י"ג כסלו, תשפ"ב

November 17, 2021

Pesak: Sapphire Financing v. Tower Real Estate LLC

The Beth Din of America (the "Beth Din") has been chosen by the parties as arbitrators pursuant to an arbitration agreement (the "Agreement", attached hereto as Exhibit A) dated as of October 3, 2021, between Sapphire Financing, with an address at 111 Broadway, New York, NY 10005, and Tower Real Estate LLC, with an address at 222 Park Avenue, New York, NY 10166, to submit to the Beth Din of America for a binding decision with respect to the alleged improper hiring of Shira Hart, a former employee of Sapphire Financing. The parties have acknowledged that the Beth Din of America is authorized to resolve this dispute. The Beth Din heard testimony as to the facts of the dispute at a hearing before the undersigned panel on November 1, 2021. The hearing was attended by Israel Gottlieb on behalf of Sapphire and by Alan Hershkowitz on behalf of Tower. Having given said matters due consideration, the Beth Din of America hereby decides as follows:

Background

Sapphire Financing ("Sapphire") is a real estate firm that specializes in mortgage brokerage. Over the years, Sapphire developed a relationship with NicheBank, a small bank that values close, personal relationships of the type that Sapphire had cultivated with it. Around 2013, Sapphire hired Shira Hart, and over the next few years, Shira closed several deals between NicheBank and Sapphire clients. Beginning in 2016, Shira worked to close deals between Tower Real Estate LLC ("Tower"), which was then a client of Sapphire, and NicheBank.

In January 2020, Sapphire furloughed Shira. Shortly thereafter, Tower offered to hire Shira, primarily as an asset manager but also to work on deals with NicheBank.

Shira asked Sapphire to match Tower's offer, but Sapphire declined to do so. Shira and Sapphire had discussions to the effect that it would be unfair for Shira to cut Sapphire out of Tower's deals with

NicheBank. Shira told Sapphire that Tower would "take care of" them and that Tower would be in touch to hammer out the details. Shira took the job with Tower.

It turns out that Tower never reached out to Sapphire, and the details of the arrangement were never discussed, let alone finalized. When Sapphire later pressed Shira about the arrangement, Shira responded that if Tower did not get in touch with Sapphire, she would personally pay Sapphire a certain basis point per each deal that Tower closed with NicheBank, to ensure that Sapphire did not lose out by her move to Tower.

Claims

Sapphire puts forth two claims against Tower. First, Sapphire claims that it is industry standard for Tower to compensate Sapphire with a certain basis point for any deal that Tower does with NicheBank in the future since, by taking Shira Hart, Tower will now benefit from the NicheBank relationship Sapphire had cultivated. To support its claim, Sapphire points to a deal it worked out under similar conditions with a different client. That deal provided for Sapphire to receive a certain basis point on future deals closed by the client. Tower denies that such an industry standard exists.

Second, Sapphire claims that it relied on the assurances, communicated by Shira, that Tower would "take care of them". Without those assurances, Sapphire claims, it would have matched Tower's offer and held on to Shira. Under a theory of promissory estoppel, Sapphire claims that it is entitled to be made whole by receiving a certain basis point of future deals with NicheBank. Tower responds that Shira was not authorized to communicate any assurances or negotiate any offer on its behalf to Sapphire. In other words, Sapphire may have relied to its detriment on Shira; it did not rely on Tower.

Discussion and Decision

Absent a restrictive covenant, Jewish law places no restriction on Shira and Tower's right to close deals with NicheBank.[1] The question before us is whether Tower must pay Sapphire a percentage of those future deals. Jewish law often incorporates the norms of the industry (*minhag ha-sochrim*).[2] However,

[1] There is extensive discussion in Jewish law whether a competitor can poach employees or clients, see, e.g., Mordekhai Bava Batra 516, Responsa Rashba 6:259, Shulchan Arukh Choshen Mishpat 156:5. But that discussion is not relevant to the instant case where Sapphire furloughed Shira before Tower hired her.
[2] See Rabbi Itamar Rosensweig, "Commercial Custom and Jewish Law", *Jewishprudence* (June 2020).

we have not seen any evidence to support Sapphire's claim that such compensation is industry standard. The settlement that Sapphire negotiated with its earlier client--which Sapphire presented as evidence of the industry practice--reflects the negotiated terms of an isolated settlement, not an industry-wide norm.[3]

Sapphire argues that it justifiably relied on the assurance that Tower would take care of them. Jewish law recognizes a doctrine of reliance (חיוב מטעם ערב), similar to the common law doctrine of promissory estoppel. Under this halakhic doctrine, a plaintiff who acts relying justifiably on the instruction of a promisor is entitled to recover damages--the cost of his reliance.[4] However, the legal standard for liability is met only when the plaintiff acts under the immediate instruction or direct promise of the defendant.[5] In the instant case, Tower never communicated with Sapphire. Attempting to calm Shira and to assure her that she will not incur the wrath of Sapphire over her move, Tower texted Shira that "we will take care of Gottlieb" (i.e., Sapphire). Shira, on her own, forwarded that WhatsApp message to Sapphire. To the extent that Sapphire relied on anything, it relied not on any directive from Tower but on a WhatsApp message forwarded by a past associate eager to remain on good terms with her old boss.[6]

Furthermore, for a claim of reliance to succeed, Jewish law authorities require that the plaintiff must have been *justified* in relying on the defendant's promise or instruction. A plaintiff cannot recklessly embrace the defendant's promise and collect damages. In such a case, the plaintiff is considered to have

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[3] To rise to the level of an industry norm, the practice must be prevalent and done with regularity, see Shulchan Arukh Choshen Mishpat 331:1:

ואינו קרוי מנהג אלא דבר השכיח ונעשה הרבה פעמים, אבל דבר שאינו נעשה רק פעם אחת או שני פעמים אינו קרוי מנהג.

[4] See Ritva Bava Metzia 73b s.v. *hai*:

שזה הבטיחו ... וסמך עליו ונתן לו מעותיו על דעת כן הרי הוא חייב לשלם לו מה שהפסיד בהבטחתו.

Ritva Bava Metzia 75b s.v. *le-havi*:

כל שהבטיח לחברו וסמך חברו עליו ואלמלא הבטחתו לא היה בא לו שום הפסד חייב לשלם לו

Shut Rashba 1:1016:

כל שעושה מעשה על פי אחר אותו אחר חייב מדין ערב.

See also Ran Bava Metzia 98b s.v. shalchah; Netivot ha-Mishpat 340:11, 182:3, 344:1, 306:6.

[5] See above, n. 4. These authorities characterize the legal principle as requiring *hotzi mamon al piv* (i.e., that the plaintiff acted under the instruction of the defendant) or *samakh al havtachato* (that the plaintiff relied on the defendant's promise to him). These formulations imply a direct promise or directive from the defendant to the plaintiff.

[6] As a factual matter, we conclude that Shira was not authorized to act on Tower's behalf. To be sure, Shira wrote in a different WhatsApp message to Sapphire that Tower's principals want to work something out and that "AH [one of Tower's principals] will likely call you sometime to work something out." Here Shira in effect communicates to Sapphire that she is not authorized to negotiate and that any settlement will be negotiated by the Tower's principals. In Jewish law, an agent generally cannot bind a principal outside the scope of his explicitly authorized agency. See,e.g., Tur Choshen Mishpat 182:7.

brought the loss upon himself.[7] Sapphire was not justified in relying on Shira's communications. First, Shira represented only that Tower desired to work something out with Sapphire, texting Sapphire that Tower "wants to work something out." No definitive arrangement had been offered or assured. Such an arrangement could range from sports tickets, to Tower using Sapphire as brokers to refinance prior deals Sapphire had brokered, to anything else. Second, Shira explicitly communicated that any deal is subject to Sapphire's future discussion with Tower's principals. Shira wrote to Sapphire "AH [one of Tower's principals] will likely call you sometime to work something out." Those discussions never took place. Based on the forgoing, we conclude that Tower was not justified in relying on these vague and tentative overtures. If Tower truly relied on Shira's communications, it did so recklessly.

Finally, a claim of reliance requires actual reliance. We are not persuaded that Sapphire in fact relied on Shira's communications. The record reflects an inconsistency in Sapphire's testimony. Sapphire initially testified that it furloughed Shira and did not match Tower's offer to Shira because it was not in a financial position to do so, as the Covid-19 pandemic had slowed business. At the same time Sapphire wants to maintain that it was *because it relied on Tower's assurances* that it would take care of them on future NicheBank deals that it decided to not match Tower's offer and keep Shira. While these claims can perhaps be reconciled, the inconsistency casts some doubt on the extent to which Sapphire truly relied on the communications from Tower.

Based on the foregoing, Sapphire's claim is denied.

Tower indicated that industry etiquette often calls for investors to refinance deals using the brokers who secured the project's initial financing. We think that such a gesture from Tower to Sapphire would be appropriate, especially in light of the moral consideration that Tower will be benefiting from the relationship that Sapphire cultivated with NicheBank through Shira. To be clear, we do not order Tower to do so, as such conduct would constitute *lifnim mi-shurat ha-din*.[8] But we believe that such a gesture from Tower would be appropriate and a productive step towards reconciliation, realizing the Torah's ideal of *mishpat shalom*: אמת ומשפט שלום שפטו בשעריכם.[9]

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[7] Responsa Maharik no. 133:

ואף על גב שהוציא [שמעון] מעותיו על סמך דברי ראובן, שמעון הוא דאפסיד אנפשיה דה"ל לאסוקי אדעתא דלמא הדר ביה ראובן.

[8] For the idea that a beth din generally should not order supererogatory performance, see Shulchan Arukh Choshen Mishpat 12:2.

[9] See Zechariah 8:16 and Sanhedrin 6b.

All other claims are hereby denied. 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 America, the provisions set forth herein, and the arbitration agreement of the parties. 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 provision of this agreement may be modified with the written consent of both parties. Except as otherwise indicated, all of the provisions of this decision shall take effect immediately.

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

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Rabbi AA	Rabbi BB, Esq.	Rabbi CC