COVID 19: CAN I GET BACK MY MONEY FROM A PESACH PROGRAM, A WEDDING HALL, MY KINDS' PLAYGROUP OR YESHIVA?

Makus HaMedina or Impracticability: Two Approaches

Certainly a pandemic like COVID does not happen often, and may that continue to be true, but in Halacha's over 2500 years of written history and a significantly shorter amount for the common law, they have dealt and will in the future likely deal with these issues differently.

First, some definitions: *Makus HaMedina* means what it sounds like, a large affliction affecting a full city or a full country. Clearly COVID falls into that category. The Mishna in Bava Metzia (103b, 105b) speaks about a storm or a swarm of locusts that destroyed the majority of the fields in the area. Another example of a general national affliction would be where the water source for all the fields in that community dried up. Halacha requires that this malady affect a large area, ergo its name, *Makus HaMedina*, however, if just one field was destroyed, it would be chalked up to his bad mazel. In the cases in the mishnios, the owner of the field wants to hold the sharecropper responsible for his unrealized profits, and the answer is no, the sharecropper is not liable due to the *Makus HaMedina*. Over the next 2000 years, the Poskim have applied this concept of *Makus HaMedina* to property rentals where the city burns down or there was some pestilence that made everybody leave the city as well as employment contracts (see for instance *Choshen HaMishpat* 321:1, 322:1, 312:17 and *Machne Ephraim*, Rentals Chapter 6). So in conclusion, under Halacha, if the obligor (e.g. a tenant, a catering hall or a mother whose children are in a play group) can show there has been a *Makus HaMedina* they may be exempt from fulfilling their obligations. As expected, there are plenty of exceptions to this rule. These gray areas and exceptions will be played out in future Batie Dinnim.

Now for secular law's view of the COVID virus, this would be the concept of Impossibility or Impracticability. To be blunt, secular law does not have much *rachmanos.* While Halacha tends to view the entire scenario based on what the Torah and the reasonable man or woman would expect a fair outcome to be, and always attempts to push a compromise, American common law elevates the contract between the parties to something akin to Halacha Mi Sinai -- rather immutable. Where Halacha prefers, and sometimes to the chagrin of the disputants, reaches some economic compromise, common law is more of a gladiator sport where the winner takes all. You cannot fulfill your contract; you breached, you lose.

Only when there are sophisticated parties to a contract with sophisticated lawyers, will they add something called a force majeure clause which would delineate when one party is exempt, for instance, from paying rent. Most sophisticated, commercial leases have a clause that says if the leased premises burns down, if the entrance way is destroyed so that a tenant on the second floor cannot enter the building, then the tenant does not have to pay rent. Many of those clauses have rules about whether government regulation prohibits the use of the rental space, and allowing the tenant not to pay rent. Those force majeure clauses are also looked at carefully. Without a good one, the tenant will likely lose. For instance, right before the outbreak of World War II, a car dealer rented space to set up his car lot. Once the war broke out, cars could no longer be sold in the United

States and he wanted to get out of his lease. He did not have in his lease a force majeure clause mentioning that a world war could break out and the United States government would prohibit the sale of automobiles. Who would? It is unlikely that there is any force majeure clause out there that talks about a pandemic. Some of these clauses do talk about government prohibition or regulation as being a reason not to pay rent. In all likelihood, in the future, sophisticated attorneys will include a pandemic problem in the force majeure clause to relieve their tenant client of paying rent during a time of government shutdown of nonessential businesses. Without a good force majeure clause courts in the United States are loath to let a party out of a contract. The concept of impracticability or impossibility is nevertheless embedded somewhat slightly in common law, see Restatement on Contracts §§ 261-264. If there is going to be a test of impossibility in common law, than COVID 19 will be that test.

So let us see how Halacha and secular law would deal with four typical issues of the last two months: wedding halls, Pesach programs, playgroups and yeshivas. At the outset, it should be known that many Batei Dinnim will follow secular law, but not the harsh secular law that does not try to spread around the pain to the parties.

Wedding Halls

Assume this scenario: your wedding was scheduled for March 25 (three days after a declaration of the state of emergency) and the bride's parents made a substantial down payment. The caterer by this time may have also incurred expenses ordering food, but the parties have also likely made down payments for flowers and musicians. On March 22, the governor prohibits all weddings. Who will suffer the loss? The Torah will look at this scenario more globally. Through no fault or cause of negligence of either party, this wedding cannot go on. There is a responsa from the *Machane Ephraim*, *Hilchos S'cirus* No. 7 which basically holds that the caterer and the parties should split the losses. He quotes a Ravan brought in Siman 98 who views a *Makus HaMedina* as a plague on both parties, who should equally share the pain. While this state of emergency called by the governor is more akin to a fire burning down every house in the city and relieving the tenant from further rent and perhaps get back some of the money she has prepaid, from the responsa, one can see how a Beth Din views this *Makus HaMedina* as affecting everyone and that we should share the pain together. Also, there are opinions in Halacha that say you can never get back prepayments from a caterer or rent from a landlord. It seems, though that the majority, would sanction a return of even prepayments.

Secular law, on the other hand, would view the situation as a breach of contract by the caterer and permit the couple to get back their money.

Facto v. Pantagis, 390 N.J. Super. 227, 915 A.2d 59 (App. Div. 2007), is a breach of contract action by a newly married couple against a banquet hall where the electricity for the entire area went out. However, in that contract, there was a force majeure clause which specifically exempted the catering hall of liability in the event there is a power shortage. The couple sued for all the money they paid to the caterer. Both the lower court and a higher court agreed with the caterer that it was exempt from reimbursing the couple due to the force majeure clause. While the lower court gave the couple nothing, the appellate court reversed and said "Where one party to a contract is excused

from performance as a result of an unforeseen event that makes performance impracticable, the other party is also usually excused from performance in this case for paying for the wedding. In our case where the government prohibits the catering hall from conducting weddings three days in advance, the bride's parents should be able to get back all of the down payment and the caterer would have to suffer the losses.

Pesach Programs.

Using the same analysis and rules described for weddings, it would appear that Halacha would look to have these parties to share the misery. Many caterers also had likely already spent the money to source food, wine and matzos before the time of the declaration of the state of emergency. No one is really at fault. Like the scenario where there was a pestilence and the landlord wants his rent (and he wins because you could have stayed), here the caterer cannot perform its duties, he could claim Macas HaMedina and be liable for the lost money on flowers, band or photographer down payments. Still he may not be liable to return any of the previously pay down payments see responsa No. 98 of the Ra'van and an opinion of the Beth Din of Rav Tzvi Pesach Frank about landlords suing tenants who fled Hebron after the massacres where they got 2/3 of the rent for many years). The guest would cite the *Rema* in *Choshen Hamishpat* 312:7 that when the whole city burns down, the tenant can get back the prepaid rent. The legal prohibition would be like a fire wiping out the program. As is often the case, there are differences of opinions in Halacha. If guests would try to sue their caterers in Beth Din, they could point to the *Rema*, but a caterer would use the defense called *kim li* which means that he would not have return any money in his possession as long as he can point to a ruling in his behalf. While one can never tell what a Beth Din will do, in all likelihood it may very well look to share the pain and award the guests some compensation while not destroying the program people. Based on the secular law above quoted, the guests would have an easier time getting back all their money by suing in court. First, it is very unlikely that any of these Passover programs had a force majeure clause that would refer to COVID and a declaration of emergency. Without such a clause they likely would be held responsible to return all the money. There is a defense in the common law of impracticality, but as we have said before, under secular law, the "contract is king." While everyone likes to get back their money, a frum Jew should be wary of going to a secular court to get back this money when the Shulchan Aruk speaks so harshly against going to secular courts. Even if you won the money, it may be deemed as if you got it through *gazeila* (stealing), so that does not sound like the right thing to be doing under this time of heavenly wrath.

Playgroups

Once playgroups have been outlawed by the declaration of emergency they too fall into this rubric mentioned above, though the secular and Halacha law would seem to coincide. Since the playgroup person cannot offer any services after the declaration of an emergency, she would be unable to claim payment. Here it seems that less likely that a Beth Din would split the difference, because the mothers or fathers now have to take care of those children, which would have otherwise been in playgroup. The question of prepayments arises. Certainly, secular law would require the playgroup host to return the money. The playgroup host's ability to claim *kim li* is not as clear because a playgroup is not analogous to a situation where someone paid rent in advance without being obligated to do so. Many playgroups require advance payments.

As is often the case, there is no clear single halchic rule on this because the Torah views a case more holistically and seeks compromise. Accordingly parent's obligation to pay the tuition payments for playgroup is closed due to COVED 19, is subject to a great debate among the earlier poskim. Some Poskim require the parents to pay the full tuition for the time the playgroups closed because they viewed the Morah more like an employee of the parents who cannot be fired without just cause. While others completely exempt the parents from the tuition payments for this time. Other Poskim require the parents to pay half of the tuition. Being that there is no clear halachic consensus, the parents cannot be forced to make further payments, but the Morahs should not cash any head checks they may have, as the parents have the halachic right to cancel the check. Whoever is holding onto money could argue *kim li.* Again the Torah views a Makkus Hamedina as affecting everyone, so we should all share the pain. See the ruling from Lakewood's Bais HaVaad Beis Din issued recently and available at its web site.

Yeshivas and colleges

Both yeshivas and colleges have made a Herculean attempt to provide services to their students online. Obviously this is not as ideal as getting the kids out of the house at 8 AM in the morning where they stay in yeshiva till 5 o'clock PM, but the yeshivas are trying their best. There have already been some lawsuits by college students against their colleges for only providing online lectures and not having the in class face-to-face lectures. So far those have been dismissed, but more are being filed daily. The colleges like the yeshivas are doing their best and are not likely to be deemed either in secular court or in Halacha to be in breach of their contract.

Every case, be it in Beth Din or court, turns on the unique facts. This article is but a general outline of issues litigants would face in either forum. Much of the source material in this article is based on a very recent lecture by the Beth Din of America on this very topic and from the Bais HaVaad of Lakewood. Anyone can get on their mailing lists, and they have excellent lectures and articles, all free of charge.

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