

VOLUME I: NUMBER 9: SIGNING RELEASES ON DEFECTIVE GOODS

by Rabbi Aron Tendler

Question:

Reuven has purchased a new home from a building contractor. At the time of the purchase he signed a document releasing the contractor from any flaws or defects that were in the home at the time of the signing, or that may reveal themselves at a later date. After moving in, Reuven quickly became aware of some defects that existed in the construction of his home.

Does Reuven have any right at all to summon the contractor to a Din Torah and demand rectification of these defects?

What is the Halacha?

Answer:

- A. Absolutely!! There is no validity at all to such a release if the purchaser had no idea at the time that he signed, what defects there may be in the home. This applies to any acquisition of a defective item. The seller must accept that the sale is void and reimburse the buyer, or pay to have the item fixed (depending on the situation).

This is true, even if, at the time of the sale, the seller explicitly stipulated to the buyer that the sale is on condition that the merchant has no responsibility if the merchandise is found to be defective.

2. If the buyer would know exactly what he is releasing the merchant from at the time of the signing, the release would be valid. For example, if the buyer was aware of certain defects in the home and signed the release, or even if he is unaware of the defect but he signs that the seller is released from a certain amount of liability, and a monetary figure is put into the release, as long as the buyer willingly signs the release it is valid.

Sources:

The Rambam (Hilchos Mekach U'Memkar 15:4) writes: "Anyone who purchases an item, does so under the assumption that it has no defects. And (even) if the seller explicitly states that he is selling the item to you on condition that if it is defective, you will not return it, if the item is defective - he (the buyer) may (still) return it! Until he states the exact defect in the merchandise and the buyer forgives him, or until the buyer says 'any flaw found in this item that lowers it's value until such and such an amount - I accept upon myself.' This is because the forgiver must know what it is that he is forgiving, and he must specify it, just like by Hona'ah." This statement of the Rambam is stated as the Halacha in the Shulchan Oruch (Choshen Mishpat 232:7).

The Magid Mishna, the S'ma (17), and the Shach (4) there explain that even though there is no explicit source for this Din in the Gemara, the Rambam derives it from the Laws of Hona'as Mamon (overpricing or price gouging - see below). The Gemara in Bava Metziah (51b) states that if a shopkeeper tells a customer that he is selling him an item on condition that the customer releases him from all responsibility, should he find out that the item is overpriced, and the customer agrees to this, we still say that the purchase is void if it is found that the price charged was 1/6 (see below) more than what is charged by other merchants for the same item in that area. This is quoted by the Rambam (Hilchos Mechira 13:3) and stated as the Halacha in the Shulchan Oruch (Choshen Mishpat 227:21).

The reason for this is because a person cannot forgive something that he does not know about. If he does not know that he is being overcharged, he cannot release the seller from his responsibilities. Similarly, if the buyer is unaware of any flaws in the merchandise, even after he has taken possession of the item, he can claim that under the circumstances he never would have purchased it and void the sale. However, if the item is something that is customarily repaired rather than returned, such as a home, the purchaser may only request that the repairs be made and not void the entire sale. This is dependent on the custom in the region of the sale, as is stated in the Shulchan Oruch (Choshen Mishpat 232:6).

In an opposite situation, all of the above would also apply. If the buyer would convince the seller that the price of an item is really 1/6 less than the going price in that area, and the seller sold it with this understanding, he has a right to void the sale when he discovers that the item was underpriced. This is clearly stated in the Shulchan Oruch there (8). It would follow, therefore, that in our case of purchasing the home, if the contractor were to release the buyer from an obligation, but he had no idea how much money he is releasing him from, the release would be invalid.

By the way, I would like to mention that if there is a clause in a contract releasing the seller from any future defects that may become known, there is another reason why this clause is invalid. This is because we have a Halachic rule of "Ain Odom Makneh Dovor Shelo Ba L'Olam" - a person cannot

buy or sell something that is not yet in existence. However, this does not render the entire contract invalid, just that one clause. This is clearly stated in the Shulchan Oruch (Choshen Mishpat 210:3) and in the Rema (ibid. 209:4). See also the S'ma (ibid. 203:18) and the Pischei Teshuva there.

Hona'as Mamon or Ona'as Mamon - over pricing, or price gouging. The source for this halacha is Vayikrah 25:14, where the Torah tells us, "When You Sell To Your Friend Or Buy From Your Friend, You Should Not Oppress One Another." Our Rabbis explain this Possuk to mean monetary exploitation.

There are actually three different legal ramifications from the Din of Ona'ah.

1. If the amount of the overcharge is less than $\frac{1}{6}$ more than the going market price, it is not considered a substantial enough claim and no legal action may be taken.
 2. If the amount of the overcharge is exactly $\frac{1}{6}$ more than the going market price, the buyer is able to claim the price differential.
 3. If the overcharge is more than $\frac{1}{6}$ more than the going market price, the sale may be canceled.
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This class is translated and moderated by Rabbi Aaron Tendler of Yeshivas Ner Yisroel in Baltimore. Rabbi Tendler accepts full responsibility for the accuracy of the translation and will be happy to fax originals of the articles in Hebrew to anyone interested.

Feedback is appreciated! It can be sent to atendler@torah.org.

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Please Note: The purpose of this column is to make people aware of Choshen Mishpat situations that can arise at any time, and the Halachic concepts that may be used to resolve them. Each individual situation must be resolved by an objective, competent Bais Din (or Rabbinic Arbitrator) in the presence of all parties involved!