Published Decision: Detrimental Reliance and Promissory Estoppel in Jewish Law

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I. Introduction: Sapphire Financing v. Tower Real Estate

The Beth Din of America recently published Sapphire Financing v. Tower Real Estate, an anonymized decision involving a dispute between two financial firms. In this post, I summarize the facts of the case and discuss the halakhic principles that governed the dayanim's decision.

The Facts

The facts of the case are as follows. The plaintiff, Sapphire Financing, is a firm that specializes in mortgage brokerage. Tower Real Estate, the defendant, is a real estate investment firm. Sapphire had cultivated a relationship with NicheBank, a small bank that values close, personal relationships of the type that Sapphire had developed with it. Around 2013, Sapphire hired Shira Hart who over the next few years closed deals between Sapphire's clients and NicheBank. Beginning in 2016, Shira closed several deals between NicheBank and Tower, which was then a client of Sapphire.

In January 2020, during the height of the Covid-19 pandemic, Sapphire furloughed Shira. Shortly thereafter, Tower offered to hire Shira, with the intention of creating their own direct relationship with NicheBank. Shira asked Sapphire if they wanted to match Tower's offer, but Sapphire declined. At the same time, Shira and Sapphire discussed the fact that it would be

unfair for Tower to profit (through Shira) off the relationship Sapphire had cultivated with NicheBank, since, by hiring Shira, Tower would effectively cut out Sapphire as the middle-man broker on its future deals with NicheBank.

Shira communicated Sapphire's concern to Tower, noting that her boss at Sapphire would be very upset if Tower profited off the relationship it (Sapphire) had cultivated with NicheBank. Tower told Shira not to worry about it and that they would "take care" of Sapphire. Shira forwarded a text message from one of Tower's principals that read "we will take care of Sapphire" to her old boss at Sapphire and told him that Tower "wants to work something out" and would be in touch to hammer out an agreement.

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 future deal that Tower closed with NicheBank, to ensure that Sapphire did not lose out by her move to Tower.

Sapphire's Claim

Sapphire claimed that it is entitled to receive a certain basis point percentage from Tower for any future deal that Tower closes with NicheBank. Tower countered that it never entered into any agreement with Sapphire and that Shira's offer to pay Sapphire a basis point per each deal was her personal offer to smooth things over with her former boss and does not bind Tower. Sapphire offered two arguments to support its claim.

II. Industry Custom and Practice

Sapphire's First Argument: Minhag

Sapphire's first argument appeals to custom. Sapphire argued that in similar cases where a client benefits from a relationship that a past broker had developed with a lending bank, it is customary for the client to continue to compensate the broker on new deals, even where the broker is no longer involved. As evidence of this custom, Sapphire points to a settlement agreement it had worked out with a different client where the client agreed to compensate Sapphire with a certain basis point on any future deals the client would close with a bank that Sapphire introduced it to.

In their decision the dayanim acknowledge that were such an industry norm to exist, Sapphire would be entitled to compensation, as Jewish law often recognizes the norms of the industry (*minhag ha-sochrim, minhag ha-medinah*).[2] But they were not persuaded by Sapphire's claim that such a minhag exists. The dayanim appeal to the Shulchan Arukh's standard (Choshen Mishpat 331:1) that to rise to the level of minhag, a practice must be

common (שכיח) and done frequently (נעשה הרבה פעמים).[3] The dayanim concluded that Sapphire's settlement with a prior client reflects the terms of an isolated settlement agreement, not a common industry practice.

III. Detrimental Reliance in Jewish Law

Sapphire's Second Argument: Detrimental Reliance

Sapphire's second argument appeals to a principle of detrimental reliance. Under the common law, a promisor can become liable for damages when he induces another party to rely on his promise to the other party's detriment.[4] Sapphire argued that Tower promised (communicated through Shira) to "take care" of Sapphire and that it relied on that promise when it decided to not rehire Shira and match Tower's offer to her. Sapphire claims that without Tower's assurance that Sapphire would not lose out on future NicheBank deals, Sapphire would have matched Tower's offer to Shira and rehired her.

The dayanim discuss the Jewish law equivalent of promissory estoppel and detrimental reliance: *hiyyuv mi-ta'am 'arev* (חיוב מטעם ערב). In the next section I offer an exposition of the halakhic principle of *'arev* as a basis for recovering damages in cases of detrimental reliance, its talmudic basis, and how it is interpreted and applied by halakhic authorities.

Promissory Estoppel and Detrimental Reliance in Jewish Law: *'Arev*

A. Ritva's Analysis of the Wine Purchaser Case

The Talmud (Bava Metzia 73b) discusses a plaintiff who had given money to the defendant to purchase wine at a below-market wine sale. The defendant accepted the money and assured the plaintiff that he would make the purchase at the price. But the defendant was then negligent and never purchased the wine, failing to make good on his assurance. The Talmud rules that if the plaintiff could no longer purchase wine at that price, the defendant is liable to compensate the plaintiff for his reliance damages—i.e., the difference in wine price.[5]

Ritva explains the legal principle underlying the Talmud's ruling as that of promissory estoppel and detrimental reliance. The defendant assured the plaintiff that he would purchase the wine at the below-market price, and the plaintiff relied on the defendant's assurance. As Ritva explains, but for the defendant's promise the plaintiff would have purchased the wine himself or found a different agent to purchase it for him. Therefore, when the defendant negligently fails to perform, he becomes liable to compensate the plaintiff for the losses he induced.[6]

Ritva grounds the Jewish law liability for promissory estoppel and detrimental reliance in the halakhic principle of *'arev* (ערב). '*Arev* is the principle in Jewish law that a guarantor of a debt obligates himself and becomes liable for the value of the debt simply by inducing the creditor to rely on his assurance to lend to the borrower. By assuring the creditor and inducing him to

lend, the guarantor himself becomes liable to compensate the creditor should the borrower default on his payment.[7] Ritva interprets *'arev* as a general principle that governs all cases of induced reliance. It is not limited to loans.[8]

The fact that Ritva grounds the defendant's liability for detrimental reliance in the halakhah of *'arev* might suggest that detrimental reliance in Jewish law is best conceptualized as a principle of contract rather than tort. The idea of *'arev* is not that the defendant harmed the plaintiff or violated his rights. Rather, by instructing and inducing the plaintiff to act in a certain way the defendant is deemed to have agreed to indemnify the plaintiff from any financial losses that would result from relying on his instruction and inducement. This characterization is consistent with Ritva's formulation that the defendant, in consideration of the plaintiff relying on his assurance, "obligates himself" (משתעבד ליה) to cover the plaintiff's losses.[9]

B. The Case of the Reneging Employer

Ritva argues that the same halakhic principle of detrimental reliance (*'arev*) underlies the Talmud's ruling that a homeowner can become liable to a worker for inducing him to lose alternative employment for the day. The Talmud (Bava Metzia 76b) discusses the case of a homeowner who induces a worker to travel to perform work, but then cancels on the worker at the last minute such that the worker can no longer find alternative employment for the day.[10] The Talmud finds the homeowner liable to compensate the worker for his reliance damages.[11] Ritva explains that even where no contractual employment relationship exists between the two parties,[12] the homeowner is liable to compensate the worker under the principle of *'arev*: The homeowner induced the worker to forgo work opportunities elsewhere, for which he becomes liable when he cancels on the worker.[13]

C. The Case of the Partnership's Risky Debt Payment

A third example of *'arev* as detrimental reliance appears in a responsum of Rashba (Shut Rashba 1:1015). Rashba was asked to rule on a case involving partners, Reuven and Shimon, who had borrowed money from Levi and had signed a note (*shetar*) to secure the loan. When the debt came due, Levi arrived to collect, but he failed to bring the note (*shetar*). In Jewish law, a debtor who pays without retrieving the *shetar* runs the risk of the creditor later producing the *shetar* and enforcing a second collection of the debt.[14] In light of this risk, the partners in Rashba's case–Reuven and Shimon–initially refused to pay the debt. Later, however, Reuven changed his mind: He instructed his partner Shimon to repay the debt from the assets of the partnership and assured him that he will retrieve the *shetar* by a specified date.[15] Shimon relied on Reuven's assurance and made the payment.

As it happened, the creditor, Levi, died before Reuven retrieved the *shetar.* And Levi's heirs, who had found the *shetar* among their father's financial assets, enforced the document in court and were able to (re)collect the full value of the debt from the partnership. Now Shimon

sues Reuven under the doctrine of *'arev* claiming that he relied to his detriment on Reuven's assurances and suffered losses because of it. Reuven counters that he never formally guaranteed to indemnify Shimon from losses.[16]

Rashba ruled in favor of Shimon, explaining that because Reuven induced Shimon to rely on his assurance, Reuven is liable under the principle of *'arev* to reimburse him for his losses.[17]

D. The Bailee's Liability Prior to Taking Possession

Ran's analysis of the Mishnah in Bava Metzia 98b offers a fourth illustration of Jewish law's *'arev* principle. The Mishnah discusses a bailee (*sho'el*) who had arranged to borrow a cow from its owner. The bailee instructs the owner to send the cow with one of *the owner's* servants for delivery. The Mishnah rules that if the cow dies en route to the bailee's house, the bailee is liable for the loss, not the owner.[18]

Ran observes that the bailee never took possession of the cow. It died in the possession of the *owner's* servant, and it never transferred into the bailee's domain. Why then is the bailee liable for the loss? Ran notes that the owner's servant cannot be characterized as the bailee's agent (*shaliach*), since the bailee's communication with the owner falls short of the halakhic requirements for appointing the servant an agent.[19]

Ran argues that the bailee is liable—never having taken possession of the cow—under the principle of *'arev*. The bailee instructed the owner to send the cow, and the owner relied on the bailee to his detriment.[20] In other words, the borrower's liability arises not in the laws of bailments (*shemirah*) but rather in the laws of *'arev* and reliance.[21]

The Standard of Reliance: Direct and Justified Reliance

Having surveyed the halakhic principle of *'arev* and some of its applications, let us return to the dayanim's analysis in Sapphire Financing v. Tower Real Estate. Recall that Sapphire argued that it relied on Tower's communication, which Shira conveyed to Sapphire, that it would "take care" of Sapphire regarding the NicheBank relationship. Here the dayanim explain that not every instance of detrimental reliance generates liability. The dayanim develop two important distinctions. First, they distinguish between direct and indirect reliance. Second, they distinguish between justified and unjustified reliance.

Direct vs. Indirect Reliance

The dayanim in *Sapphire* held that the liability of *'arev* requires a direct instruction, assurance, or promise from the defendant to the plaintiff. As they note in their decision, the halakhic "standard for liability is met only when the plaintiff acts under the immediate instruction or direct promise of the defendant." Here the dayanim appeal to the rishonim's formulations of the doctrine of *'arev*, which imply an assurance or instruction communicated directly from one party to the other.[22] The dayanim write:

"[halakhic] 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."

Tower never communicated directly to Sapphire that it will take care of Sapphire. Rather, one of Tower's principals had texted Shira–in an effort to allay her fear that Sapphire will be angry with her for utilizing the relationship with NicheBank for Tower's benefit—not to worry because "we will take care of Sapphire." Shira on her own forwarded that text message to Sapphire. Thus, the dayanim concluded that "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."

Justified vs. Unjustified Reliance

The dayanim also distinguished between justified and unjustified reliance, holding that a plaintiff is entitled to recover damages only when his reliance on the defendant was *justified.* The dayanim cite a responsum of Maharik, who discusses a case where the defendant, Reuven, had assured the plaintiff, Shimon, that he would lobby and advocate for him *pro bono* so long as the plaintiff covered the expenses.[23] The plaintiff relied on the defendant's promise and paid the expenses. But then the defendant reneged and asserted that he will not complete the job unless the plaintiff also compensated him for his work. The plaintiff countered that the defendant is obligated to complete the job *pro bono*, since he had already relied on the defendant's promise when he paid the expenses.[24]

Maharik denies the plaintiff's claim for reliance. He reasons that because the defendant was acting *pro bono*, the plaintiff was not justified in relying on the defendant's assurances. Someone who offers a service without charge cannot be reasonably relied upon to complete the job. Therefore, Maharik concludes, the plaintiff "brought the loss upon himself".[25] In other words, to prevail on a claim of reliance the plaintiff must have been justified in relying on the defendant's promise.

As the dayanim write in *Sapphire*:

"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 brought the loss upon himself."

Applying this analysis to the case before them, the dayanim maintain that Sapphire was not justified in relying on the communication from Tower. They offer two reasons for characterizing Sapphire's reliance as unjustified. First, they note that the content of Tower's assurance was so underspecified and vague that it is not even clear what Sapphire expected to receive from Tower. What then did they rely upon? The dayanim write:

“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.”

The second reason the dayanim cite is the fact that Shira herself communicated to Sapphire that the specifics of the deal would have to be worked out with Tower’s principals. How, then, can Sapphire rely on a deal that had not yet materialized? The dayanim write:

“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 Sapphire was not justified in relying on these vague and tentative overtures. If Sapphire truly relied on Shira’s communications, it did so recklessly.”

Summary: Damages for Detrimental Reliance (*‘Arev*) in Sapphire v. Tower

To summarize, the dayanim weighed whether Tower can be held liable under a theory of *‘arev*. They found that there is no basis for liability under *‘arev* because Tower never directly instructed Sapphire to act and because Sapphire’s reliance was not justified. It is also worth noting that the dayanim raised a third consideration in rejecting Sapphire’s claim: They were not persuaded that Sapphire in fact relied on Tower. The dayanim write:

“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.”

IV. *Lifnim Mi-Shurat Ha-Din*

Judicial Enforcement of Supererogatory Conduct

The dayanim denied Sapphire’s claim for damages. However, in the final paragraph of their decision, they note, based on Tower’s own testimony, that industry etiquette often calls for investors to refinance a loan using the brokers who secured the initial financing. The dayanim counsel Tower that it would be proper for them to use Sapphire as brokers when they refinance the loans Sapphire originally secured, though the dayanim refrain from ordering Tower to do so. The dayanim write:

“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.* 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.”

Here the dayanim appeal to Jewish law’s distinction between obligations that arise in *din* (justice) and supererogatory moral obligations (*lifnim mi-shurat ha-din*). Many Jewish law authorities hold that a beit din cannot compel performance of supererogatory moral obligations. For it is in that very sense that they are supererogatory.[26] Thus, given the dayanim’s assessment that such behavior constitutes *lifnim mi-shurat ha-din*, they counseled that course of action but stopped short of compelling it.[27]

V. Summary

To summarize, the dayanim’s decision in Sapphire Financing v. Tower Real Estate involves three separate areas of Jewish law. First, the dayanim considered whether there is a basis in minhag to support Sapphire’s claim for a certain basis point on future deals Tower closes with NicheBank. Here the dayanim denied Sapphire’s claim noting that even though Sapphire was able to point to some precedent in prior practice, that precedent hardly satisfied the halakha’s criteria for what constitutes a minhag.

Second, the dayanim considered whether Sapphire was entitled to damages under a theory of detrimental reliance (*‘arev*). They analyzed the principle of *‘arev* liability in Jewish law and offered two distinctions to assess whether Sapphire was entitled to damages. On one level, they distinguished between direct and indirect reliance. On another level, they distinguished between justified and unjustified reliance. The dayanim held that Sapphire’s reliance was both indirect and unjustified, and therefore denied Sapphire’s claims. In addition, they called into question, on factual grounds, Sapphire’s assertion that it in fact relied on Tower’s assurance.

Third, the decision raises the question whether a beit din should enforce conduct that the dayanim deem supererogatory. In this case, the question was whether the dayanim should impose “industry etiquette” even though the relationship between the parties had soured. Following Jewish law’s distinction between *din* and *lifnim mi-shurat ha-din*, the dayanim counseled Tower in the proper course of action but refrained from ordering it.

Sapphire Financing v. Tower Real Estate can be accessed here.

NOTES

[1] Rabbi Itamar Rosensweig is a dayan at the Beth Din of America and a maggid shiur at Yeshiva University.

[2] See Rabbi Itamar Rosensweig, Commerical Custom and Jewish Law, *Jewishprudence* (June 2020).

[3] 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, e.g., *Restatement (Second) of Contracts* § 90:

"A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."

[5] See Bava Metzia 73b:

אמר רב חמא: האי מאן דיהיב זוזי לחבריה למיזבן ליה חמרא, ופשע ולא זבין ליה – משלם ליה כדקא אזיל אפרוותא דזולשפט.

[6] Ritva Bava Metzia 73b:

כיון שנתן לו מעותיו ליקח סחורתו ואלמלא הוא היה לוקח ע"י עצמו או ע"י אחרים אלא שזה הבטיחו שיקח לו וסמך עליו ונתן לו מעותיו על דעת כן הרי הוא חייב לשלם לו מה שהפסיד בהבטחתו דבההיא הנאה דסמיך עליה ונותן לו ממונו משתעבד ליה משום ערב.

Other rishonim read the Talmud's case differently and therefore propose a different basis for the defendant's liability. Ri interprets the case as one where the defendant explicitly and contractually obligated himself to pay the plaintiff for losses if he fails to perform—even though the Talmud omits that crucial fact. Ritva cites Ri's position:

ותירץ ר"י דהכא נמי כשהתנה כן בפירוש שאם לא יקח לו שישלם לו פסידא שלו.

[7] See Bava Batra 173b. The guarantor becomes liable even without performing a *kinyan,* because it is the fact of his inducing reliance that generates liability. See Shulchan Arukh Choshen Mishpat 129:2:

אמר להם בשעת מתן מעות: הלוהו ואני ערב, נשתעבד הערב ואינו צריך קנין. הגה: ואפילו לא נתערב בהדיא, רק שאומר למלוה להלוות ללוה כי בטוח הוא, ועשאו על פיו והיה שקר, חייב לשלם לו, דהוי כאילו נתערב לו.

[8] Ritva's crucial premise—that *'arev* liability extends beyond loans—is implicit in the Talmud Kiddushin 6b, which applies the liability of *'arev* to effect a kiddushin where a woman instructs her husband-to-be to incur an expense by relying on her instruction. See Ritva

Kiddushin 8b s.v. *ve-ha-nakhon* and Shut Rashba 1:1015 (below, n. 17).

[9] Further support for the position that *'arev* liability does not arise in tort emerges from the Ritva's analysis of the wine purchaser case. Ritva opens his discussion by noting that the agent's liability cannot arise in tort, because under Jewish tort law principles the agent's failure to purchase the wine would constitute mere *gerama* which would not generate liability. Ritva writes:

האי מאן דיהיב זוזי לחבריה למזבן ליה חמרא ופשע ולא זבין ליה משלם ליה כדאזיל אפרוותא דבלשפט… בבלשפט היה נמכר בזול והכא ה"ק שיתן לו במעותיו יין כפי שער הזול שנמכר בבלשפט… ולכולהו פירושי קשה לי למה חייב לשלם לו כלום ומאי שנא ממבטל כיסו של חברו שהוא פטור מפני שאין היזקו אלא גרמא.

This implies that when Ritva later settles on *'arev* as the basis of liability in the Talmud's case, he conceives of it as a liability distinct from tort.

[10] For a discussion of this talmudic case, see Rabbi Itamar Rosensweig and Tzirel Klein, "Depriving a Worker of Employment Opportunities," *Jewishprudence* (October 2020).

[11] Similarly, if the worker induced the homeowner to rely on his assurance and the worker reneged, the worker can become liable to compensate the homeowner for his reliance damages, or at least for a portion of them. See Bava Metzia 75b and 78a, and Ritva Bava Metzia 75b. See below, note 13.

[12] Ritva Bava Metzia 75b:

ודעת מורי הרב שאין כל דיני משנתינו וגמרא דעלה אלא במי ששכר פועלים באמירה בלא קנין.

[13] Ritva Bava Metzia 73b:

וזה ענין שכירות פועלים דבפרקין דלקמן… שבעה"ב חייב לשלם להם מה שמפסידין דכיון שסמכו זה על זה נתחייבו זה לזה במה שיפסידו על פיו, וזה דין גדול.

Ritva Bava Metzia 75b:

והטעם בתשלומין אלו הוא ממה שאמרנו למעלה דכל שהבטיח לחברו וסמך חברו עליו ואלמלא הבטחתו לא היה בא לו שום הפסד חייב לשלם לו אם פשע בדבר.

Note that in the case where the worker reneges on the homeowner (see above note 11), the Talmud caps the worker's liability to the homeowner based on the value of the worker's labor or materials. Ritva explains these caps based on his general theory that *'arev* liability arises from an implied indemnification of the promiser to the promisee. (See above.) The worker's liability is therefore capped by what is deemed to be the maximum amount reasonable for the worker to have indemnified the homeowner when he induced reliance. See Ritva Bava Metzia 75b:

וא"ת אם כן למה אינו שוכר עליהם אלא כדי כפל שכרן בלבד או כדי חבילה, י"ל דמסתמא היינו דאסיקו אדעתייהו שאם לא יוכלו לעשות שימצא לעולם פועלים בכפל שכרן ועל זה בלבד הבטיחוהו, אא"כ נתנו לו חבילה דמסתמא הקנו לו חבילה שלהן להתחייב לו עד כדי דמיה.

[14] See Shulchan Arukh Choshen Mishpat 82; Choshen Mishpat 46:1-2; and Choshen Mishpat 69:2. This problem could sometimes be obviated by drafting a receipt (*shovar*). See Shulchan Arukh Choshen Mishpat 54:1-3. But this option was more cumbersome and provides the debtor with less security than if he retrieves the original note.

[15] Shut Rashba 1:1015:

בראובן ושמעון שותפין לוו מנה מלוי. ובא לוי לגבות חובו מהם ולא הביא שטרו בידו. ולא רצו ראובן ושמעון לפרעו עד שיחזיר להם שטר חובו. ולבסוף נתרצה לו שמעון שאמר לו ראובן פרעהו ממעות השתוף ואני אתן לך השטר לזמן פלוני וכן אמר בשעת מתן מעות.

[16] Ibid:

ובנתים מת לוי ובאו יורשיו ותבעו שטר החוב והוצרכו לפרעם שלא היה להם ראיית פרעון. ועכשו תבע שמעון את ראובן שותפו שישלם לו מדין ערב. והלה טוען שאין כאן ערבות אלא עצה השיאו.

[17] Ibid:

הדין עם שמעון שכל שעושה מעשה על פי אחר אותו אחר חייב מדין ערב. וכדאמרי' בפ"ק דקדושין (דף ז') תן מנה לפלוני ואקדש אני לך מקודשת מדין ערב. ואמר רבא התם וכן לענין ממונא. לומר שאם אמר תן מנה לפלוני ושדי נתונה לך הרי זו נתונה.

[18] Mishnah Bava Metzia 98b:

משנה. השואל את הפרה... אמר לו השואל: שלחה לי ... ביד בנך, ביד עבדך, ביד שלוחך... ושלחה ומתה – חייב.

[19] Ran Bava Metzia 98b

אפילו למ"ד שליח שעשאו בעדים הוי שליח ה"מ בעדים כדאמרינן דלהכי טרח ואוקמיה בסהדי כי היכי דלוקמי ברשותיה והכא ליכא סהדי אלא דאמר למשאיל לשדורי ליה בידיהו. וכי תימא כיון דאמר למשאיל כשליח שעשאן בעדים דמי תינח לר' חסדא דאמר הוי שליח לרבה דאמר לא הוי שליח מאי איכא למימר.

[20] Ibid:

וי"ל דהכא לאו מדין שליחות הוא אלא מדין ערב שכיון שא"ל להוציא פרתו מרשותו ושלחה ביד עבדו נתחייב מדין ערב ככל מוציא ממון מרשותו של חבירו נתחייב לו חבירו כדין ערב והכי מוכח בפ"ק דקדושין... שואל זה כשהוא מתחייב עליה בשהי' ברשות העבד לאו מדין שואל גמור הוא אלא מדין ערב.

[21] For further cases of '*arev* liability as detrimental reliance, see Netivot ha-Mishpat 182:3 (a principal who instructs his agent to make a purchase on his behalf but later annuls the agency–without notifying the agent—becomes liable under *'arev* for the agent's

expenditures); Netivot ha-Mishpat 344:1 (if Reuven instructs Shimon to tear Reuven's own garment, Shimon is exempt from tort damages because Shimon's damages to Reuven are canceled by Reuven's liability to Shimon under the doctrine of *'arev*); Netivot ha-Mishpat 306:6 (if a patron relies on an artisan to dye a fabric red but the artisan negligently dyes the fabric black, the patron is entitled to recover the lost profit of what the red fabric *would have been worth* (i.e., lost profit) under a theory of *'arev*, since the patron relied on the artisan); Shulchan Arukh Choshen Mishpat 14:5 as explained by Yeshu'ot Yisrael Ein Mishpat 14:4 (if one litigant induces another to travel to a distant court for adjudication but then fails to arrive for the hearing, that litigant becomes liable to pay the other's expenses under the principle of *'arev*).

[22] Perhaps another way of putting the dayanim's point is that for the defendant to be found liable he must have directly induced the plaintiff to rely on his promise.

[23] These expenses appear to be the costs of paying off the relevant officials or parties.

[24] Shut Maharik no. 133:

על דבר ראובן שהבטיח שמעון להשתדל בעבורו חנם זולתי ההוצאה ואחר אשר הוציא הלה את מעותיו והיה הדבר עומד להגמר חזר בו ראובן מדיבורו ואומר לו שלא יגמור אם לא יתן לו כך וכך. וכן עשה שמעון פייסו בממון כרצונו ושוב באו מעות ראובן ביד שמעון ורוצה שמעון לעכבם באמרו כי שלא כדין הכריחו לפייסו בממון.

[25] Ibid:

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

[26] See Rosh Bava Metzia 2:7:

ואת המעשה זה הדין. אשר יעשו לפנים משורת הדין. ולאו דכייפינן ליה, דאין כופין לעשות לפנים משורת הדין.

Shulchan Arukh Choshen Mishpat 12:2:

ואין בית דין יכולין לכוף ליכנס לפנים משורת הדין, אף על פי שנראה להם שהוא מן הראוי.

See also Beit Yosef Choshen Mishpat 12:2.

[27] Some Jewish law authorities maintain that a beit din can compel performance on supererogatory moral obligations. See Mordekhai Bava Metzia no. 257:

גם אנן כייפין למיעבד לפנים משורת ... דתני רב יוסף והודעת להם את הדרך וגו' ואמר ר' יוחנן לא נחרבה ירושלים אלא בשביל שהעמידו דבריהם על דין תורה ולא עשו לפנים משורת הדין וכן פסק הראב"ן ואבי"ה דכייפין להו לעשות לפנים משורת הדין.

See also the view cited in Shulchan Arukh Choshen Mishpat 12:2 and Bach Choshen Mishpat 12:4.

According to these authorities–who endorse judicial coercion of supererogatory obligations–what distinguishes obligations that arise in *din* from those that arise in *lifnim mi-shurat ha-din*?

One distinction is that whereas a beth din *must* enforce obligations that arise in *din*, it has discretion over whether it wants to enforce an obligation that arises *in lifnim mi-shurat ha-din.* In other words, in the case of *din*, coercion is mandatory, whereas in the case of *lifnim mi-shurat ha-din* coercion is discretionary.

Another distinction is that decisions based on *lifnim mi-shurat ha-din* are more sensitive to a range of equitable considerations that would not bear on a decision grounded in *din*. For instance, some of these authorities maintain that a beit din should only enforce a ruling of *lifnim mi-shurat ha-din* if the party found liable is quite wealthy (‘*ashir*) but not if he is poor (‘*ani*).