BAIS HAVAAD
HALACHA CENTER

על פי התורה אשר יורוך
Yorucha
weekly overview

A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY OVERVIEW VIDEO

Contracts 101
Halachic Deals & Documents: Part I

Rav Shmuel Binyomin Honigwachs

THE VARIOUS LEVELS OF LOAN DOCUMENTS:

To begin our discussion of loan documents, we must first briefly outline three distinct forms of contracts. The halachos will vary depending on which type of *shtar* was used.

1. The most basic loan contract is a simple IOU drafted by a lender and borrower, on which the borrower signs that he owes the lender money. Such a document is simply written up between the two of them, with no witnesses present to observe the transaction.
2. A stronger form of documentation is a contract signed by witnesses who attest that they observed the transaction of the borrower, borrowing money from the lender.
3. The third type of contract has what is known as "*ne'emanus*" written into the *shtar*. *Ne'emanus* basically means that the borrower grants a level of trust to the lender, and agrees that he will not challenge his claims as long as he holds the contract.

One main difference between these three types of documents is when the borrower claims that he has already repaid the debt. There is a disagreement amongst the *Poskim* whether a borrower is believed to say that he paid back a loan when the lender has in his possession a signed IOU without witnesses; however, if the document has *ne'emanus* written into it, all agree that the borrower would not be able to claim he already paid. Since he granted his trust to the lender, he cannot deny the debt unless he has clear proof, such as witnesses who testify that they saw him paying or a receipt of payment from the lender.

To avoid problematic situations where one party may claim he is owed money while the other claims he already paid, it is highly recommended that all loan documents should include *ne'emanus*.

THE GUARANTOR'S DEBT:

To illustrate the practical aspects of *ne'emanus*, as well as several other important concepts of *shtaros*, let's look at a very interesting case that recently came to *bais din*. A man brought a claim against another individual, whom he claimed cosigned on two loans – one for $100,000 and one for $150,000. The details of the case were as follows:

- **Lender's Claim to the Guarantor:** Since the borrower was unable to pay his debts, the lender claimed that the cosigner owed him $250,000 (accumulation of both loans), plus another $150,000 of accrued interest.
- **$100,000 Loan Claim:** This was documented with a *shtar* that the lender had in his possession, which contained a "*heter iska*", a clause allowing him to charge interest in a halachically permitted way. The lender also had a separate *shtar* in which the cosigner agreed to guarantee the loan and accept responsibility if the borrower could not pay.
- **$150,000 Loan Claim:** Regarding this loan, the

lender had no contract on the actual transaction. All he had was a document in which the guarantor accepts responsibility to pay the loan if the borrower cannot.

- **Guarantor's Response:** The guarantor said that he recalls singing the document regarding the $100,000. He added that when it became clear the borrower could not pay, he submitted a few payments towards the debt. He said that he had no recollection of signing anything for a separate $150,000 loan, although he did remember the borrower telling him that he may have to borrow an additional $50,000. Although he didn't recall signing anything to that extent, he suggested that it is possible that the document about a loan for $150,000 was a replacement for the $100,000 document, and that $150,000 was actually the total amount of money the borrower received from the lender.
- **Lender's Claim:** For his part, the lender said he remembers giving two loans. He didn't clearly recall how much money he lent out, but he checked his ledger and it said that he had given one loan for $150,000 and one for $100,000.
- **The Lender's Ledger:** The *bais din* examined his ledger and saw that it contained a number of discrepancies that invalidated it from being used as evidence and deemed it unusable as a form of verification of the loans. Thus, all they had to work with was the actual documents in question.

PROBLEMS WITH THE DOCUMENTATION ON THE 150,000 LOAN CLAIM:

The *bais din* began its deliberation by analyzing the alleged $150,000 loan, for which the borrower had no actual loan contract and only had a document stating the guarantor accepts responsibility.

They cited the *Nesivos Hamishpat*, who discusses a comparable situation. The *Nesivos* speaks about a case where a guarantor agrees to cosign on a loan, but only on the condition that a valid halachic *shtar* be written between the lender and borrower. If the loan is given without such a shtar, the *Nesivos* rules that the guarantor bears no responsibility, and he would be exempt from covering for the borrower if he can't pay.

The reason for this ruling is because the cosigner wanted the documentation of the loan to be written so that he would have some recourse against the borrower if he ended up having to pay the lender. He wanted a contract to be written so that he could use it to try to reclaim his loss from the lender, and he only agreed to guarantee the loan on the condition that he had this option. Since the document was never written, he never accepted any responsibility and thus he would not have any obligation to pay.

The same reasoning certainly applies in our story. The document on which the cosigner signed stated that he was accepting to guarantee the loan and that a *shtar* of the actual loan was attached. Without this *shtar*, he could not try to recoup his loss from the borrower if he were to pay the loan in his stead. Such a *shtar* was not attached, and the document that was in the possession of the borrower did not even have the name of the lender on it. We can assume that the guarantor would never have accepted responsibility under such circumstances, and the document the borrower presented for this $150,000 would not be enforceable.

WILL NE'EMANUS WITHIN THE SHTAR HELP THE LENDER?

The *bais din* also discussed another aspect of the $150,000 document, which could possibly exempt the cosigner even without the reasoning of the *Nesivos*. They surmised that perhaps the reason the actual loan contract could not be located, and only the document in which the consigner accepted responsibility was available, was because the borrower had repaid the loan and taken back the contract. As we explained, when a contract has *ne'emanus* written into it, the lender is believed to say that it was not repaid. In this instance, the document in which the cosigner accepted responsibility had ne'emanus written into it. Thus, it could be argued that no claim of payment could be made in contradiction to the *ne'emanus*.

This claim, however, is countered by the *Rana"ch*, who discusses a very similar case. He speaks of an instance where a guarantor granted *ne'emanus* to a lender, and still, he rules that the guarantor is still believed to claim the loan was repaid. His reasoning is that we always try to narrow the extent of *ne'emanus* as much as possible, only giving the lender as much trust as is clearly defined in the document. In this case, the

guarantor only wrote in the *shtar* that the lender will be believed to say that he [the guarantor] never paid him – but it does not say that the lender is believed to say that the borrower never paid him. Since this is not explicit in the *shtar*, the lender does not have that level of *ne'emanus*.

A QUESTION OF INTEREST ON THE $100,000 LOAN:

The *bais din* then moved on to the question of whether the cosigner was liable to pay for the interest accrued on the $100,000 loan.

They noted that there is a debate amongst *Poskim* as to how to construct a *heter iska* when there is a cosigner on a loan. Some opinions rule that a standard *heter iska* between the lender and borrower that mentions the cosigner is sufficient to extend the interest to the guarantor, while others say that a separate document must be drafted in a very specific manner.

The Rabbanim of this *bais din* ruled that the *heter iska* on the loan document could be used to permit the cosigner to pay interest to the lender if he so wished, but it could not be used to force him to pay the interest. Their reasoning was that since there are some opinions that a separate *heter iska* is needed for a cosigner, the guarantor could claim that he takes the side of those *Poskim* (a claim known in halachic terms as "*kim li*") and, therefore, cannot be forced to pay. Since he is the *muchzak*, the party holding the money, *bais din* cannot usurp the money from him.

THE $100,000 LOAN ITSELF:

Finally, the bais din turned its attention to the $100,000 loan, which the cosigner admitted took place but claims he already made some payments.

While it is true that the cosigner is believed to say he made payments, there is no proof that the payments were made for this loan, as it is always possible that he made them for the other loan of $150,000 (assuming it exists). Generally speaking, if a lender is in possession of a loan document and a borrower claims he already paid, if the lender acknowledges he received a payment but claims it was for another loan that was made with a verbal agreement, the lender is believed even if the *shtar* does not have *ne'emanus* written into it. He is believed because, had he wanted to lie, he could have denied receiving the payment altogether and forced the borrower to pay based on the contract he is holding. Since he did not blatantly deny receiving payment, it can be assumed that he is telling the truth.

If, however, the borrower has witnesses that can attest he submitted the payment, the lender is not believed because he does not have the option of denying the payment. Only if the loan document has *ne'emanus* written into it would the lender be believed to say that the payment was for another loan (unless the witnesses testify that they know for certain that the payment was for this specific loan).

In our story, the cosigner claims he made payments, but it is not clear which loan he made payments for. Even though *bais din* disqualified the $150,000 loan, based on his *ne'emanus*, the lender may still be believed were he to claim with certainty that he did extend that loan and that is what the payments were for. In this case, however, this lender was not completely sure he ever made this $150,000 loan or if the payments were for that loan – so, his *ne'emanus* will not really be able to help him.

BLANK SPACES:

One more point that was discussed by the *bais din* needs a bit of background explanation.

We already mentioned one difference between an IOU without witnesses versus a halachic document with witnesses is that a borrower would be believed to say he repaid an IOU but would not be believed to say he repaid a *shtar* with witnesses.

Another difference is that witnesses may not sign on a *shtar* if there are any blank spaces between the lines or words. This is because that could lead to forgeries or fraud by adding words to the document. An IOU drafted between two individuals, however, is allowed to have blank spaces. If the borrower agrees to use this document, he obviously trusts the lender not to cheat him and has no problem with the blank spaces.

The contracts used in this story were a bit strange. From the way they were drafted, they seemed to start off in the form of an IOU, as they were written from the perspective of the borrower and cosigner themselves and not from the perspective of the

witnesses observing the transaction. At the end of the document, after the entire transaction was detailed and the parties signed, the witnesses signed their names. Additionally, both documents contained some blank spaces. This led to the question of whether these blank spaces voided the document, as such spaces usually would to a shtar with witnesses.

One of the *dayanim*, Rav Avrohom Boruch Rosenberg *shlit"a*, a world-famous expert on *Choshen Mlshpat*, issued an interesting and novel ruling. He said that from the way the document was formulated, it was evident that the witnesses never intended to sign that they witnessed the transaction; rather, all they were signing to, was to testify that they confirm that the signatures of the lender and cosigner are authentic. Having said this, he ruled that the document had the status of a *shtar* with no witnesses, meaning it does not have the power of a halachic *shtar* with witnesses but it is valid even with blank spaces. Thus, the guarantor would remain liable for the $100,000 debt, but he is believed to say he already made payments toward it.

In order to avoid such confusion, when witnesses sign a document it is suggested to write clearly that they are signing to verify that they witnessed the entire transaction and affirm that it occurred.