

# What Duty Do You Have to Inspect Seasonal Rentals?

By Barry S. Goodman, Esq.

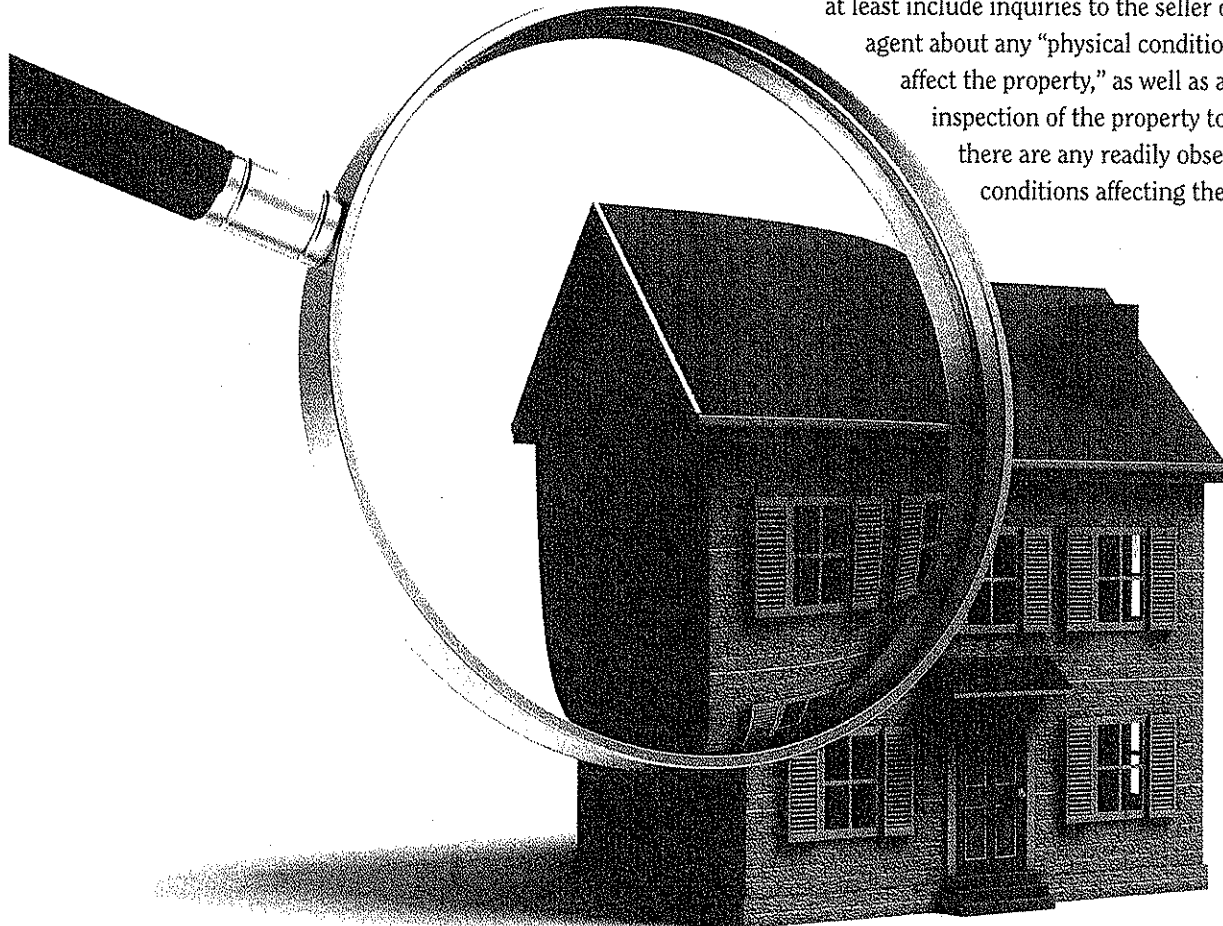
You are looking forward to what you hope will be a busy season for seasonal rentals. However, do you know what duty you have to inspect the premises for obvious and not so obvious defects that could cause whoever is renting the premises to suffer an injury? Could you be liable if there are construction defects, such as missing handrails or steps that are higher than the construction code permits? What level of inspection does the Real Estate Commission require? Is the duty to inspect a seasonal rental any different than the duty to inspect an open house?

A recent decision, *Reyes v. Egner*, deals with these questions. Whether you represent landlords, tenants, or both, it is critical that you understand what duty you have to inspect a seasonal rental for possible defects.

## THE REAL ESTATE COMMISSION'S REQUIREMENTS

The N.J. Real Estate Commission's regulations require that every real estate "licensee shall make reasonable effort to ascertain all material information concerning the physical condition of every property for which he or she accepts an agency or which he or she is retained to market as a transaction broker."<sup>1</sup> Such a "reasonable effort" must

at least include inquiries to the seller or the seller's agent about any "physical conditions that may affect the property," as well as a "visual inspection of the property to determine if there are any readily observable physical conditions affecting the property."<sup>2</sup>



The Commission defines "material information" as including where "a reasonable person would attach importance to its existence or non-existence in deciding whether or how to proceed in the transaction, or if the licensee knows or has reason to know that the recipient of the information regards, or is likely to regard it as important in deciding whether or how to proceed, although a reasonable person would not so regard it."<sup>3</sup> Of course, real estate licensees must reveal such material information not only to their own client but, "when appropriate to any other parties to a transaction,"<sup>4</sup> including to a tenant of a seasonal rental.

### **DUTY TO INSPECT AND WARN VISITORS IN AN OPEN HOUSE**

In one of the key cases dealing with a real estate licensee's duty to inspect premises, the N.J. Supreme Court decided in *Hopkins v. Fox & Lazo, REALTORS*<sup>5</sup> that a licensee has a duty to warn about property defects to potential home buyers and members of the public who attend an open house the licensee conducts. This duty extends "only to defects that are reasonably discoverable through an ordinary inspection of the home undertaken for purposes of its potential sale."<sup>6</sup> Significantly, the Court added that "[t]he broker is not responsible for latent defects that are hidden and of which the broker has no actual knowledge."<sup>7</sup>

In *Hopkins*, a person visiting an open house fell and was injured when she did not see that there was a step down because the floor covering on the step and both floor levels were the same pattern of vinyl. Of course, the woman who fell had never been to the house before going to the open house that day. Under such circumstances, the Court held that both the real estate licensee and the homeowner could be liable for the injury.

### **DOES HOPKINS APPLY TO SEASONAL RENTALS?**

The key issue in *Reyes v. Egner* was whether or not the *Hopkins* decision concerning open houses should be extended to seasonal rentals. Since the N.J. Supreme Court's decision ultimately turned on the facts in *Reyes*, those facts are critical to understand the outcome of the case.

In *Reyes v. Egner*, Reyes (Colombia) decided to rent a house in a vacation home for two years over the Labor Day weekend in Stone Harbor, N.J. The Fox & Lazo listed

the rental, which was owned by Harry and Holly Egner, and provided a one-page form lease that Colombia and the Egners signed. The rent was \$4,050 and the Egners paid Prudential a commission of 12 percent of that amount.

The rental premises has an elevated rear deck that is adjacent to the master bedroom, is approximately four-feet wide and leads to a six-step stairway that connects it to the ground below. The deck can be accessed through sliding glass doors from the master bedroom, which opens to a small wooden platform on the top of the deck. The platform is about seven inches below the bottom of the sliding glass door and there is another six and a half inch drop from the platform to the deck. The deck's wooden boards and the platform run in the same direction and essentially are the same color, which is similar to the wood coloring in the master bedroom. There also are no handrails attached to either the platform or the deck. Both the height of the step exiting the master bedroom and the lack of handrails appear to have been construction code violations. Colombia did not visit the property or take any visual tour of the property before moving in with her parents and other guests. On the ninth day of their stay in the house, Colombia's father, Hermes Reyes ("Reyes"), opened the sliding glass doors for the first time to go out onto the deck. He said he was unaware that there was a drop and, when he lost his balance, there was no handrail for him to grab. As a result, he fell down the stairs onto the ground and suffered severe injuries. Reyes and his wife then filed suit against the Egners and Prudential.

### **THE APPELLATE DIVISION'S SPLIT DECISION**

After the trial court held that neither Prudential nor the Egners owed any duty of care to conduct a reasonable inspection of the property for the protection of Reyes, the Appellate Division partially reversed, holding that the lessors, the Egners, owed a duty of care to Reyes but that the broker, Prudential, did not. With regard to the Egners, the Appellate Division held that such a lessor can be liable "even in the absence of a lessor's concealment, if the plaintiff demonstrates that the lessor has failed to disclose a condition which involves unreasonable risks of physical harm to persons on the land if (a) the lessee does not know or have reason to know of the condition or risk involved, and (b) the lessor knows or has reason to know



of the condition, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk."<sup>8</sup> The Court also noted that the fact that the injuries were caused by possible construction code violations was not the determinative but could be used as evidence at trial.<sup>9</sup>

With regard to Prudential, the Appellate Division rejected Reyes' argument that the Hopkins decision concerning the duty of real estate licensees to inspect and warn in an open house situation should be extended to this case. The Court noted that, in Hopkins, the N.J. Supreme Court specifically indicated that "the broker is not a guarantor of the safe condition of the premises" and that "the broker's duty 'does not replicate the more comprehensive duty owed by homeowners,' especially since they do not have the same intimate knowledge of the structural flaws or physical defects in the premises as the homeowners."<sup>10</sup>

In addition, the Appellate Division indicated that Prudential only undertook a "limited scope" of responsibility by agreeing to advertise the property, collect rent and make emergency repairs. Moreover, the "walk-through" of the house that the Prudential agent did months earlier when she represented the Egner's in the purchase of the property satisfied the Commission's duty to inspect the premises at the time of sale.<sup>11</sup>

The Appellate Division also rejected Reyes' contention that the statement in the Consumer Information Statement (CIS) that a seller's agent "must disclose defects of a material nature affecting the physical condition of a property which a reasonable inspection by the licensee would disclose"<sup>12</sup> was applicable. The Court noted that the Commission's regulations exempt the CIS requirement for residential rentals for not more than 125 consecutive days.<sup>13</sup> As a result, Court declined to extend the Hopkins decision and invited the N.J. Supreme Court to do so if it believed that would be appropriate.<sup>14</sup> The N.J. Supreme Court then agreed to review the decision as to Prudential.

### **THE SUPREME COURT'S FACT-SENSITIVE DECISION NOT TO EXTEND HOPKINS**

In a 3-3 decision (with one Justice recusing herself),<sup>15</sup> the N.J. Supreme Court affirmed the Appellate Division's decision

that the Hopkins duty of care to warn about any reasonably discoverable dangerous conditions in a house does not extend to a real estate licensee handling a short-term lease of a summer rental under the facts of this case. The Court concluded that the decisive issue was that Reyes had been in the property for nine days before he fell, which allowed him "ample opportunity" to inspect and discern the physical defects that might be on the property.<sup>16</sup>

The Court explained that its "holding in Hopkins did not suggest an intent to require that a REALTOR® provide an ongoing guaranty of a property's safety, nor was it designed to protect occupants of a property from personal responsibility for awareness of their surroundings and the dangers inherent in those surroundings."<sup>17</sup> Significantly, the Court also noted that the duty imposed by the Commission to make a reasonable effort to ascertain all material information pertaining to the physical condition of a property and to disclose it as required in the regulations "does not extend to the imposition of liability in the scenario presented in this matter, where a tenant has, for nine consecutive days, been in possession of and in residence at the rental property."<sup>18</sup>

The three dissenting Justices contended that, although a broker would have a right of indemnification against the owner of the property, Reyes should be permitted to also sue Prudential.<sup>19</sup> The dissent therefore would have imposed "a duty on brokers, such as Prudential, to inspect and warn short-term renters of reasonably discoverable dangers on the premises."<sup>20</sup>

### **CONCLUSION**

As a result of the decision in Reyes, there presently is no duty for a real estate licensee to inspect a seasonal rental property and to warn renters about any defects that they discover. However, caution is advised in light of the fact-sensitive decision of the N.J. Supreme Court that in large part was based upon the fact that Reyes was in the rental property for nine days before he fell. It is unclear if the N.J. Supreme Court would have reached the same decision if Reyes had fallen within the first few hours of moving into the seasonal rental.

It therefore is strongly advised that real estate licensees continue to make reasonable efforts to ascertain all material

information concerning the physical condition of every seasonal rental property and to disclose any potentially dangerous conditions that they discover. It also is recommended that you include in listing agreements, and in a written disclosure to renters, that you are not inspecting or warranting the condition of the property and that the renter should do a walk-through of the property before signing the lease and, certainly, before taking occupancy. Finally, you should include in all listing agreements for seasonal rentals that the owner will defend and indemnify you if a lawsuit is brought by any person for injuries that arise from the condition of the property.

Even if there is no duty to inspect and warn, it still makes sense for you, as a real estate professional, to also recommend to the owner that the owner correct any defects of which you are aware and to advise potential tenants about any such problems. Such common sense steps will help to ensure that you will have minimized any possibility of liability for injuries in a short-term rental. ■

- <sup>1</sup> N.J.A.C. 11:5-6.4(b).
- <sup>2</sup> N.J.A.C. 11:5-6.4(b)1.
- <sup>3</sup> N.J.A.C. 11:5-6.4(b)2.
- <sup>4</sup> N.J.A.C. 11:5-6.4(c).
- <sup>5</sup> 132 N.J. 426 (1993).
- <sup>6</sup> *Id.* at 448.
- <sup>7</sup> *Id.* at 448-449.
- <sup>8</sup> *Reyes v. Egner*, 404 N.J. Super. 433, 456 (App. Div. 2009).
- <sup>9</sup> *Id.* at 458.
- <sup>10</sup> *Id.* at 464.
- <sup>11</sup> *Id.* at 466.
- <sup>12</sup> N.J.A.C. 11:5-6.9(h).
- <sup>13</sup> N.J.A.C. 11:5-6.9(d)2.
- <sup>14</sup> *Reyes v. Egner*, 404 N.J. Super. 433, 466-467 (App. Div. 2009).
- <sup>15</sup> Any decision by the NJ Supreme Court to overturn an Appellate Decision opinion must be by majority of the Justices of the Court voting on the matter. Where there is a 3-3 decision, the ruling of the Appellate Division is deemed to be affirmed.
- <sup>16</sup> *Reyes v. Egner*, 201 N.J. 417, 421-422 (2010).
- <sup>17</sup> *Id.* at 421.
- <sup>18</sup> *Id.* at 422.
- <sup>19</sup> *Id.* at 429-431.
- <sup>20</sup> *Id.* at 435.

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## New Jersey Real Estate Brokerage Law

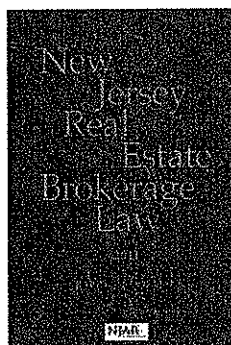
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