did not grant the *bar-metzra* rights to take the property from the buyer, since he benefited the *bar-metzra* by buying the property. However, some say that the buyer should consult the *bar-metzra* first if he is readily available (*C.M.* and *Rabbi Akiva Eiger* 175:38).

There is a dispute whether the bar-metzra has rights in a property that belonged to another Jew and is located between him and a gentile.

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of an object, involves an element of negligence, because had the person watched the object carefully enough, the loss wouldn't have happened. But a case of *oness* that the person couldn't necessarily have prevented even if he tried, is an *oness gamur*. (See *Tosafos* ibid. for a discussion of what degree of *oness* would exempt a *mazik* from liability).

In our case, although the clothing would not have been damaged had Reuven cut the grass carefully, because the item was on his parents' property, and he had no reason to believe it was there, it would seem that the Rema would rule that it is an *oness gamur* and he is not liable.

But even the Shulchan Aruch, who rules that a person generally *is* liable for *oness gamur*, likely would agree that Reuven is not liable in this case. The *halachah* (*C.M.* 378:6) is that when a person enters someone else's property without permission, and the property owner doesn't know he is there and accidently hurts him, the owner is not liable for damages. *Tosafos* (*Sanhedrin* 76b, s.v. *Rotzei'ach*) explain that this is a case of *oness gamur*, for which, in their opinion, a person is not liable. According to the Ramban's view that a person is liable in most cases of *oness gamur*, the owner is still not liable, because the person who was damaged was the negligent party, as he entered the property without permission. We therefore consider him to have caused the damage to himself (*Ramban* ibid.).

If the property owner hurt the visitor deliberately, he is liable even if the person entered without permission. [The Rambam (*Hilchos Chovel* 6:3) rules that even if a person was authorized to enter someone else's property, the owner is not liable for accidental damages, but many *poskim* disagree (*Shulchan Aruch* 378:7; see *Mishpat Hamazik* 5:1).]

If the homeowner noticed that the person entered his property but then hurt him accidently, some *poskim* rule that he is liable and some rule that he is not (see *Shulchan Aruch* 378:6).

In our case, although the neighbor's child had permission to enter the property, he did not have permission to leave his article of clothing behind for the homeowner to safeguard. He is therefore considered the negligent party and Reuven is not liable (See also *Minchas Shlomo, B.K.* 27b and *Mishpat Hamazik*, *vol.* 2, 2:4 regarding whether this *halachah* applies when the owner of the object is not the one who placed it in someone else's property).

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