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לע"נ הרב יחיאל מיכל בן ר' משה אהרן אורליאן

CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

HELD IN ESCROW

Mr. Levine was purchasing a house from Mr. Hyman. He had transferred money for the purchase to an escrow account, and the parties were near closing. However, an issue arose between them regarding certain repairs to the house. Each party claimed that according to the contract the cost for these repairs was to be covered by the other party.

The two were litigating the disputed repairs in Rabbi Dayan's *beis din*. The sum in dispute was not large, but the litigation was taking time, and both parties were interested in closing already, even before the dispute was resolved.

They agreed to follow through with the closing, while the disputed sum would remain in escrow, and would be handled in accordance with the halachic ruling, whenever it would be issued.

After hearing the sides, *beis din* concluded that the liability for the repairs was subject to an unresolved dispute between the *poskim*. Therefore, following the principle of *hamotzi mei'chaveiro alav ha'reayah,* they ruled that the questionable sum should remain with whoever was in possession (*muchzak*).

This led to a new dispute between the parties: Who is considered *muchzak* in this case?

"I should be considered in possession," claimed Mr. Levine, the buyer. "I initially entrusted the money in the escrow account, so that in cases of doubt, the questionable sum should be returned to me."

"I disagree," said Mr. Hyman, the seller. "The money was placed in the escrow account to be given to me and was being held on my behalf, so I should be considered in possession, especially since the sale was closed."

A third possibility was raised, that perhaps neither party should be considered in sole possession, since the money was being held by the escrow attorney, in which case the disputed sum should be divided.

The two turned to the *beis din*, and asked:

"Who is considered in possession (*muchzak*) in this case?"

"Regarding money and movable items, whoever physically holds it is considered *muchzak* in situations of doubt," replied Rabbi Dayan. "This is in contrast to real estate, regarding which the previous established owner (*mara kama*) is usually considered the one in possession.

"In the case of two parties who both entrusted money to a third party, so that neither physically holds it, Tosafos (*B.M.* 2a, s.v. *v'yachloku*) writes that the third party holds it on behalf of

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

IS AN AUCTION ONAAH?

Q: Am I allowed to participate in an auction — either online or live —or is there an issue of *onaah* with either overpaying or underpaying for the item?

A: The Torah (*Vayikra* 25:14) teaches us that a person is not allowed to take advantage of another person's lack of knowledge of the fair price of an item. This prohibition applies to both the seller, if he overcharges for the item, and to the buyer, if he convinces the seller to sell it to him for less than its value (*Shulchan Aruch, C.M.* 227:1).

Chazal issued guidelines as to how significant the discrepancy between the price paid and actual value must be in order for a claim of *onaah* to be considered valid.

If the *onaah* was for less than one-sixth of the item's value (16.66%), then since most people consider that discrepancy negligible, the sale is final and the aggrieved party has no right to demand back the difference. (The *Rishonim* debate whether it is permissible to overcharge or underpay less than one-sixth deliberately; see ibid. 227:6 with *Rabi Akiva Eiger* and *Imrei Baruch*.)

If the discrepancy is exactly one-sixth, the difference must be returned to the aggrieved party, but the sale remains final.

If the discrepancy represents more than a sixth of the item's value, the aggrieved party may nullify the sale (ibid. 227:2-4).

Nowadays, because the range of prices charged by various sellers can be extremely large, we calculate *onaah* when one overcharges or underpays an amount outside of the market range of prices.

Therefore, in calculating *onaah* perpetrated by the buyer, we use the lowest marketable price. If the buyer underpaid by a sixth or more of the lowest price in that range, the seller has a valid claim. In the case of *onaah* perpetrated by the seller, we use the highest price in the range, and if the buyer overpaid by a sixth or more of that price, he has a valid claim against the seller (*Hilchos Mishpat, Hakdamah* 3).

CASE FILE

both, and the two parties are considered equally in possession.

"However, when only one party entrusted the money in escrow, there is a dispute between the Acharonim who is considered in possession (*Pischei Choshen*, *Shtaros* 13:[4]; *Divrei Ge'onim* 107:3).

"Mishneh Lamelech (*Hil. To'en V'nit'an* 15:9) writes that since neither litigating party holds it physically, we resort to the last established owner (*mara kama*) also regarding movable items that are in the hands of a third party. Therefore, whoever entrusted the money to the third party is considered in possession, regarding doubt.

"However, Beis Meir (*E.H.* 53:2) writes that even when entrusted by one party we considered the money as being held on behalf of both parties. We do not consider the *mara kama* in possession, but rather they should divide the money.

"This issue revolves around a discussion in the *poskim* regarding a father-in-law who entrusted money with a third party to be given to his son-in-law as dowry under certain conditions, which is the subject of a dispute between the *Rishonim"* (see *Rama, E.H.* 53:4; *Chelkas Mechokek* 53:13-14).

"Beis Shlomo (*C.M.* #73) rules like Mishneh Lamelech," concluded Rabbi Dayan. "He adds that *chezkas mara kama* applies even to money, against *Shach* (91:33) who differentiates between money and other movable items. Thus, in this case of doubt, Mr. Levine, who entrusted the money, is considered in possession and it should be returned to him."

Verdict: in cases of doubt, money entrusted in escrow by two parties is considered in joint possession; if entrusted by one party, he is considered in possession as the *mara kama*.

MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS
Mechilah (Forgoing) #22
***Mechilah* of One Partner**

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

Q: I accrued a debt at a grocery store owned by two partners. One agreed to forgo the debt, but later the other partner demanded his share. What is the halachah?

A: If two people lent to you, and one was *mochel* the entire amount, this does not exempt you from the share of the other person, even if the loan was written in one document, so that the two lenders are like partners (*C.M.* 77:7; *Sma* 77:19).

Shach (77:19) questions this, though, and suggests that each partner is authorized completely on behalf of the partnership, although he may have to recompense his partner. However, later *Acharonim* rule that partnership authorization does not include forgoing without the other partner's knowledge (*Pischei Teshuvah* 77:4).

Nonetheless, if the *mechilah* was a business consideration for the benefit of the partnership, and certainly if done in compromise for counterclaims or partial payment, the action of one partner is binding on the other (*Hagahos Imrei Baruch* 77:7; *Pischei Choshen*, *Halvaah* 7:31).

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The *halachah* is that even if the perpetrator made the transaction conditional on the other party not being able to claim *onaah* afterward, the condition is not valid. Since the aggrieved party does not know how steep the discrepancy will be, he can't truly consent to that condition (ibid. 227:21).

The *poskim* deliberate how these *halachos* apply to a public auction. Would there be *onaah* if the price offered by the winning bid differs by at least a sixth of the actual value?

Some *poskim* rule that there would be a valid claim of *ona'ah* (*Teshuras Shai* 1:456), but many *poskim* argue that there is no *onaah*, for the following reasons.

The *halachah* is that when prices are not set based on a market value, but on a cost-plus basis (where the price is set based on the amount it costs to produce a unit plus a fixed percentage of profit), there is no *onaah*. Although there would usually be an *onaah* claim even if the seller claims that he overcharged only because he had to mark up the price enough to make it worthwhile for him to engage in this transaction, if the seller specifically stipulates that his price is based on his cost plus a certain percent profit, there is no *onaah* (*Shulchan Aruch* 227:27).

Based on this, some *poskim* write that since an auction is held with the universal understanding that the final price will not be based on the market value, but by the winning bid, there is no *onaah* (*Erech Lechem,* ibid.; *Shu"t Sho'el Umeishivah, Fourth Mahadura* 3:137, but cf. *Mishpat Shalom* 227:15, *Mishmeres Shalom* 10 who argue with this logic).

Other *poskim* write that if the starting price at the auction is based on an appraisal of the item, so that bidders understand that they are paying more than the market value, the buyer cannot claim *onaah* since he consented to overpay by bidding at the auction and he is fully aware of how much he is overpaying (*Mishpat Shalom* ibid.). But this would seem to be true only for items offered at the auction based on the fair market value, but not if the auction begins at a price that is unrelated to the market value.

Others explain that based on the actual *halachos* of *onaah*, there might technically be a valid claim in the case of an item sold at auction for a high or low price, but the prevalent custom to engage in a bidding war during an auction, which means that the item is eventually sold at more than market value, and supersedes the *halachah* (*Shu"t Rav Yedidyah Tiah Weil, C.M.* 10, *Chikekei Lev, C.M.* 49). Others suggest that since each party consents to participate in the auction on the chance that he will be able to make money on the item, he agrees to make the sale final even if he loses money (ibid.; see *Divrei Ge'onim* 5:19).

Other *poskim* reason that certain items don't have a set market value; the value is set by the amount a buyer is willing to pay for it. In such cases the *halachah* of *onaah* does not apply, because as the bids go up, the value of the item rises (*Hilchos Mishpat* pg. 152).

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