THE WERDIGER EDITION

BUSINESS WEEKLY

RESTORING THE PRIMACY OF CHOSHEN MISHPAT

UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

Issue #651 | Vayikra | Friday, Mar 24, 2023 | 2 Nissan 5783

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

CASE FILE

Rabbi Meir Orlian
Writer for the Business Halacha Institute

לע"נ הרב אהרן בן הרב גדליהו ע"ה

TESTIMONY IN COURT

Mr. Schwartz was talking to his neighbor, Mr. Eidelstein. "Do you remember the monetary dispute I have with Mr. Weiss?" asked Mr. Schwartz.

"Yes," replied Mr. Eidelstein. "What about it?"

"I just sued him!" Mr. Schwartz said. "I'd like you to testify."

"I remember very clearly what happened," Mr. Eidelstein replied. "There's no doubt that Mr. Weiss owes you! In which *beis din* did you sue him?"

"I sued him in civil court," replied Mr. Schwartz.

"Did you try suing first in *beis din*?" asked Mr. Eidelstein. "Did you get permission from *beis din* to sue in court?"

"No, I didn't," acknowledged Mr. Schwartz bashfully. "I wanted to bring the case to *beis din*, but my lawyer wouldn't hear of it; I couldn't stand up to him."

"I know that Mr. Weiss owes you," said Mr. Eidelstein. "I'd be glad to testify in *beis din*. However, I'm not comfortable with testifying in court when you do not have halachic permission to sue there."

"But you know that Mr. Weiss owes me," said Mr. Schwartz. "What difference does it make to you where you testify? I'm not asking you to say anything that isn't 100% true or that you don't know firsthand!"

"I'll have to think about it," said Mr. Eidelstein. "I don't like the idea."

"I should mention," said Mr. Schwartz, "that my lawyer already requested the court to issue a subpoena for you to come and testify."

"Oh, really?" said Mr. Eidelstein. "That's not a simple issue! I'm going to have to consult someone on this."

Mr. Eidelstein called Rabbi Dayan and asked:

"Am I supposed to testify on behalf of Mr. Schwartz in court? Am I allowed to testify if issued a subpoena?"

"In *Parashas Vayikra* (5:1), the Torah states that if a person withholds testimony, he bears sin: "*im lo yaggid – v'nasa avono*,'" replied Rabbi Dayan. "From this verse, the *Gemara* (*B.M.* 56a; *Shevuos* 35a) derives the requirement to testify in *beis din*. In addition, it is a fulfillment of *hashavas aveidah* and possibly also *lo sa'amod al dam rei'echa*, which require us to spare a fellow Jew from loss" (*C.M.* 28:1; *Ketzos* 28:3; *Nesivos* 28:1; *Sha'ar Hamishpat* 28:2).

"The requirement of *im lo yaggid* does not apply in civil court, though, even in a lawsuit between a Jew and a non-Jew, especially if the civil law does

BHI HOTLINE

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

REGRETTING DESPAIR

Q: I lost a valuable object. A *bachur* helped me look for it, but to no avail. After a while, I was *meya'eish* (despaired) of finding it. Shortly thereafter, that *bachur* excitedly approached me and returned the object, which he had found.

Am I allowed to accept it, or am I obligated to inform him that I was *meya'eish*, and that according to *Halachah*, he is entitled to keep it?

A: Once you were *meya'eish*, anyone who found the *aveidah* (lost object) was entitled to keep it. In this case, however, the *bachur* clearly did not intend to acquire it when he picked it up — on the contrary, he picked it up with the intention of returning it to you. The *halachah* is that a person who lifts an *aveidah* with the intention of giving it to someone else acquires it on behalf of the other person (*Shulchan Aruch, C.M.* 269:1). Some *poskim* apply this principle to a case like yours, ruling that since the finder lifted it for your sake, you acquired it immediately (*Nesivos* 259:1).

Other *poskim* maintain that a person who lifts an *aveidah* for someone else must specifically intend to make a *kinyan* for that person in order for it to belong to him. In your case, since the *bachur* thought you still own it, he did not intend to make a *kinyan* for you. You therefore did not acquire it when he lifted it (*Ketzos Hachoshen* 259:1). But since this *bachur* didn't intend to acquire it for himself either, you may accept it from him without informing him that you had been *meya'eish*.

A third opinion among the *poskim* is that since you had been *meya'eish*, and the *bachur* could have acquired it for himself had he known about your *yi'ush*, it is possible that he actually did acquire it upon lifting it. They cite proof from the *halachah* that a person's property (*chatzeir*) acquires items that are *hefker* (ownerless) even if he doesn't know that they are there (*C.M.* 243:8; *Erech Shai* 259; see *Tosafos, B.M.* 10a, s.v. Rav; cf. *Tosafos, Beitzah* 39b, s.v. *Hacha* and commentaries there, who discuss whether

not conform with Torah law" (see *C.M.* 28:3-4).

"Nonetheless, *poskim* write that to testify on behalf of a Jew against a non-Jew in civil court is still included in *hashavas aveidah*" (*Mizrach Shemesh* [*Me'oded*] 1:21).

"Regarding a suit between two Jews in civil court, if the plaintiff received permission from *beis din* to sue in civil court, or is allowed to for other reasons, the element of *hashavas aveidah* similarly applies" (see *Rema* 26:2; *Gra* 26:6; *Mishpatecha L'Yaakov* 4:24; 8:11).

"However, if the plaintiff sued in civil court against *Halachah*, when he could have sued in *beis din*, *Rema* rules (Responsum #52) that the witness should not testify, since he thereby supports the plaintiff's violation of turning to civil court. *Shaar Hamishpat* (26:1), though, maintains that *hashavas aveidah* still applies, if thereby you will return to the plaintiff what is due. *Imrei Binah* (*Dayanim* #27), refutes this position, since the plaintiff himself is not allowed to retrieve his money in this manner. Nonetheless, in criminal cases, some write that the requirement to testify applies, to uphold justice and purge iniquity" (see *Mishpetei Uziel, C.M.* 4:13).

"If you are subpoenaed, though," concluded Rabbi Dayan, "so that you are required by law to testify and there is concern of *chillul Hashem* should you refuse, it seems permitted" (*C.M.* 28:3; *Pischei Choshen*, *Nezikin* 4:[74]; Eidus 1:[15]).

Verdict: A witness is required to testify in *beis din* from *'im lo yaggid.'* In a secular court, there is a requirement based on *hashavas aveidah* or *lo saamod*, when the plaintiff is allowed to sue there. Otherwise, some *poskim* do not allow testifying between two Jews, unless the witness was issued a subpoena.

MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS
***Dayanim* (Judges) #39**
Rendering the Ruling

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

Q: How is the ruling rendered? What if there is a split decision?

A: After the *Dayanim* deliberate, the head of panel renders the ruling. Even if there was a split decision and the head was in the minority, he should render the ruling so that it should not be evident that he dissented (*C.M.* and *Sma* 19:1).

The dissenting *Dayan* should not excuse himself to the litigant, that he was in his favor but the other *dayanim* outnumbered him, since this entails *lashon hara* about the majority.

For this reason, if the *Dayanim* give the ruling in writing and there was a split decision, they should not specify the names of the majority and the dissenter. Their respective reasons should also not be identified by name (*C.M.* 19:2).

There is a dispute between the early *Acharonim* whether the dissenting *Dayan* is required to sign the ruling. The *halachah* is that he must sign if there is concern that not signing will impede the ruling or indicate that he dissents (*Radbaz* #172; *Pischei Teshuvah* 19:4).

a person can acquire something by lifting it if he had no intention of acquiring it).

The question is whether the same principle applies if a *hefker* object finds its way into a person's hand (*kinyan yad*). Some *poskim* rule that a person's hand is no different from his property, so just as a *chatzeir* can acquire any *hefker* object in it, so can a person's hand (see *Tosafos, B.B.* 54a, s.v. *Adata*; *Shach, C.M.* 275:3; *Ketzos Hachoshen* 268:2, citing Maharit).

Others argue that a *hefker* item that merely lands in a person's hand does not effect a *kinyan*; rather, in order to acquire it, he has to lift it with the intention of making a *kinyan* (*hagbahah*) (*Ketzos Hachoshen* ibid., explaining Rashi's opinion in *Kesubos* 31a.; *Imrei Binah, Dinei Kinyanim* 6, citing *Piskei Rid.* See also *Mishneh L'melech, Hilchos Gezeilah* 17:8).

But even if a person's hand acquires items for him without him being aware that it is there, the *kadmonim* deliberate what the *halachah* is if a person *knows* that something is in his hand, and he still has no intention of acquiring it.

Tosafos (*B.B.* loc. cit.) writes that a person only acquires a *hefker* item without intending to do so if he is unaware that it is in his possession, but if he knows that it is in his possession and does not intend to acquire it, it does not become his. According to this opinion, since the *bachur* who found your object knew that it was in his possession, and he had no intention to acquire it, it did not become his. But many *poskim* disagree with that opinion (see *Shach* 275:3).

Some write that if a person did not intend to acquire the object only because he didn't know that it was *hefker*, and had he known that it was *hefker* he would have intended to acquire it for himself, then it is his, even according to *Tosafos* (*Machaneh Ephraim, Kinyan Chatzeir* 5).

Returning to your case, whether the *bachur* made a *kinyan* for himself is the subject of several disputes. It stands to reason, therefore, that you may accept it from him without informing him that you had been *meya'eish*.

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