Beth Din of America Reported Decision 6

Kosher Quality Caterers, Inc. v. Kalman Goodman & Menachem Moskowitz

January 19, 2005

The Beth Din of America, having been chosen as arbitrators pursuant to an arbitration agreement between Kosher Quality Caterers, Inc. (represented by Shmuel Shendofsky and Benjamin Baron) as plaintiffs and Kalman Goodman and Menachem Moskowitz as defendants to submit their disputes in reference to damages allegedly suffered from an aborted sale of a business interest, having given proper notice of the time and the place of meeting, having given said matters due consideration, having heard all parties and witnesses testify to the facts of said dispute and differences, and having received documentary evidence submitted by the parties, does conclude as follows:

Facts

In late 2002 and early 2003, plaintiffs sought to sell Paradise Pizza Corp. ("Paradise Pizza"), a kosher pizzeria in upstate New York that plaintiffs had been operating in the summers to serve the Jewish summer camp market. Paradise Pizza would in any case undergo significant change for the summer of 2003 because it

would be moving to a new and larger location ("the Vista site"). The landlord, Mr. George Johnson ("Landlord"), was building a new building for Paradise Pizza on the Vista site, and Paradise Pizza would be expected to enter into a new lease and make other capital investments to ready the property.

Defendants expressed interest in purchasing a 50% interest in Paradise Pizza, and the discussions led to the writing of a term sheet in mid-March 2003. While the term sheet is unsigned, all parties agree that it reflected the general terms of a mutually-acceptable business deal. The term sheet explicitly contemplates that a full, written contract would be signed by the parties, after which defendants would deliver a first payment of $30,000 toward the full purchase price of $119,000.

Plaintiffs and defendants dispute whether defendants continued to insist upon a written contract. It is undisputed, however, that the defendants wrote a total of four checks totaling $30,000 to Landlord's attorney to be held in escrow for the new lease. One check, for $10,000, was dated April 15, 2003, and the other three checks are dated May 8-9, 2003. The new lease was signed in either early April or early May 2003 (the document contains an uninitialed change) by Mr. Shendofsky, on behalf of either Kosher Quality Caterers, Inc., or Paradise Pizza Corp. (again an uninitialed change). Mr. Baron also signed, apparently simultaneously, a personal guarantee backing the lease.

On May 19-20, 2003, defendants stopped payment on the checks to landlord's escrow, giving rise to the current *din torah*. Defendants argue that they stopped payment on the checks because the plaintiffs' continued failure to provide them with a written contract had diminished their confidence in the plaintiffs as partners.

As things turned out, due to a failure to perform by Landlord and/or his subcontractors, the new Paradise Pizza building at the Vista site was not ready for occupancy for either of the 2003 or 2004 summers. The Beth Din has received no evidence that any rent was paid under the lease for either summer, which is consistent with the failure of Landlord to perform under the lease agreement.

Claim

When pressed by the Beth Din to define the damages sought, the plaintiffs offered the following rationale in their submission of August 30, 2004, and it is upon the basis of this claim that we rule (we cite from Point 2 of the submission): "[I]f Kalman and Menachem had not stopped payment and continued with the deal[,]

Kosher Quality would have received $119,000 even if the building would not have been ready...."

In essence, plaintiffs argue that defendants were *halachically* obligated to consummate the business deal and should be liable for their failure to do so in an amount totaling the full purchase price.

In support of their argument that the amount of damages should equal the full purchase price, plaintiffs argue that they could not have found a subsequent buyer for an equal price because (1) the business suffered from having been closed in summer 2003 and (2) the reputation of the business had been damaged by "word on the street that we had a terrible problem with this business deal."

Holdings and Rationale

While this case involves a complex set of facts, many of which are disputed, the essential facts – as presented above – are clear. We also believe that the *halacha* involved is clear.

This case arises in the context of partnership, and could have posed issues related to the *halachot* of partnership. Defendants arguably became partners by writing checks to Landlord's escrow prior to the execution of the lease by Mr. Shendofsky and withdrew from the partnership subsequent to the execution of the lease. Had any rent been paid by Kosher Quality to Landlord, it is possible that defendants would have been liable for half of the rent. However, we received no proof of such payment. To the contrary, it seems that Landlord failed to perform his obligations under the lease, leaving him in no position to demand rent.

In the absence of a claim based on partnership, this case turns on whether the business deal agreed on in the unsigned term sheet is *halachically* binding. On this, the *halacha* is clear: in the absence of a written agreement or *kinyan*, a contract is not binding.[1] We also note that the subsequent diminution of the value of Paradise Pizza is much more likely to be attributable to Landlord's failure to make the premises available for either 2003 or 2004 than to any action by the defendants. We thus find for the defendants as a matter of law.

Despite our holding that the defendants were not technically bound by their oral agreement, we wish to emphasize that the *halacha* views their failure to

[1] *Shulchan Aruch*, *Choshen Mishpat*, 189:1.

consummate the transaction in 2003 as morally wrong. While oral agreements do not create binding contracts, the *halacha* considers a person who reneges on an oral agreement to be a *mechusar amanah*, a person lacking in trustworthiness and integrity in business affairs.[2] In order to escape a finding of *mechusar amanah* in this case, the defendants carry the burden of proof to demonstrate that their cancellation of the checks given to Landlord's escrow was appropriate. This could be so only if the check cancellation was due to changed circumstances either (1) caused by the plaintiffs' negligence or (2) not anticipated as a risk at the time that the defendants reached their oral agreement with the plaintiffs and submitted their checks. (The general question of whether unanticipated changed circumstances permit a party to renege on an oral agreement is a subject of *halachic* controversy.[3]) We hold that the defendants have not proved that the plaintiffs were negligent in fulfilling any of their material responsibilities or that Landlord's failure to have the building completed by the summer was an unanticipated risk. As a result, the defendants remained morally obliged to consummate the transaction. However, as noted in the previous paragraph, the defendants' moral failure does not give rise to a payment obligation at this time.

Both parties have made claims against the other for legal fees related to the case. Legal fees are generally not recoverable except where the Beth Din believes that the equities of the case require it. In this case, we believe that neither side is entitled to the recovery of legal fees from the other. The plaintiff's case cannot be seen as frivolous in light of our finding that the defendants had a moral obligation to fulfill their oral commitment reflected in the unsigned term sheet.

Both sides also submitted claims to recover advertising and promotion costs relating to the planned opening of Paradise Pizza in 2003. As neither side has provided proof of such costs, we deny the claims of both parties to such costs.

The parties shall not speak disparagingly of each other. The obligations set forth herein shall be enforceable in any court of competent jurisdiction, in accordance with the rules and procedures of the Beth Din of America and the arbitration agreement. Any request for modification of this award by the arbitration panel shall be in accordance with the rules and procedures of the Beth Din of

[2] *Shulchan Aruch*, *Choshen Mishpat,* 204:11.
[3] See *Rama*, *Shulchan Aruch*, *Choshen Mishpat*, 204:11 and *Biur HaGra*, *Choshen Mishpat*, 204:18.

America, and the Arbitration Agreement of the parties. Any provision of this decision may be modified with the consent of both parties. All of the provisions of this decision shall be effective immediately.

IN WITNESS WHEREOF, we hereby sign and affirm this decision as of the date written above.

By: _____	_____	_____
Rabbi AA	BB, Esq.	Rabbi CC
Dayan	Dayan	Dayan