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Spring 2010  
Volume VII: Issue 2

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## *REAL ESTATE AND THE LAW*

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### **Brokers Duty of Care – Open House vs. Short-Term Rental**

The New Jersey Supreme Court previously concluded that a realtor conducting an open house has a duty to advise the guests (or invitees) of any physical features or conditions of the property that pose a hazard or danger to visitors, which the broker discovered during a reasonable inspection of the premises.

The New Supreme Court addressed the Broker's duty of care in the case Hopkins vs. Fox & Lazo Realtors, 625 A.2d 1110 (NJ Sup. t. 1993). In that case, on April 26, 1987, Emily Hopkins accompanied her son and daughter-in-law to an open house in Plainsboro, New Jersey, to which they had been invited by a salesperson employed by Fox & Lazo Realtors. When they first arrived, they were not greeted by a realtor, so they started to tour the house on their own. When they reached the kitchen, they were greeted by a Fox & Lazo representative, who left them free to inspect the house unaccompanied. The house's kitchen led up to a family room that was slightly elevated from the front portion of the house, which also contained a powder room and laundry room. Mrs. Hopkins waited on the upper level in the family room while her family viewed the patio and grounds.

When Mrs. Hopkins heard her son and daughter-in-law reenter the house, she sought to join them in the foyer, where the staircase to the second floor was located. She went down the hallway from the laundry room toward the foyer, unaware that a step led down from the hallway into the foyer. The floors on both levels and the step were covered with the same pattern vinyl, causing Mrs. Hopkins to fail to see the step. She fell, fracturing her ankle. She sued Fox & Lazo, arguing that they had a duty to warn her of any known risks inside the house or any risks that a reasonable inspection would have revealed. When the

trial court dismissed her complaint on the ground that the broker had no such duty, she appealed.

On appeal, the Court reasoned that the imposition on the broker of a general duty to exercise reasonable care in preventing foreseeable harm to its open house customers is fair and just.

A real-estate broker, in many situations, manages or directs an open-house inspection of the premises. The broker is responsible for advertising the open house, posting signs, and ultimately inviting customers onto the premises. A broker frequently suggests conducting such an event to a homeowner. The owner is often absent from the premises for the duration of the open house. In this case, defendant extended a personal invitation to Hopkins and her family. One may reasonably assume in this context that a customer acts on the broker's invitation to come on to the property. The customer may reasonably expect to be able to rely on and use the services proffered by the broker in connection with an examination of the premises.

The broker receives very tangible economic benefits from the relationship with the potential buyers who visit the home. The open house enables the broker to sell the house and earn a commission. Also, an open house presents a broker with an opportunity to meet and cultivate future clients. More generally, the broker can discuss other listings with visitors and thus promote his or her individual business interests. Thus, the economic benefit that a broker obtains from staging an open house extends beyond the potential sale of the particular property. We conclude that implicit in the broker's invitation to customers is some commensurate degree of responsibility for their safety while visiting the premises.

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In determining the scope of a broker's duty in these circumstances, one must analyze the extent of the invitation, the risk involved in the activity, and the fairness of imposing a duty to avoid that risk. It is highly foreseeable that visitors to an open house could be injured by dangerous conditions during the course of wandering through an unfamiliar house. In many cases, the customer may reasonably expect that the broker will be familiar with the premises and would rely on the broker's presumed familiarity with the house, including a knowledge of all of its important features and physical characteristics. Nevertheless, not all brokers are actually familiar with all of the houses that they may show to potential buyers. Some brokers will not have had the opportunity to inspect the house before the open house commences.

In determining the scope of a broker's duty in these circumstances, one must analyze the extent of the invitation, the risk involved in the activity, and the fairness of imposing a duty to avoid that risk. It is highly foreseeable that visitors to an open house could be injured by dangerous conditions during the course of wandering through an unfamiliar house. In many cases, the customer may reasonably expect that the broker will be familiar with the premises and would rely on the broker's presumed familiarity with the house, including a knowledge of all of its important features and physical characteristics. Nevertheless, not all brokers are actually familiar with all of the houses that they may show to potential

buyers. Some brokers will not have had the opportunity to inspect the house before the open house commences.

We thus determine that a broker is under a duty to conduct a reasonable broker's inspection when such an inspection would comport with the customary standards governing the responsibilities and functions of real-estate brokers with respect to open-house tours. Such inspection should consist of an examination of the premises to ascertain the obvious physical characteristics that are material to its salability, as well as those features that a prospective purchase would routinely examine during a "walk through" of the premises. That inspection would impose on the broker the duty to warn of any such discoverable physical features or conditions of the property that pose a hazard or danger to visitors. That duty, however, would not require the broker to warn against any dangers that are not otherwise known to the broker or would not be revealed during the course of such a reasonable broker's inspection.

In the latest case, Reyes vs. Egner, A-90-08, the New Jersey Supreme Court held that the broker's duty of care that requires warning open-house visitors of safety hazards (discussed above) does not cover or apply to short-term rentals of properties. The article regarding this recent decision is attached for your ease of reference.

**The Law Office of Melissa Suarez**  
would like to show its appreciation and invite you to an  
evening of cocktails and hors d'oeuvres at

**Café Italiano Ristorante**  
14 Sylvan Avenue, Englewood Cliffs, NJ 07632

**Date: May 15<sup>th</sup> 2010**  
**Time: 4:00 p.m. – 7:00 p.m.**

Please contact Dorothy with a response by May 7, 2010  
via telephone: (201) 569 – 1166; or email: [admin.suarzlaw@verizon.net](mailto:admin.suarzlaw@verizon.net)

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**Professional advice should be obtained before attempting to address any legal situation or problem.**

## No Broker's Duty To Warn Renters Of Safety Hazards

**D**rawing a proverbial line in the sand, the state Supreme Court held Thursday that the broker's duty of care that requires warning open-house visitors of safety hazards does not cover short-term rentals of properties.

The justices, in *Reyes v Egner*, A-90-08, affirmed dismissal of a beach-house guest's suit charging the renting broker had a duty to warn of and repair unsafe conditions — like the lack of a deck railing that caused his slip and fall.

With Justice Helen Hoens recusing, the remaining justices deadlocked on whether to extend the holding of *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426 (1993), which first recognized the open-house duty of care. The 3-3 split affirms the decision below.

Those favoring affirmance said the facts of the case did not compel an extension of *Hopkins*, particularly since the tenants had occupied the property for nine days before the injury occurred, which gave them ample opportunity to inspect and discern its physical defects.

But the three dissenters found it strained logic to hold a real estate broker has a duty to warn open-house visitors of dangerous conditions, even if receiving no financial benefit, but no corresponding duty to a short-term renter from whom a financial profit is made.

On Aug. 31, 2003, Hermes Reyes, staying at the Stone Harbor house rented by his daughter, stepped out of his bedroom through a sliding door and onto a deck that was several inches lower than the door's sill. He lost his balance, reached for a handrail that wasn't there, and fell down the deck's stairs to the ground, suffering severe back injuries.

Reyes sued the homeowners, Harry and Holly Egner, and their rental agent, Prudential Fox & Roach Realtors, claiming both had a duty to make sure the property was safe and to warn tenants of a potentially hazardous condition. The suit alleged negligence, violations of the Consumer Fraud Act and breach of the implied warranty of habitability.

Middlesex County Superior Court Judge Vincent LeBlon dismissed the claims on summary judgment. He found no evidence the Egners fraudulently

concealed the dangerous condition and further found that Prudential's rental agreement stated the company was not responsible for injuries occurring on the property.

Appellate Division Judges Jack Sabatino, Philip Carchman and Rudy Coleman reversed as to the Egners but affirmed as to Prudential. Sabatino said the request to extend *Hopkins* to short-term rentals "raised several policy arguments for why a broker should be liable in tort for failing to perform an adequate inspection of rental property."

Justices Barry Albin, Virginia Long and John Wallace Jr. thought the extension warranted, saying failure to place on brokers a duty to inspect and warn short-term renters of reasonably discoverable dangers on the premises has the effect of creating separate classes of victims.

"Our tort jurisprudence now demands that a broker at an open house say 'buyer, watch your step,' but allows a broker with full knowledge of a dangerous condition to remain mute to a short-term lessee and by his silence say 'renter be damned,'" Albin wrote for the dissenters. "This cannot be the result the Court had in mind in *Hopkins*."

Albin found it irrelevant whether Reyes had "ample opportunity" to discover the defect. That implicates the doctrine of comparative negligence, not the duty of care, and would be a question for the jury to decide, he said.

"Sadly, my concurring colleagues today take a pass on the Appellate Division's invitation to refine our developing common law," he said.

Justices Jaynee LaVecchia and Roberto Rivera-Soto and Chief Justice Stuart Rabner, who carried the day, said *Hopkins* "did not suggest an intent to require that a realtor provide an ongoing guarantee 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."

"Rather, *Hopkins* established the proposition that realtors owe a duty of

care to protect invited visitors to a marketed piece of property from physical

conditions that the nature and duration of their visit might not afford them the opportunity to recognize for themselves," LaVecchia wrote.

She said extending *Hopkins* to short-term rentals could have serious financial consequences for owners of shore properties and brokers who handle them, sharply raising insurance premiums and adversely affecting tourism. "We cannot imagine that those increases would be borne by anyone other than the renters — the families, friends and individuals — who vacation in New Jersey each year," she added.

Albin disagreed, saying that imposing the duty of care would lead to fewer payouts, thus reducing premiums.

Reyes' lawyer, Toms River solo John Novak, says, "We understand New Jersey is having trying economic times, but we respectfully disagree with the notion that the duty of care should be decided with an obvious consideration of insurance premiums. Insurance is risk-shifting that goes from the insured to the insurance company. However, the risk here has been shifted to the tenants and their guests."

Barry Goodman, who argued for amicus New Jersey Realtors Association, says the ruling is fair. "Realtors have no training in construction code violations," says Goodman, of Woodbridge's Greenbaum, Rowe, Smith & Davis. "The family here had been in the house for nine days and had the opportunity see what the problem was."

Prudential's lawyer, Michael Kearns, of New Brunswick's Hoagland, Longo, Moran, Dunst & Doukas, did not return a telephone reporter's call. ■



PHOTO BY CARMEN NATALE

**UNDER THEIR NOSES:** Realtors' lawyer Barry Goodman agreed with the Court that the tenants, after nine days of occupancy, should have noticed the lack of a railing.