

HALOCHOSCOPE

This week's question:

A tenant moved into an apartment where there were already *mezuzos* in place. The previous tenant says that they were there when he moved in. the landlord says that they do not belong to him. The new tenant can leave them there. However, he wants to know whether he is obliged to make an effort to trace the original owner and to pay him. In addition, if and when he removes them, whether to replace them with his own *mezuzos* or to check them, may he put them back? May he keep them in his possession indefinitely and may he use them? Perhaps he is obliged to put them back, rather than replace them with his own! If he does not put them back right away, may he do so when he moves out, exchanging his own *mezuzos* with these that were there when he originally moved in?

The issues:

A) Removing a *mezuzah* from its place

B) Checking *mezuzos*

C) Who owns these *mezuzos*? What is the current tenant's liability?

A) Removing a *mezuzah* from its place [most of this issue reproduced from Halochoscope XVI:34]

The Talmud forbids removing a *mezuzah* from a rented property, when moving out. This applies even to the *mezuzah* affixed by this same tenant when he moved in. According to most of the explanations provided, this also applies to a seller. Usually, the new resident should pay the former resident for his *mezuzos* (see section C). According to some, this applies to tenants. A seller has no claim against a buyer for those *mezuzos*. Since they are nailed on, they are included in the sale. Others maintain that this alone might not apply to this type of fixture. However, the presumption that a *mezuzah* is not to be removed might indeed play a role.

The *mitzvah* of *mezuzah* applies to the resident, rather than the landlord. An owner is Scripturally obligated, and a tenant is Rabbinically obligated. If the *mezuzah* was already affixed, the resident has lost out on the performance of the *mitzvah*. Some ponder the tenant's right to demand that the *mezuzah* not be affixed before he moves in, so he can perform the *mitzvah*. In a case where the new resident is buying the property, assuming that the *mezuzos* are included, he will at least own them. While he lost the performance of the act of the *mitzvah*, he has his own *mezuzos* on his doors. If it is a tenant, the *mezuzos* could conceivably be included in the rent. This might be considered a type of ownership. However, since it is not part of the landlord's obligation, it is more like a loan.

In all cases, the new resident may replace the existing *mezuzos* with his own *mezuzos*, especially if they are nicer. He then gains his own personal *mitzvah*. He would then return the original *mezuzos* to their rightful owner. *Chutz la'aretz*, in the Diaspora, a tenant is only obligated personally after living there for thirty days.

The explanations why one should not remove a mezuzah are: (i) *Mezuza* affords protection to the house. Removing it allows access to destructive forces. (ii) Some add, the incoming Jewish tenant will not be required to affix his *mezuza* for thirty days. The outgoing tenant will be indirectly liable for any harm befalling the incoming tenant. According to this, if the incoming tenant or buyer will affix his *mezuza* immediately, the restriction against removal is lifted. (iii) Removal of the *mezuza* lowers the level of holiness on the door-post; *maalin bakodesh velo moridin*, one may not lower sanctity. (iv) Removal of the *mezuza* removes the *Shechinah*, divine Presence, from the house, another manifestation of *horada bikedusha*. (v) It lowers the level of *kedusha* of the *mezuza* itself. While attached to the door-post it is serving its holy purpose. This reasoning would allow moving it from one door-post to another. Accordingly, if one cannot get *mezuzos* for his new home, he may remove the old ones and affix them immediately in his new home.

The Talmud relates, King Munbaz took a *mezuza* with him on his travels. He had no permanent residence, and wanted a memento of *mezuza* wherever he went. However, he did not affix it to the door-post. He affixed it to a stick and placed it by the door. Some suggest that had he affixed it, he could not have removed it when he moved on. Even though he was clearly not obliged, as his lodging was of a very temporary nature, once attached, it could not be removed.

If a doorway is painted, the *mezuza* must be removed. It may only be replaced when the paint has dried and there is no risk of damage to it from the chemicals. Similarly, if the next tenant will not respect the *mezuza*, or if it is a gentile, the *mezuza* may not be left on the doorway. While it is indeed dangerous to remove it, in these cases, the respect for the *mezuza* itself takes precedence. [See Baba Metzia 101b-102a Avoda Zara 14a Yerushalmi Peah 1:1 Menachos 32b, Poskim. Tur Sh Ar YD 291:2, commentaries.]

B) Checking mezuzos

The Talmud says that a *mezuza* on a private residence must be checked twice in seven years. On a public doorway, the *mezuza* must be checked twice every fifty years. There are two reasons to check: it might have deteriorated or it might have been stolen. For the latter reason, one should actually glance at the *mezuza* whenever he passes it. There is a common practice to place one's hand on the *mezuza*, and many also kiss it. This ensures that the case is intact. It is still possible that the *mezuza* was stolen, though unlikely. The second reason requires opening it up and examining the lettering. Due to conditions, some locations are conducive to deterioration in a shorter time period. Checking is an obligation, because one may not rely on status quo. The natural deterioration of the materials is always a concern. Nowadays, the *mezuza* can be wrapped and protected somewhat. However, it will still deteriorate eventually. Depending on the damage, some *mezuzos* can be fixed, while others will need to be replaced.

The obligation to check would seem to apply to the resident, who has the obligation to affix, even if the *mezuza* does not belong to him. The point of checking is to ensure that the *mitzvah* is being performed correctly. After removing it for checking, the resident need not recite a new *brocha* when re-affixing it. However, the poskim say that if there was a long delay or if it was given to a professional to check, there is a requirement for a new *brocha*. If the *mezuza* needed to be fixed or replaced, a new *brocha* is required.

[See Yuma 11a, Poskim. Tur Sh Ar YD 191:1, commentaries. Chovas Hadar 1:8 11:14.]

C) Responsibility and liability of a borrower

Some *mitzvos* require *lachem*, the item must be owned by the one performing the *mitzvah* with them. *Mezuzah* does not appear to have this requirement. Accordingly, one could fulfill his obligation with a borrowed *mezuzah*. Accordingly, he recites the *brocha* on a borrowed *mezuzah*. We alluded to the concept of a *mezuzah* on loan in section A. One may not use a *mezuzah* that is stolen or that does not belong to him, without the owner's permission. This is *mitzvah haba'ah ba'avairah*, a *mitzvah* done through a transgression. Therefore, if one uses an existing *mezuzah*, it is either not considered his own *mitzvah*, or he has some right to use it.

What if one rented an apartment under the impression that there would be *mezuzos* on the door-posts, but found that they were not there? The owner never had the obligation, because he did not live there. The previous tenant was never part of the transaction with the new tenant. The new tenant may not presume that the landlord affixed a *mezuzah* specially for him. However, he may assume that the previous resident will not remove the *mezuzos* that were already there. From these presumptions, it is evident that the new resident has some kind of right to the *mezuzos*, based on the requirement to leave them on the door-posts.

Usually, the outgoing tenant may ask that the incoming tenant pay for the *mezuzos*. It is proper for the incoming tenant to pay for them. However, the outgoing tenant may not demand payment legally. If this were the case, if the incoming tenant refused to pay, the *mezuzah* would be considered stolen property. Rather, the outgoing tenant must simply leave the *mezuzah* in place. In our case, the outgoing tenant will inform the incoming tenant that if and when it is replaced, it should be returned to its true owner.

This assumes that an incoming tenant may not do with the *mezuzah* as he sees fit. It still belongs to the original tenant. If removed, it must be returned to the original tenant. In that case, it is on loan to the incoming tenant for the duration. As soon as it is removed, even for checking, the new tenant has no right to keep it in his possession.

However, this is unclear. From the language of the various poskim, it appears that some view it as though the obligation to leave the *mezuzah*, as a practical matter, removes it from the ownership of the original tenant. One may make stipulations with his landlord before entering into any agreement to be compensated for the *mezuzos*. Furthermore, a homeowner who moves and rents his home to a new tenant may stipulate that the tenant pays for the *mezuzos*. This implies that if no such stipulation was made, the original owner loses his rights to that *mezuzah*.

Some poskim also say that when asking for payment from an incoming tenant, one may not ask for the full price of the *mezuzah*, but for the value of a basic *mezuzah* [if this is less]. This implies that when asking for payment one may only seek compensation for saving the new tenant from his own costs. This concept exists when one provides a service to his fellow without being asked to. In those cases, the service provider may demand the payment, but is limited to asking for the net gain, rather than the sum cost or value. In our case, even this amount may not be demanded, but asked for respectfully. The recipient is not required to pay, but it is proper to pay for it. On the other hand, it is

possible that there is indeed an obligation *latzeis yedei shamayim*, to satisfy one's obligation to Heaven. This applies when the legal system is not empowered to enforce payment, but there is a legal obligation. In some cases, it applies when there is no legal obligation, but a moral one. Our case could be viewed as either of the two.

By occupying the home, the new tenant passively borrows the borrowed *mezuzah*. This raises the issue of *shomer shemasar leshomer*, a guardian handing over the item to a second guardian. Apart from liability issues, sub-loaning is forbidden even with a *mitzvah* item. The only way it would be permitted in our case, is if the owner agrees, or if it is still considered in the domain of the first borrower.

However, given the nature of tenant turnover, it must be assumed that the same *mezuzah* could be left to the 'care' of many future tenants. Perhaps it is not even the second tenant handing over to the care of the third, but more like the original owner handing it over to the third tenant.

The aforementioned rule that the old tenant may ask respectfully, but may not demand payment is debated. One view maintains that he may legally demand payment. It is his *mezuzah*. The other maintains that there is an unspoken agreement based on the need to leave it behind, as mentioned. Thus, the issue of ownership is indeed a question. The poskim debate further whether this is resolved by consensus. The default in such cases is *hamotzie mechavero alav haraaya*, he who wishes to claim from his fellow has the burden of proof. Usually, this means that for the duration, the one holding the item may claim it as his own. He is not a *shomer*, but is the *de facto* owner.

The ethical question remains: perhaps the new tenant should find the owner and offer payment. We mentioned that when removing them to check them, the actual *mezuzos* could be returned to the owner and replaced with those of the new tenant. According to our discussion, this is also an ethical gesture, rather than required. The new tenant does not want anyone to harbor a claim against him. Therefore, the new tenant may keep the *mezuzah* indefinitely. He could make a note that should the owner ever contact him, he will try to return it. [See Gitin 29a Baba Metziah 6a-b 29a-b 35b-36b 41a 43b Baba Basra 88a, Poskim. Tur Sh Ar CM 291:21-26 307:4-5 342 359:5, commentaries. Minchas Chinuch 423. Chovas Hadar 1:1 12 51. YD 391, Daas Kedoshim 1. Chelkas Yaakov II:160. Minchas Yitzchok V:110 IX:106. Yabia Omer III:18. Shevet Halevi II:159. Beer Moshe III:181. Halacha Lemoshe on Kitzur Shulchan Aruch 11:22(191-198).]

In conclusion, the new tenant may use the *mezuzos* as though they are his to keep for the duration. Ethically, he should be prepared to return them if the owner contacts him.

On the Parsha *The men came along to accompany the women .. if it could be found in his possession techailless .. shitim wood .. [35:22-24]* The women brought their jewelry or gold. One may not accept these without the husbands' agreement [*Haamek Davar*]. What does '*can be found*' mean? [see commentaries, *Meshech Chochma*] Perhaps they could not prove ownership of the materials, but the contestant could not prove it either. It was considered their own enough to donate. Perhaps this is hinted in the juxtaposition of these three *pesukim*.

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