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ח כסלו תשע"ו  
November 20, 2015

*Pesak Din (Decision): Mizrahi v Ben-David et al*

*(This pesak has been anonymized and lightly edited for publication.)*

The Beth Din of America, having been chosen by the parties as arbitrator pursuant to an arbitration agreement dated as of November 9, 2015 (the "Arbitration Agreement" attached hereto as Exhibit A), entered into by Shmuel Mizrahi ("Mizrahi"), Yair Ben-David ("Ben-David") and Jacob Cohen ("Cohen"), to submit to the Beth Din of America for a binding decision with respect to the disposition of 16 and 20 West 10<sup>th</sup> Street, St Louis, MO, and having given proper notice of time and place of meeting, having heard testimony and having received documentary evidence, and having given said matters due consideration, does hereby issue the following award in accordance with the Rules and Procedures of the Beth Din of America:

FACTS

Shmuel Mizrahi and Jacob Cohen have owned neighboring houses for over 18 years. Mizrahi lives at 24 West 10<sup>th</sup> Street with his wife and children. Cohen has been renting out 16 and 20 West 10<sup>th</sup> Street (the "Property") to a tenant for the past 19 years. Over that time, Mizrahi has repeatedly expressed his interest in purchasing the Property. At one point, Mizrahi acquired eight feet of Cohen's property (six feet purchased with an additional two-foot easement that will eventually revert to Mizrahi), but Cohen was never interested in selling the entire Property.

On or about September 20, 2015, Mizrahi approached Cohen with an offer of \$3,600,000.00. Cohen rejected the offer but indicated that he would consider selling for \$5,000,000.00. Mizrahi did not make a counteroffer.

About a week later, Cohen received an unsolicited call from a real estate broker, Nate Isaacs, representing a buyer willing to pay \$5,000,000.00 for the Property with a closing by January 1, 2016, if the Property could be delivered vacant. Cohen responded that Mizrahi had been pursuing the Property for years and had the right of first refusal under the Jewish law principle of *Dina de-Bar Metsra* (the law of the abutter).

Cohen called Mizrahi and informed him of the offer. Mizrahi inquired as to the identity of the offeror, but Cohen declined to tell him. Mizrahi even asked if it was Nate Isaacs, but Cohen did not respond. At that point, Mizrahi informed Cohen that he did not think the buyer would close on the deal. Mizrahi therefore declined the offer. That night Mizrahi discussed the offer with his wife, called Cohen the next morning and stated that he was not willing to pay more than \$4,000,000.00.

On or about November 1, 2015, a neighbor revealed to Mrs. Mizrahi that Yair Ben-David was the potential buyer and that Ben-David and his wife were coming that night to inspect the Property. Mizrahi knew that Ben-David was a serious buyer, and he now realized that Cohen had a real offer.

Early the next morning, Mizrahi contacted Cohen with a counteroffer. He offered to pay \$5,000,000.00, close by January 1, 2016 and allow the current tenant to remain on the Property. Cohen replied that he would consider the offer.

After that discussion, Cohen met with Yair Ben-David's father who indicated that Yair would match Mizrahi's offer for the Property to be sold with the tenant still in place. On or about November 5, 2015, Cohen informed Mizrahi that he was selling the Property to Ben-David.

## CLAIMS

Mizrahi asserts his right to purchase the Property under the halakhic principle of *Dina de-Bar Metsra*, which provides an abutter with the right of first refusal when property is put up for sale. Ben-David counters that Mizrahi waived his right to purchase the Property when he twice told Cohen that he was not interested in making the purchase at the price proposed by Ben-David.

Mizrahi responds that his initial refusal was not a waiver of right. Rather, the reason why he told Cohen that he wouldn't match the \$5,000,000 offer was because he did not believe that the offer was serious. Mizrahi notes that he tendered a matching offer the moment it became clear to him that Ben-David's offer was serious.

## GOVERNING LAW

The parties requested for this matter to be decided in accordance with Sephardic Jewish law.

## DISCUSSION

### Dina de-Bar Metsra: Some Background

Jewish law provides an abutter with the right of first refusal when a property is up for sale. This principle is known as *Dina de-Bar Metsra* and is grounded in “*ve-Asita ha-Yashar ve-ha-Tov be-Einei Hashem.*” (“Do what is right and good in the eyes of Hashem”) <sup>1</sup> Underlying *Dina de-Bar Metsra* is the idea that the abutter would significantly benefit from acquiring an adjoining property, at a minimal cost to the third-party buyer (who can always purchase property elsewhere).<sup>2</sup>

Jewish law also secures the right of the abutter *ex post facto*—even after the property has been sold to a third-party buyer. Should the abutter seek to assert his right of *Dina de-Bar Metsra*, Jewish law will construe the third-party buyer as an agent of the abutter. The abutter can reimburse the third-party buyer

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<sup>1</sup> Bava Metsi'a 108a; Devarim 6:18.

<sup>2</sup> Rashi Bava Metsi'a 108a s.v. *ve-Asita*.

for his costs and take title to the property.<sup>3</sup>

Because *Dina de-Bar Metsra* is grounded in weighing the substantial benefit to the abutter against the third-party buyer's minimal cost (he can purchase property elsewhere), the principle does not apply when the third-party buyer is someone unfamiliar with the real estate market, such as an orphan, who would find it difficult to purchase property elsewhere.<sup>4</sup>

Rabbenu Tam limits *Dina de-Bar Metsra* to fields, on the theory that the benefit to the abutter consists in the efficiency of plowing two fields together.<sup>5</sup> But an overwhelming majority of *poskim*, including the Shulchan Arukh, reject this view.<sup>6</sup>

### Waiver of Right

The crucial question at the heart of this *din torah* is whether an abutter's initial refusal to match a third party's offer constitutes a binding and irrevocable waiver of right. Several considerations bear on determining whether the abutter is deemed to have waived his right and whether that waiver is irrevocable. First, was the waiver accompanied by a formal *kinyan*? Second, did the abutter waive his right before the property was sold to the third-party buyer or after? Third, was the waiver communicated to the buyer or to the seller?

The Talmud discusses a case where the third-party buyer approaches the abutter, expresses his interest in purchasing the property and receives permission from the abutter to proceed with the purchase. The Talmud concludes that the abutter's permission does not constitute a binding waiver of right unless a formal *kinyan* has been performed.<sup>7</sup> Rashi explains that absent a formal *kinyan*, the abutter can argue that he only directed the buyer to proceed with the purchase in order to expose the seller's asking price.<sup>8</sup>

Rabbenu Simcha offers a different reading of the Talmud's case, distinguishing between a *kinyan* performed before the sale has been executed and one that was performed afterward. He maintains that even a formal *kinyan* would not constitute a binding waiver, unless it was performed *after* the buyer closed on the property. Rabbenu Simcha argues that the abutter's right does not vest until after the property has been sold, and as such, the right is not his to waive before the sale has been executed. Before the sale, the abutter's *kinyan* constitutes a *kinyan devarim*—a mere pledge, rather than a bona fide transfer of right.<sup>9</sup> Rav Yosef Karo rejects Rabbenu Simcha's view.<sup>10</sup>

Ramah, cited in Tur, distinguishes between a waiver communicated to the buyer and a waiver

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<sup>3</sup> Rambam Shekhenim 12:5; Shulchan Arukh Choshen Mishpat 175:6.

<sup>4</sup> Shulchan Arukh Choshen Mishpat 175:47 and Sema no. 83.

<sup>5</sup> Tosafot Bava Metsi'a 108b.

<sup>6</sup> See Beit Yosef Choshen Mishpat 175:53 s.v. batim; Shulchan Arukh Choshen Mishpat 175:53.

<sup>7</sup> The Talmud records a dispute between Naharda'ei and Ravina, and rules in accordance with Naharda'ei. See also Rambam Shekhenim 14:2.

<sup>8</sup> Which presumably would be marked up if the abutter revealed his interest to the seller. See Rashi Bava Metsi'a 108a s.v. Neharda'ei.

<sup>9</sup> See Mordekhai Bava Metsi'a 393.

<sup>10</sup> See Beit Yosef Choshen Mishpat 175 s.v. u-Piresh; Shulchan Arukh Choshen Mishpat 175:31.

communicated to the seller. He limits the Talmud's requirement of *kinyan* to the case where the abutter directed the *buyer* to proceed with the purchase. If, however, the abutter directed the *seller* to proceed with the sale, the abutter is deemed to have waived his right even without a *kinyan*.<sup>11</sup> Following Rashi, Hagahot Ashri explains that the purpose of the *kinyan* is to ensure that the abutter's permission to proceed constituted a genuine waiver of right rather than a stratagem to reveal the seller's asking price. Hagahot Ashri contends that this consideration applies only to discussions between the abutter and *buyer*. (In discussions between the abutter and *seller*, the asking price would presumably be known.)<sup>12</sup> The Shulchan Arukh rules in accordance with Ramah.<sup>13</sup> On the face of it, Ramah's position suggests that Mizrahi had waived his right to the Property when he told Cohen (the seller) to proceed with the sale.

Although the Shulchan Arukh rules that a waiver communicated to the seller is valid even without a *kinyan*, he clarifies in Shut Avkat Rokhel that the abutter has the power to retract his waiver so long as the sale has not been executed.<sup>14</sup> In other words, the Shulkhan Arukh adopts Ramah's view that a waiver communicated to the seller is valid (and becomes binding when the sale is executed) but maintains (in Shut Avkat Rokhel) that it can be revoked up until the execution of the sale. Knesset ha-Gedolah adopts the Avkat Rokhel's position, as does Rabbi Aaron Levine in his *Economics and Jewish Law*.<sup>15</sup> It is also codified in the Pitchei Choshen.<sup>16</sup> On this view, Mizrahi can retract his waiver so long as the sale has not been executed.

Another reason to allow Mizrahi to retract his waiver emerges from the Shut Ginat Varadim's analysis. In discussing a case with a similar fact pattern, he disagrees with the above interpretation of Ramah's view and argues that even when the abutter instructs the *seller* to proceed, he can later claim (as does Mizrahi) that he did so only so as not to betray his interest in the property to the seller. Therefore, Ginat Varadim argues that Ramah would consider a non-*kinyan* waiver binding only if the abutter instructed *both* the seller and buyer to proceed with the sale. Mishpat Shalom le-Maharsham supports Ginat Varadim's position.<sup>17</sup>

The Beth Din accepts Mizrahi's contention that he initially instructed Cohen to proceed with the sale only because he did not believe that Cohen had received a bona fide offer. This was evidenced by the fact that Mizrahi placed his superior bid immediately after he realized that Ben-David's offer was serious. According to Ginat Varadim, this kind of waiver is invalid without a formal *kinyan*, since it was intended only to secure favorable terms of sale. Moreover, according to Rav Yosef Karo in Shut Avkat Rokhel, Mizrahi has the right to retract his waiver so long as the sale has not been executed.

A final consideration is based on the position of the Chemdat Shlomo cited in the Pitchei Teshuvah.<sup>18</sup> He maintains that when the abutter waives his right *to the seller*, he effectively empowers *the seller* with the choice to enforce it. The waiver is not binding with respect to the third-party buyer, who is not entitled to

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<sup>11</sup> Tur Choshen Mishpat 175:47.

<sup>12</sup> Hagahot Ashri Bava Metsi'a 9:22.

<sup>13</sup> Shulchan Arukh Choshen Mishpat 175:31

<sup>14</sup> Shut Avkat Rokhel 123.

<sup>15</sup> Knesset ha-Gedolah Choshen Mishpat 175:37; Rabbi Aaron Levine, *Economics and Jewish Law*, pg. 32.

<sup>16</sup> Pitchei Choshen Shutfim u-Matsranut chapter 11 note 49.

<sup>17</sup> Shut Ginat Varadim 6:6; Mishpat Shalom Choshen Mishpat 175:13.

<sup>18</sup> Pitchei Teshuvah Choshen Mishpat 175:11.

enforce it. If the *seller* wishes, he can activate *Dina de-Bar Metsra* even after the sale has been executed. In our case, Cohen has indicated that he is equally happy to sell to either party.

Accordingly, the Beth Din concludes that *Dina de-Bar Metsra* shall remain in effect.

### DECISION

Based on the foregoing, it is decided that Mizrahi has the right to purchase the Property from Cohen for the agreed upon price of \$5,000,000.00, closing by January 1, 2016. The Property shall be delivered “as-is” and with no guarantee of vacancy.

The Beth Din commends the parties on their conduct throughout the *din torah*. All parties acted with utmost honesty and integrity and have demonstrated scrupulous commitment to Torah and *Mitzvot* throughout the proceedings. We urge the parties to continue to relate to each other in peace and friendship as the Torah mandates, and without any rancor or acrimony.

All other applications and claims are hereby denied. All of the provisions of this decision shall take effect immediately. 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 decision by the arbitration panel shall be in accordance with the Rules and Procedures of the Beth Din of America and the Arbitration Agreement. Any provision of this decision may be modified with the consent of both parties.

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

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Rabbi AA

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Rabbi BB, Esq.

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Rabbi CC