To Be Argued By:
FREDRICK E. SHERMAN

New York County Clerk's Index No. 0113274/2004

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

JERICHO GROUP, LTD.,

Plaintiff-Respondent,

—against—

MIDTOWN DEVELOPMENT, L.P.,

Defendant-Appellant.

APPELLANT'S BRIEF

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Defendant Midtown Development, L.P., appeals from an order of the Supreme Court, New York County (Charles Ramos, J.), entered February 20, 2007, which granted plaintiff's motion to vacate a judgment of dismissal that was entered by the Clerk on September 19, 2006, at the direction of this Court in *Jericho Group, Ltd. v. Midtown Development, L.P.*, 32 A.D.3d 294, 820 N.Y.S.2d 241 (1st Dep't 2006) ("Final Order," in record on appeal at R.406-17).

INTRODUCTION

This case is here, once again, on an appeal from an order of Justice Ramos and two things have not changed: the plaintiff, Jericho Group, Ltd., continues to pursue every conceivable tactic in pursuit of a windfall profit on a real estate transaction that it abandoned five years ago; and Justice Ramos continues to lend support to Jericho's meritless claims, most recently in the face of this Court's unanimous decision dismissing those claims with costs and without leave to replead. A third theme has emerged with the latest chapter of this prolonged litigation: Jericho's single-minded determination to have decisions in this case made not by this Court, or by the Court of Appeals, but only by Justice Ramos.

Jericho did not want this Court to decide the issues that it brought before the lower court on its motion to vacate the judgment. On the prior appeal, Jericho made and then withdrew a motion to supplement the appellate record with the same documents it later submitted on its vacatur motion to challenge this Court's

ruling that Jericho terminated its contract with Midtown. Jericho also made and then withdrew a motion for leave to reargue in this Court and for leave to appeal to the Court of Appeals which made all of the same arguments—and submitted all of the same "newly discovered evidence"—that Jericho invoked in support of its motion to vacate. Jericho's submissions on its motion for reargument were not new, as Midtown pointed out in opposing it. Nor would they have warranted a different result on the prior appeal if Jericho had allowed this Court to decide the motion, or if Jericho had moved to vacate the judgment in this Court.

Jericho maneuvered itself back to the lower court, however, and the lower court adopted Jericho's baseless arguments. While the lower court stated that it is "without authority to vacate or modify" a decision by this Court, it effectively did just that by encouraging Jericho to defy this Court's Final Order. (R.18, 25). The court revisited the merits of Jericho's now-dismissed claims—holding there was "sufficient evidence of fraud" (R.19)—and wrote that "Plaintiff is welcome to file a new complaint in a new action," which Jericho did two days after the Court entered its order vacating the judgment. (R.25). Jericho's follow-on action re-asserts *all* of the causes of action that this Court dismissed, and makes others based on the same transaction, as if this Court had never issued its dismissal order. Now, instead of being finished with this frivolous lawsuit, as this Court ordered it should

be, Midtown is confronted with the Kafka-esque scenario of prosecuting this appeal *and* defending an entirely new action.

It is time for this case to end. This Court should reverse the lower court's order vacating the judgment and direct the Clerk to enter a judgment on the merits dismissing Jericho's amended complaint, with full costs to Midtown.

STATEMENT OF QUESTIONS PRESENTED

Whether the lower court's order vacating the judgment should be reversed, and a final judgment dismissing Jericho's amended complaint on the merits should be entered, on any one of the following grounds:

1. For at least two years before it brought this action, Jericho had notice of the facts it invoked as support for vacating the judgment. The lower court ruled, however, that the judgment may be vacated on the ground of "fraud" under CPLR 5015(a)(3) even though Jericho's evidence was not "newly discovered."

2. The lower court's order is based on what it says is evidence of fraud in connection with the underlying transaction—a contract to sell real property in Manhattan—not a fraud in procuring the judgment.

3. Even assuming that it were permissible to vacate a judgment on the basis of post-judgment assertions of fraud in the underlying transaction, Jericho's "newly discovered evidence" does not show that Midtown either breached the contract or committed fraud, as the lower court erroneously stated.

4. Jericho has acted in a bad faith and dilatory manner, as shown by its conduct in making and then withdrawing motions in this Court on the prior appeal which made all of the same arguments Jericho later made on its motion to vacate, attempting to re-litigate the question of whether it cancelled the contract in the face of this Court's ruling that Jericho did cancel the contract, and attempting through other improper means to maintain a grip on property that does not belong to it. The lower court vacated the judgment notwithstanding Jericho's bad-faith conduct.

STATEMENT OF THE CASE

The pertinent background to this appeal begins with the facts before this Court on the prior appeal.

A. The Contract And Jericho's Cancellation Of The Contract

Defendant, Midtown, owns parcels aggregating more than two acres of undeveloped real property in a formerly industrial area on the Far West Side of Manhattan. (R.93; R.102 ¶30(a)). The property is located on Eleventh Avenue between 36th and 38th Streets, near the Hudson rail yards. (R.93). On June 18, 2002, Midtown entered into a contract to sell its property to Jericho for $28 million. (R.93). The contract provided for an "AS IS" sale and expressly stated that Midtown "has made *no representations [and] is unwilling to make any representations*" about the property or its condition. (R.95 ¶25; R.98 ¶29(b); R.106 ¶38) (emphasis added). The contract further provided that "neither party" is

"relying upon any statement or representation, not embodied in this contract, made by the other." (R.95 ¶25).

The contract gave Jericho, the buyer, a seventy-five day "Study Period" to evaluate the property and the right to cancel the contract and get back its $250,000 down payment at any time during this period. (R.97-98 ¶29(a)). In other words, Jericho acquired a free option on the property for 75 days. Jericho was responsible for conducting its own due diligence during the Study Period. Specifically, the contract stated that Jericho shall "cause to be performed, at [its] cost and expense, such environmental and/or architectural/engineering and or other tests and/or inspections as [Jericho], in its sole discretion, shall elect to perform." (R.97-98 ¶29(a)). The contract provided that Jericho could make "reasonabl[e] requests" to Midtown for documents "relating to the condition of the Property" and that Midtown was to respond by making available to Jericho "such documents within [Midtown's] current custody or control." (R.101 ¶29(c)).

A month after Jericho executed the contract, it sought to extend the 75-day Study Period by nearly an entire year, because Jericho wanted to get a better "reading" on how the City would allow the property to be developed after it had completed a comprehensive planning proposal for the Far West Side. As Jericho's counsel wrote to Midtown on July 17, 2002:

> Jericho will need an extension until at least July 1, 2003, in order to get any meaningful "reading" from the City as to how the property may be developed. . . . .
>
> My clients are aware that Midtown refrained from making any representation in the contract concerning zoning and/or permits and they are not asking that Midtown do so at this time . . . .

(R.519-20). From mid-July 2002 until a few days before the Study Period expired on September 3, 2002, the parties negotiated over an extension of the Study Period through written correspondence. (R.517-30). They did not agree upon terms. (R.414-15; R.536).

The day after Midtown informed Jericho by letter that Midtown would not agree to Jericho's offers to extend the Study Period—and only four days before the Study Period expired—Jericho raised the first of two issues relevant to this appeal. By letter dated August 30, 2002, Jericho ticked off a laundry list of reasons why, in Jericho's view, Midtown should extend the Study Period to allow Jericho more time to conduct "due diligence." (R.546-47). Among other things, Jericho wrote that it had "very recently heard scuttlebutt" about "an oil spill on the properties" and asked Midtown to "advise" Jericho about it:

> [O]ur client's principals have very recently heard scuttlebutt that there may have been an oil spill on the properties which may or may not have been cleaned up. Please advise, <u>immediately</u>, if there is any truth to this information and also whether Midtown, or any of its representatives, ever received any notice, written or oral, from the City of New York or any agency thereof, or

> from any third party, of the existence or possible existence of an oil spill or any other hazardous material on either of the properties, and, if so, the disposition thereof.

(R.547, emphasis in original).

Midtown responded to Jericho's request with a letter dated September 3, 2002, stating that Midtown "has no information with respect to whether or not an oil spill from adjacent properties onto the Sites was cleaned up." (R.549). Attached to Midtown's letter was an August 23, 2002 e-mail sent from Midtown's broker to another broker who served as a conduit of information to Jericho, in which Midtown stated it had "no papers confirming the successful cleanup of the oil spill from properties neighboring the Sites" and provided detailed instructions on how Jericho could obtain documents concerning the spill from the New York State Department of Environmental Conservation ("DEC"). (R.550).

Jericho raised the other issue bearing on this appeal only one day before the Study Period expired. The parties' contract attached a development agreement between Midtown and the National Railroad Passenger Corporation ("Amtrak"), and the exhibits referenced in the Amtrak agreement were not attached to it. (R.117-38). By letter dated September 2, 2002—seventy-four days after Jericho had executed the contract and one day before the Study Period was to end—Jericho requested a copy of the Amtrak exhibits:

> Exhibit B to the referenced contract, an agreement dated April 23, 1990, among Midtown, Jerrart Venture and National Railroad Passenger Corporation, makes reference to Exhibits A-1, A-2, A-3, B-1 and C-1, none of which were attached thereto. Please provide a copy of these exhibits directly to our client . . . .

(R.543). Midtown responded to this request on September 3, 2002 by noting that Midtown had not received Jericho's letter until that day—which is confirmed by the fax header on Jericho's September 2 letter (R.543)—and stating that "Midtown does not now (and did not at the commencement of the Contractual 'Study Period') have the Exhibits referred in your letter, so it could not provide those Exhibits to Jericho." (R.544). Midtown also noted that Jericho must either proceed to closing or cancel the contract and receive its down payment back in accordance with the contract's terms. (R.544-45).

That same day, September 3 (the final day of the Study Period), Jericho wrote that, unless Midtown would agree to make representations about the oil spill, undertake to clean it, or extend the Study Period—none of which Midtown had agreed to do in the parties' contract or during their unsuccessful negotiations to extend the Study Period—Jericho was requesting the return of its down payment:

> Be advised that, unless you advise us in writing that Midtown is willing (i) to make an affirmative representation that the oil spill referred to in my earlier letter of today's date has been cleaned up and paid for or (ii) to undertake whatever cleanup may be necessary at its cost and expense or (iii) to extend the study period for a sufficient period to allow Jericho to investigate this

> matter, and, in any case provide Jericho with the requested due diligence documentation, Jericho requests that the monies paid upon execution of the Contract be returned to it in accordance with the Contract's terms.

(R.531).

Midtown's counsel, who was also the escrow agent under the contract, insisted that Jericho must provide a clear, written statement that it was canceling the contract before it was entitled to return of the down payment. (R.532-33). Eventually, by letter dated September 12, Jericho stated that it was indeed canceling the contract and requested the return of its down payment:

> [T]his letter will serve as confirmation that our letter on behalf of Jericho dated September 3, 2002, requesting the return of Jericho's down payment was intended as the exercise of Jericho's right under paragraph 29(a) of the referenced contract to cancel said contract and receive the return of the monies paid upon execution thereof.

(R.536). Midtown promptly thereafter returned the down payment to Jericho. (R.471 ¶44; R.537-40). Jericho kept the money. (R.471 ¶44; R.479 ¶75).

B. Jericho's Complaint And This Court's Order Dismissing It

Two years later—after Midtown's property had dramatically increased in value—Jericho commenced this lawsuit. (R.726). Its amended complaint asserted four causes of action for breach of contract, including two causes of action for specific performance. (R.477-83). Jericho also asserted a cause of action for "deceit" that was predicated on Midtown's purported breaches of the contract and Midtown's alleged failure to disclose certain information concerning the property

or the contract. (R.483-85). Midtown moved to dismiss the amended complaint on the ground, among others, that Jericho could not seek to enforce a contract that it had cancelled. (R.759-61). Justice Ramos denied Midtown's motion in its entirety from the bench, and Midtown appealed. (R.428-56).

This Court unanimously reversed the lower court's order and dismissed Jericho's complaint on multiple, alternative grounds. On Jericho's claims for specific performance or damages due to Midtown's alleged breach of its disclosure obligations, the Court ruled, first, that the "assertions in this complaint, brought two years subsequent to the cancellation of the agreement, do not support Jericho's allegation that Midtown breached the contract." (R.413). Second, the Court ruled that "[a]n additional ground for dismissal of the first and third causes of action is the settled rule that a party cannot seek specific performance of a cancelled real estate contract." (R.413). The Court noted that, if Midtown had "willfully or deliberately breached its [disclosure] obligations"—and the Court had already held that the record did *not* support Jericho's allegations of breach—"Jericho's first two causes of action would not have been barred by its termination of the contract and recovery of its down payment." (R.413-14). After noting this, however, the Court expressly held that Jericho's allegations of breach "are either contradicted by the documentary evidence submitted on the motion or premised on a misreading of Midtown's obligations" under the contract. (R.414).

This Court also ruled that Jericho could not assert a cause of action for fraud in connection with the "exhibits to an agreement with Amtrak" or "information concerning the occurrence and ramifications of an oil spill," because "Jericho's allegations that Midtown intended to breach a contractual obligation do[] not support an action for fraud." (R.416). Alternatively, the Court ruled that there "was no evidence of actionable fraud" and noted in that regard that "Jericho made requests for documents on the eve of the expiration [of the study] period which could have been made much earlier." (R.416-17). "Further, the record is plain that Midtown provided Jericho with information in its possession, and that it alerted Jericho as to additional sources of information as to the railway easement and the alleged oil spill." (R.416). In particular, the Court observed that "Midtown gave Jericho the name of a contact person at the [DEC], his telephone number, and a project number and spill number for the [oil spill] incident at issue, so that Jericho could find out the status of any spill and/or cleanup." (R.410; *see also* R.550).

Finally, the Court dismissed Jericho's claim for damages, on yet another alternative ground that the contract "limits Midtown's liability for breach to return of Jericho's down payment," as well as Jericho's claims that Midtown should be held in breach of a non-existent amendment to the contract to extend the Study Period. (R.414-15, 417). The Court awarded costs to Midtown and directed the

Clerk of the Court to enter a judgment of dismissal, which the Clerk duly entered on September 19, 2006. (R.406; R.418-19).

C. Jericho's Efforts In This Court To Stave Off Judgment

On September 18, 2006, Jericho moved in this Court for reargument and an emergency stay of entry of the judgment. (R.762-827; R.626-27). The centerpiece of Jericho's motion was what it claimed was newly discovered evidence of "fraud" related to the Amtrak exhibits and information concerning the oil spill, which Jericho contended required the Court to "vacate and recall its Decision." (R.763 ¶3; R.764 ¶8; R.766-71 ¶¶13-27). Along with that motion, Jericho sought an interim stay of entry of the judgment, on the ground that it would be prejudiced by the cancellation of a notice of pendency Jericho had filed that effectively precluded Midtown from selling its property before this lawsuit was dismissed. (R.626-27; R.825-27 ¶¶86-93). The Court, per Justice Mazzarelli, who was the Presiding Justice on the panel that dismissed Jericho's complaint, summarily denied Jericho's application for an interim stay and ordered a briefing schedule on the motion for reargument. (R.627).

Midtown timely opposed Jericho's motion for reargument. (R.598-624). Midtown showed, among other things, that the "newly discovered evidence" on which Jericho's motion was based was *not* new, but was known to Jericho for *years* before it filed its complaint and actually in Jericho's possession for at least

eight months before this Court issued its decision. (R.605-09 ¶¶18-26). Midtown also asserted that a motion for reargument may not be based on "newly discovered evidence" and sought sanctions in connection with Jericho's utterly baseless motion. (R.603-605 ¶¶14-17; R.621 ¶53).

Jericho responded by withdrawing its motion. (R.828-29). Jericho did this, it said, "[t]o avoid loss of time, and with due concern for prudent use of the Court's resources." (R.828). According to Jericho, it was "appropriate to withdraw this motion before this Court and present the documents and arguments of fraud in the Supreme Court." (R.828). In other words, Jericho believed that Justice Ramos was in a better position to determine whether Jericho's newly discovered evidence "would be decisive" in *this Court*, as Jericho's reargument papers had contended it would be. (R.764 ¶8). This was not the first time Jericho had withdrawn a motion in this Court. As this Court noted in its Final Order, Jericho had also made and then withdrawn a motion to supplement the record on appeal. (R.417; R.629-35). By that motion, Jericho sought to bring to this Court's attention some of the *same documents* on which it later based its motion to vacate the judgment in the lower court. *Compare* R.631, *with* R.44; R.186-88.

D. Jericho Retreats To The Lower Court And The Lower Court Vacates The Judgment

A month and a half after the judgment was entered (so much for "avoid[ing] loss of time"), Jericho moved in the lower court, by order to show cause, to vacate

the judgment, to "amend" its now-dismissed complaint, and for a preliminary injunction to restrain Midtown from selling its property. (R.28; R.401). The lower court ordered Midtown to respond to Jericho's motion in just two business days and held oral argument less than a week after Jericho made the motion. (R.401-02; R.1220). Justice Ramos stated at the argument, "I will take a very careful look at what the Appellate Division has done" to determine whether "there is anything left in the case," because the Justice was "disturbed on a personal level" by Jericho's purportedly new evidence. (R.1250).

By order dated February 2, 2007, entered on February 20, the lower court granted Jericho's motion to vacate the judgment and denied its requests to amend the complaint and for a preliminary injunction. (R.8-25). The lower court *acknowledged* that "the judgment is based on the Appellate Division's decision dismissing this action," that it "cannot reverse the Appellate Division's dismissal of the complaint," and that it "is without authority to vacate or modify" a decision of this Court. (R.18, 23). The lower court reasoned, however, that while this case was over and it had no authority to effectively "reverse" this Court, Jericho was "welcome to file a new complaint in a new action," as a formalistic maneuver for avoiding the preclusive effect of this Court's final order. (R.25, "[T]here is no complaint pending before this Court, having been dismissed by the Appellate Division. Plaintiff is welcome to file a new complaint in a new action . . . .").

The lower court tried to sidestep other bars to Jericho's post-judgment motion using similar reasoning. The court explicitly acknowledged that there was no basis for vacating the judgment on the ground of "newly discovered evidence," under CPLR 5015(a)(2), because Jericho's evidence was not new. (R.19). Jericho's motion was based on what it claimed was newly discovered evidence of fraud regarding Midtown's "misrepresentations" in September 2002 about the oil spill, Midtown's contact with the DEC regarding the spill, and Midtown's possession of documents from the DEC. (R.51-53 ¶¶83-84).

The record before this Court on the prior appeal shows, however, that Jericho was on notice of this purported evidence for *years* before it filed its complaint. As the lower court noted—and as we elaborate in more detail in the argument section below—"[o]n September 24, 2002, Jericho obtained documents from NYDEC" that Jericho contended, *in October 2002*, showed Midtown had met with the DEC and had documents from the DEC in its possession:

> By letter dated October 18, 2002, Jericho demanded an explanation from Midtown as to why it failed to provide these NYDEC documents to Jericho initially on June 19, 2002, as required by the contract, or in August or September 2002 when Jericho specifically requested information about the spill.

(R.15). The lower court similarly noted that "Jericho admittedly reviewed the NYDEC documents in September 24, 2002 and saw NYDEC's correspondence with Midtown." (R.19).

While the lower court acknowledged that, on this record (which was also before this Court on the prior appeal), "relief cannot be granted under CPLR 5015(a)(2)," the court proceeded to rule that the judgment could be vacated on the basis of a purported fraud under CPLR 5015(a)(3). (R.19). The "fraud" the court pointed to, however, was not a would-be fraud in procuring the judgment. It was a purported fraud in the *underlying transaction*, as Jericho alleged in its complaint that this Court *dismissed* when it reversed the lower court on the prior appeal. According to the lower court, for example, Jericho had "sufficient evidence of fraud with regard to the NYDEC documents" because "Midtown repeatedly said to this Court that it had complied with its disclosure obligation in 2002 when it clearly had not." (R.19-20).

The other ground on which the lower court granted Jericho's motion was purported misrepresentations by Midtown about the Amtrak exhibits. (R.21-23). In its complaint, Jericho alleged that Midtown misled it when, in response to Jericho's request for the exhibits on the day before the Study Period expired, Midtown stated it "does not now (and did not at the commencement of the Contractual 'Study Period) have the Exhibits." (R.478; R.544). After discovery uncovered *no evidence* that these exhibits have ever existed, Midtown's counsel in the underlying transaction affirmed as part of a summary judgment motion (which the lower court had denied as moot in light of this Court's final order of dismissal)

that his statements to Jericho about the exhibits in September 2002 were truthful and that, to his knowledge, the Amtrak exhibits do not exist. (R.851 ¶26). The copy of the Amtrak agreement attached to the parties' contract was thus indeed a "true copy," as stated in the contract. (R.104 ¶31).

Nevertheless, the lower court *agreed with Jericho* that the judgment should be vacated on the basis of a "fraud on the Court" with respect to the Amtrak exhibits. The basis for the court's ruling was that "[i]t is fraud or misrepresentation to say that something exists when it does not." (R.22). On Midtown's motion to dismiss, by contrast, the lower court had ruled that Midtown made an actionable misrepresentation by allegedly delivering an incomplete copy of the Amtrak agreement. (R.455, "The fraud of the deceit is when you are asked to turn over a document, instead of turning over the complete document you turn over half the document."). Thus, when discovery revealed no evidence of Jericho's now-dismissed claim, the lower court simply transposed its rationale for allowing Jericho to proceed with it.

E. Jericho Files A New Action At The Lower Court's Invitation

Two days after the lower court entered its order vacating the judgment, Jericho filed a new complaint, as the lower court had explicitly "welcome[d]" Jericho to do (R.25), and a new notice of pendency against Midtown's properties. Jericho's new complaint is based on the same underlying transaction that is at issue

in this case and asserts *all* of the same claims that this Court has already dismissed. Jericho also added Midtown's counsel in the transaction as individual defendants. *See* Verified Compl., *Jericho Group, Ltd. v. Midtown Dev't, L.P.*, Index No. 600566/2007 (Sup. Ct. N.Y. Cty.) (filed Feb. 22, 2007);[1] *see also* R.366-99 (proposed amended complaint asserting same claims against same defendants).

In addition to re-alleging all of its now-dismissed claims, Jericho's new complaint seeks a declaratory judgment that it did *not* cancel the contract (*see id.* ¶¶148-53), even though this Court unanimously ruled that "Jericho cancelled the contract and recovered its down payment." (R.413). Jericho also seeks a declaratory judgment that Midtown purportedly "had a duty to comply with Jericho's requests for an extension of the Study Period" (Verified Compl. ¶¶ 154-60), notwithstanding this Court's ruling that "there never was any agreement to extend the study period." (R.414-15).

Jericho's newly filed case had been assigned to Justice Ramos, on the basis of a Request for Judicial Intervention that Jericho filed on February 28, 2007, in which Jericho represented that its new case is related to the action that this Court already dismissed. On March 1, 2007, defendants removed Jericho's second lawsuit to the United States District Court for the Southern District of New York,

[1] "This Court may take judicial notice of court documents." *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 271 A.D.2d 49, 51 n.1, 711 N.Y.S.2d 391, 393 n.1 (1st Dep't 2000), *rev'd on other grounds*, 96 N.Y.2d 280, 727 N.Y.S.2d 49, 750 N.E.2d 1097 (2001).

on the basis of diversity of citizenship. *See* Notice of Removal, *Jericho Group, Ltd. v. Midtown Dev't, L.P.*, No. 07-CV-1792 (S.D.N.Y.) (available on Westlaw).

STANDARD OF REVIEW

A lower court order on a motion to vacate a judgment is reviewed for abuse of discretion. *See Pjetri v. N.Y. City Health & Hosps. Corp.*, 169 A.D.2d 100, 103, 571 N.Y.S.2d 934, 936 (1st Dep't 1991). However, "where the moving party's claim is of dubious merit, as here, that discretionary power should be subordinated to the policy favoring the finality of judgments." *Greenwich Sav. Bank v. JAJ Carpet Mart, Inc.*, 126 A.D.2d 451, 453, 510 N.Y.S.2d 594, 596 (1st Dep't 1987).

ARGUMENT

"The utility of judgments as final determinations of the rights and obligations of the parties would be fatally impaired were a court's discretion to grant relief from a judgment not carefully limited." *Pjetri*, 169 A.D.2d at 103, 571 N.Y.S.2d at 936. The lower court abused its "carefully limited" authority here.

I. JERICHO HAD NOTICE OF THE PERTINENT FACTS FOR YEARS BEFORE THE JUDGMENT WAS ENTERED

Jericho's motion to vacate should have been denied because Jericho was on notice of the facts that it now claims support vacatur for *two years* before it brought this action and nearly *four years* before the Clerk entered the judgment. The lower court acknowledged that there was no basis for vacating the judgment under CPLR 5015(a)(2), on the ground of "newly discovered evidence," because

Jericho had this evidence well before the final judgment was entered. (R.19). The lower court reasoned, however, that it nevertheless had the authority to vacate the judgment on the ground of "fraud" under CPLR 5015(a)(3), based on the same evidence. (R.19-23). That is wrong.

A. A Party May Not Seek Vacatur On The Basis Of Facts Of Which It Had Notice Before The Judgment Was Entered

A motion to vacate a judgment may not be granted on the basis of "fraud" when the movant was on notice of the facts supporting this ground before the judgment was entered. *See Richard B. v. Sandra B.B.*, 209 A.D.2d 139, 144, 625 N.Y.S.2d 127, 130 (1st Dep't 1995) ("To succeed in a fraud claim (CPLR 5015[a][3]), [the movant] had to show that he was not on notice, actual or constructive, of the wife's fraud . . . ."). A party who, like Jericho here, has *actual knowledge* of what it claims is fraud before the entry of the final judgment is of course on "notice" of it and is thereby precluded from later seeking vacatur on this ground:

> [A]lthough CPLR 5015(a)(3) permits the vacatur of final judgment on grounds of fraud or misconduct by a party, that statute does not apply where the moving party had knowledge of the fraud or misconduct before entry of the final judgment.

Summer v. Summer, 233 A.D.2d 881, 881, 649 N.Y.S.2d 615, 616 (4th Dep't 1996); *see also, e.g., McGovern v. Getz*, 193 A.D.2d 655, 657, 598 N.Y.S.2d 9, 10 (2d Dep't 1993) (motion to vacate on the grounds of "newly discovered evidence

and fraud and misrepresentation . . . (*see*, CPLR 5015[a][2], [3])" is "without merit" because movant "was aware of the so-called newly discovered evidence" "before the . . . judgment was issued"); *In re Zahoudanis*, No. 44248805, slip op. (Surrogate Ct. Kings Cty. Dec. 28, 1999) (available on Westlaw at "12/28/1999 N.Y.L.J. 26"), *aff'd*, 289 A.D.2d 412, 734 N.Y.S.2d 891 (2d Dep't 2001) ("Vacatur [under CPLR 5015(a)(3)] is not appropriate where the moving party had knowledge of the alleged fraud prior to entry of the judgment.").

This Court has also repeatedly held that a judgment may not be vacated on the ground of fraud when the motion is based on facts which, with due diligence, could have been discovered before entry of judgment. *See Bongiasca v. Bongiasca*, 289 A.D.2d 121, 122, 735 N.Y.S.2d 42, 43 (1st Dep't 2001) ("Defendant was properly denied relief under CPLR 5015(a)(2) or (3). Defendant did not show that his new evidence could not have been found earlier with due diligence."); *H & Y Realty Co. v. Baron*, 193 A.D.2d 429, 430, 597 N.Y.S.2d 343, 344 (1st Dep't 1993) (motion to vacate "on the ground of fraud" properly denied because movant "did not carry her heavy burden" to establish that "despite due diligence she could not have discovered the [evidence]" before entry of judgment, "since she should have been on notice of the relevant facts").

B. Jericho Had Notice Of Its Purportedly "Newly Discovered" Evidence Even Before It Filed Its Now-Dismissed Complaint

This legal standard readily disposes of Jericho's motion to vacate the judgment. The lower court's order is based on two categories of what Jericho called "new" evidence of fraud: (i) correspondence between Midtown and the New York State Department of Environmental Conservation ("DEC") regarding an oil spill on the property and documents Midtown obtained from the DEC; and (ii) statements by Midtown's counsel concerning the exhibits to an agreement between Midtown and Amtrak. (R.14-18). Jericho was on notice of what it now contends, erroneously, was Midtown's fraud regarding these issues for years before Jericho brought this lawsuit. Indeed, not only could Jericho have discovered its "new" evidence of fraud before entry of the final judgment, it did.

1. Information Concerning The Oil Spill

Jericho's "newly discovered facts" regarding Midtown's alleged "failure to produce documents in Midtown's possession or control regarding the oil spill" do not show that Midtown breached the contract or committed fraud. (R.51 ¶83(a); R.53 ¶85). *See infra* pp. 40-47. Merits aside, however, Jericho's contentions regarding the DEC oil spill documents do not provide a basis for vacating the judgment.

(a) Jericho Alleged In Its Complaint That Midtown Had "Knowledge And Writings" About The Spill

As a threshold matter, Jericho's "evidence" is *not* new, and therefore cannot support vacatur of the final judgment. *Jericho pleaded in its now-dismissed, verified complaint* that "Jericho was to learn sometime after the Study Period that Midtown had actual knowledge and writings in its possession pertaining to the oil spill." (R.475 ¶64). Midtown repeatedly brought this allegation to the attention of the lower court and underscored that, in light of it, Jericho's motion to vacate the judgment must be denied. (R.1239; R.1247; R.1320). The lower court did not mention this allegation anywhere in its order vacating the judgment.

By Jericho's own admission, then, it was on notice by no later than November 2005—when it filed its amended complaint—that Midtown had "actual knowledge and writings in its possession" concerning the oil spill. (R.475 ¶64). That was nearly *two years* before the final judgment was entered. For this reason alone, Jericho's contentions regarding the oil spill documents plainly cannot provide a basis for vacating the judgment. *See Richard B.*, 209 A.D.2d at 145, 625 N.Y.S.2d at 131 (party "should be barred from setting forth a claim of newly discovered evidence or fraud" in connection with judgment of paternity because "[a]ccording to his own affidavit [submitted in divorce proceeding], he knew, as early as five months before the child's birth, that he might not be the father").

(b) Jericho Was On Notice That Midtown May Have Had Documents Concerning The Spill

The record on the prior appeal also reflects that Jericho was, in fact, on notice that Midtown may have had DEC documents in its possession for two years before Jericho commenced this lawsuit.

Jericho's principal submitted an affidavit in response to Midtown's motion to dismiss in which he acknowledged that he went to the DEC "on or about" September 24, 2002 to "review[] information on file regarding the oil spill and its cleanup." (R.560 ¶5; R.577 ¶¶19-20.) Among other documents, Jericho's principal reviewed that day a "copy of a letter from [Midtown's counsel] to New York State Department of Environmental Conservation, dated June 29, 1998," in which Midtown had requested access to the DEC's files concerning the oil spill. (R.590; R.591-92). On October 18, 2002—nearly four years before the judgment was entered—Jericho accused Midtown of withholding information "regarding the oil spill" that Midtown may have obtained from the DEC's files:

> According to our Contract, Midtown had to provide this information [the June 29, 1998 letter requesting documents from the DEC] and all the subsequent information and documents, regarding the oil spill, to Jericho, as part of the Diligence material that your firm provided [on] June 19, 2002, or at-least when we specifically requested them from your firm and Midtown, in August and September 2002.

(R.590). This material was all in the record on the prior appeal.

Indeed, *Jericho argued to this Court on the prior appeal* that, on the basis of its "research[]" of the DEC file, "[i]t is well documented that Midtown and its representatives absolutely knew about such occurrence of the spill" and that "Midtown expressly failed to make available to Jericho all relevant materials pertaining to the Property, including . . . environmental situations, [and] the oil spill." Brief for Plaintiff-Respondent, *Jericho Group, Ltd. v. Midtown Dev't, L.P.*, No. 0113274/2004, 2005 WL 5249488, at *10, *24-25, *59 (1st Dep't Dec. 7, 2005).

Accordingly, for two years before Jericho filed its complaint, Jericho had in its possession documents that, according to it, showed that Midtown had withheld DEC documents concerning the oil spill. This prior actual and constructive notice of the "fraud" about which Jericho now complains is an absolute bar to Jericho's motion to vacate the judgment. *See DiIorio v. Gibson & Cushman of N.Y., Inc.*, 161 A.D.2d 532, 533, 566 N.Y.S.2d 1, 2 (1st Dep't 1990) (vacatur under 5015(a)(3) denied where movant was "put on notice, actual or constructive, of the acts constituting [the] alleged fraud"); *Carroll v. Bene*, 246 A.D.2d 649, 649, 667 N.Y.S.2d 313, 313 (2d Dep't 1998) (vacatur on grounds of, *inter alia*, "fraud" not warranted where movant "was aware of the evidence before the entry of the [] order").

The lower court acknowledged that Jericho was aware of the DEC documents and Midtown's correspondence with the DEC by no later than September 2002, when Jericho inspected the DEC file. *See* R.19 ("Jericho admittedly reviewed the NYDEC documents in September 24, 2002 and saw NYDEC's correspondence with Midtown."). That should have been the end of the matter. Indeed, the lower court ruled that "relief cannot be granted under CPLR 5015(a)(2)" because "Jericho itself knew of the correspondence between Midtown and DEC well before this action was filed in 2004." (R.19). *For the same reason*, relief cannot be granted under CPLR 5015(a)(3), because Jericho was plainly on notice of the facts giving rise to its post-judgment allegations of fraud "well before this action was filed in 2004." (R.19). *See Cent. Funding Co. v. Kimler*, 54 A.D.2d 748, 749, 387 N.Y.S.2d 892, 892 (2d Dep't 1976) (denying vacatur under CPLR 5015(a)(3) because "so-called newly discovered evidence purportedly establishing fraud was readily obtainable at the time the action was commenced").

Further, not only was Jericho on notice of the DEC documents in Midtown's possession for years before the judgment was entered—which alone required denial of Jericho's motion to vacate—but Jericho had *actual possession* of those documents for more than eight months before this Court directed entry of the judgment. After waiting a year to conduct *any* discovery in this action, Jericho served a request for documents on September 26, 2005 (R.748-55)—on the last

day for doing so under the lower court's scheduling order (R.756)—and later reviewed the DEC documents in Midtown's possession on November 29, 2005, as they were timely produced in this action by Midtown. *See* R.1337 ¶8 (Jericho's counsel: "It was only when I took the time to inspect, at Midtown's counsel's office, the cartons of documents" on "November 29, 2005 that I came across the DEC documents."); *see also* R.405 ¶3; R.710; R.1266. On this independent ground, Jericho's motion to vacate should have been denied. *See In re Livingston Cty. Support Collection Unit v. Zamiara*, 309 A.D.2d 1259, 1260, 765 N.Y.S.2d 564, 564 (4th Dep't 2003) (examiner "erred in granting petitioner's motion" to vacate because it "was based on evidence that petitioner had in her possession before the entry of the . . . order").

(c) Jericho's Decision Not To Try To Put The DEC Documents Before This Court Shows Lack Of Diligence

The lower court made an exception for Jericho to the rules governing vacatur of final judgments. The court adopted Jericho's excuse that there was "no mechanism" for Jericho to get the DEC documents before this Court on the prior appeal and thus ruled that Jericho should be permitted to file a "new complaint in a new action," notwithstanding this Court's final order of dismissal. (R.53 ¶85; R.25). There is no such exception. And, in any event, the premise for it is wrong. Indeed, Jericho's failure even to try to put the DEC documents before this Court

only shows that its motion should have been denied on the *additional* ground that Jericho did not exercise due diligence here.

First, Jericho could have made a motion to this Court to supplement or enlarge the record on appeal. *See Mt. Lucas Assocs., Inc. v. MG Ref. & Mktg., Inc.*, 250 A.D.2d 245, 254, 682 N.Y.S.2d 14, 21 (1st Dep't 1998) ("The proper procedure, if a party wishes to enlarge the record on appeal, is to make a motion to that effect to this Court.").[2] In fact, Jericho made just such a motion in December 2005, and that motion included the *same documents* that Jericho later submitted to Justice Ramos as a basis for vacating this Court's ruling that Jericho cancelled the contract. (R.631; R.186-88). Without explanation, however, Jericho withdrew its motion to supplement the appellate record before this Court decided it. (R.634-35).

Regardless of whether this Court would have granted a motion to supplement the record, due diligence in this context required that Jericho at the very least *attempt* to put before the Court documents that, according to it, warranted denying Midtown's motion to dismiss and now require the Court to

[2] *See also F.I. duPont, Glore Forgan & Co. v. Chen*, 58 A.D.2d 789, 789, 396 N.Y.S.2d 660, 661 (1st Dep't 1977) ("[W]e believe it better, since we should review all the facts to deal with the matter appropriately, to grant the motion [to supplement the record], which we do, without costs."); *Andon ex rel. Andon v. 302-304 Mott St. Assocs.*, 94 N.Y.2d 740, 746, 709 N.Y.S.2d 873, 877 (2000) (where the Court of Appeals noted that a party may "move to enlarge the record on appeal").

effectively undo its carefully reasoned Final Order dismissing Jericho's complaint. Instead, Jericho chose to withdraw its motion to supplement and remain silent without ever once mentioning to this Court evidence that Jericho now states (incorrectly) "precludes any debate" as to the merits of its claims. (R.49 ¶74). The time to make such purportedly show-stopping submissions was before this Court ruled on the merits of Jericho's claims, not afterwards. Whatever else might be said about Jericho's tactics, this is decidedly *not* due diligence. *See Jennifer W. v. Steven X.*, 268 A.D.2d 800, 801, 702 N.Y.S.2d 215, 216 (3d Dep't 2000) (where evidence was "known and purposely withheld from [the] Court," motion to vacate on the ground of "fraud" pursuant to CPLR 5015(a)(3) was properly denied).

Second, Jericho could have included the DEC documents in the record on the prior appeal had it acted diligently in seeking discovery from Midtown. *See DiIorio*, 161 A.D.2d at 533, 566 N.Y.S.2d at 2 (vacatur under CPLR 5015(a)(3) denied where movants "were simply lacking in due diligence in not making timely discovery of the document"). But Jericho did not serve a document request on Midtown until a *year* after it filed its complaint. (R.748-55; R.713-25). If Jericho had sought discovery from Midtown at the outset of the case in September 2004, as a diligent plaintiff would have, Jericho readily could have submitted documents produced by Midtown as part of its opposition to Midtown's motion to dismiss five months later in February 2005, or at least by the time the lower court decided the

motion eight months later in May 2005. (R.564-80; R.426 ¶5; R.428).[3] Or Jericho might have requested an adjournment of the motion—a familiar tactic to Jericho in this case—to allow it to take discovery. For this entire time, however, Jericho sat idly by without seeking *any* discovery from Midtown.

Thus, not only did Jericho fail to act with the requisite diligence, it did not act with any semblance of interest in prosecuting its case. Instead, Jericho acted in a wait-and-see manner, apparently content that its notice of pendency had rendered Midtown's property unsaleable. *See H & Y Realty Co.*, 193 A.D.2d at 430, 597 N.Y.S.2d at 345 (motion to vacate "on the ground of fraud" properly denied where movant "never requested the information despite the opportunity to do [so] in the course of discovery"). The Court should therefore reject the lower court's notion that the timing of the prior appeal constrained Jericho from presenting its "newly discovered evidence" before entry of the final judgment. *See Richard B.*, 209 A.D.2d at 144, 625 N.Y.S.2d at 130-31 (denying vacatur on the basis of "newly discovered evidence or fraud"; "[a]lthough movant had ample opportunity [to contest his paternity], he waited until after entering into the agreement, obtaining a judgment of divorce and remarrying to submit to blood tests to determine whether he was the biological father").

[3] A motion to dismiss does not stay discovery in a Commercial Division case. *See* Commercial Division Rule 11(d) (effective Jan. 17, 2006); *see also* (Former) Rules of the Justices of the Commercial Division, Rule 12 (in effect when Midtown filed its motion).

2. Exhibits To Midtown's Agreement With Amtrak

The lower court's ruling that the judgment should be vacated due to a purported "fraud" in connection with the Amtrak exhibits is baffling. Not only is there no legal or factual basis for this theory, but, even assuming the Court were to entertain it, it does not provide a basis for vacating the judgment because Jericho was on notice of the facts underlying this assertion for two years before Jericho filed its complaint.

(a) Jericho's New Theory Of "Fraud" Is Not Actionable

Jericho's post-judgment theory that Midtown committed a fraud in connection with the Amtrak exhibits is a 180-degree reversal of its as-pleaded theory. As pleaded in its now-dismissed complaint, Jericho claimed that Midtown made a misrepresentation when Midtown stated that it "does not now (and did not at the commencement of the Contractual 'Study Period') have the Exhibits referred in your letter." (R.543-44). According to Jericho's complaint, "Midtown had in its possession and/or control the Exhibits to the Amtrak agreement" and "willfully failed to deliver the same to Jericho," in response to Jericho's request on the day before the Study Period expired. (R.478 ¶72).

In pursuit of this theory, Jericho took discovery of Midtown, Midtown's counsel, Midtown's broker, Midtown's architects, Midtown's land-use lawyer, another prospective buyer, and Amtrak. (R.606-07 ¶20). *None* of these sources

had a copy of the exhibits to the Amtrak agreement or testified to knowledge of them. (R.606-07 ¶20). Most tellingly, in response to a request by Jericho under the federal Freedom of Information Act, Amtrak produced a September 1998 letter from Midtown's counsel. (R.1057; R.1062-65). In that letter, Midtown's counsel stated, "[W]e [Midtown] are unable to locate the Exhibits to the Agreement; we hope that Amtrak has in its files a complete copy of it." (R.1064). Amtrak did *not* produce a copy of the exhibits in response to Midtown's counsel's statement or in response to Jericho's FOIA request. (R.851 ¶26; R.1180-1202). Discovery thus showed that the copy of the Amtrak agreement attached to the parties' contract was indeed a "true copy" and that Midtown did not breach the contract or commit fraud by "fail[ing] to deliver" the Amtrak exhibits. (R.104 ¶31; R.478 ¶72).

That should have been the end of this specious claim. Not for Jericho, though. After uncovering *no evidence* of the Amtrak exhibits during discovery, Jericho just turned its claim upside down. In its motion to vacate, Jericho frivolously asserted that Midtown's counsel committed a "callous and cynical fraud" by making a *truthful* statement to Jericho in September 2002 that Midtown did not have a copy of the exhibits and then four years later, in July 2006 as part of Midtown's motion for summary judgment, affirming the truth of this statement and adding that "to my knowledge the exhibits referred to in the 1990 agreement between Amtrak and Midtown do not exist." (R.47-48 ¶¶70-71).

The lower court *agreed* with Jericho, ruling that the judgment of dismissal should be vacated on this preposterous ground because "[i]t is fraud or misrepresentation to say that something exists when it does not." (R.22). This is not, first of all, fraud. Contrary to the lower court's characterization, Midtown did *not* state to Jericho in 2002 that the exhibits exist; Midtown stated, truthfully, that it did not have them. (R.544; R.850-51 ¶¶25-26). And there is no inconsistency—let alone one that, on its face, shows the requisite willfulness to vacate a judgment—between stating in 2002 that Midtown did not have the exhibits and then later stating, in 2006 after Jericho scoured the earth searching for the exhibits and did not find them (notably, during this litigation and *not* during the Study Period), that Midtown's counsel has no knowledge that the exhibits exist. (R.851 ¶26). *See, e.g.*, *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 69, 790 N.E.2d 1156, 1161 (2003) (no basis for vacating judgment under CPLR 5015(a)(3) where party "remained steadfast" on "critical assertions"); *Bongiasca*, 289 A.D.2d at 122, 735 N.Y.S.2d at 43 (movant "was properly denied relief under CPLR 5015(a)(2) or (3)" where "he did not sufficiently demonstrate that [alleged] testimonial misstatements were willful").

In any event, Jericho's new theory of fraud is not actionable. This Court has already ruled, on the basis of well-settled law, that Jericho's allegations concerning the "exhibits to an agreement with Amtrak" do not "constitute actionable fraud"

because "Midtown's obligation to provide documents flowed from the 'due diligence' requirements of . . . the contract" and "allegations that Midtown intended to breach a contractual obligation do not support an action for fraud." (R.416). In addition, Jericho agreed in the contract that it would *not* rely on any representations by Midtown, and the contract further provided that Midtown was not making any representations and was unwilling to make any representations. (R. 95 ¶25; R.106 ¶38).

Nor would Jericho's "newly discovered evidence" concerning the Amtrak agreement support a cause of action for breach of the contract. Midtown did not have a copy of the Amtrak exhibits when the parties executed the contract in June 2002. (R.544; R.850-51 ¶¶25-26). Nor did Midtown have the exhibits when Jericho asked for them by letter dated September 2, 2002, the day before the Study Period expired. (R.544; R.850-51 ¶¶25-26). There is no dispute about this. Midtown thus *truthfully* represented in the contract that the attached copy of the Amtrak agreement was a "true copy." (R.104 ¶31). And, even assuming Jericho's pretextual request for the exhibits on the day before the Study Period expired could be deemed "reasonable," Midtown did not breach the contract by "fail[ing] to deliver" the exhibits because *Midtown did not have them*. (R.101 ¶29(c); R.478 ¶72).

For all of these reasons, the Court does not need to reach the question of whether Jericho had notice, before entry of the judgment, that the exhibits to the Amtrak agreement do not exist. There simply is no basis, in law or fact, for Jericho's post-judgment notion that Midtown committed any "fraud" or "breach" regarding the Amtrak exhibits.

(b) Jericho Was On Notice Of Its "New" Allegations Of Fraud For Years Before The Judgment Was Entered

Even if the Court were to indulge the specious notion of fraud advanced by Jericho and accepted by the lower court, Jericho was on notice, for years before it commenced this litigation, of its purportedly new evidence that the Amtrak exhibits "do not exist."

From the time that Jericho first received a copy of the Amtrak agreement—in June 2002, when the parties executed the contract—Jericho was on notice that the exhibits to the agreement may not have existed. (R.117-38). Indeed, the Amtrak agreement itself refers to the "preparation of the exhibits"; it does *not* assume their existence. (R.120). Further, when Midtown informed Jericho in September 2002—in response to Jericho's last-minute request for the purportedly "critical" exhibits—that Midtown did not have them, Jericho was once again put on notice that the exhibits may not exist. (R.48 ¶72; R.543-44). Further still, when Jericho took discovery from the full coterie of parties that might be expected to have the Amtrak exhibits and did not uncover *any* evidence of them, Jericho was

again put on notice that the exhibits may not exist. (R.606-07 ¶20). Finally, even Jericho's "smoking-gun" evidence of "fraud"—that Midtown's counsel affirmed the truth of his September 2002 statement to Jericho and added that, to his knowledge, the Amtrak exhibits do not exist—was in Jericho's possession *before* the judgment was entered. (R.851 ¶26).

Thus, from June 2002 through the entry of judgment in September 2006, Jericho was continuously and repeatedly put on notice that the Amtrak exhibits may not exist. Accordingly, even if the Court were to entertain Jericho's legally and factually erroneous notion that Midtown committed fraud by failing to disclose that the Amtrak exhibits do not exist, this theory cannot provide a basis for vacating the judgment. (R.47-48 ¶¶70-72; R.52 ¶83(b)). *See Richard B.*, 209 A.D.2d at 144, 625 N.Y.S.2d at 130-31.

II. THE LOWER COURT'S ORDER IS BASED ON ALLEGED "FRAUD" IN THE UNDERLYING TRANSACTION, NOT FRAUD IN OBTAINING THE JUDGMENT

The lower court also erred in vacating the judgment under CPLR 5015(a)(3) because, taking its analysis at face value, it describes only a purported fraud in the underlying transaction, not a fraud in obtaining the judgment.

"[I]t is well established that a party seeking to set aside a judgment on the basis of fraud 'will not prevail by merely showing fraud in the underlying transaction but must show fraud in the very means by which the judgment is

procured.'" *Cofresi v. Cofresi*, 198 A.D.2d 321, 321, 603 N.Y.S.2d 184, 185 (2d Dep't 1993) (quoting *Bell v. Town Bd. of Pawling*, 146 A.D.2d 729, 730, 537 N.Y.S.2d 214, 214 (2d Dep't 1989)); *see also Miller v. Pechok*, 282 A.D.2d 259, 259, 723 N.Y.S.2d 351, 352 (1st Dep't 2001) ("[M]otion to vacate . . . the judgment was properly denied for failure to show fraud, misrepresentation or other misconduct *in its procurement*.") (emphasis added); *Dunkin' Donuts, Inc. v. HWT Assocs., Inc.*, 181 A.D.2d 713, 714, 581 N.Y.S.2d 610, 610 (2d Dep't 1992) ("CPLR 5015 permits vacatur of a judgment for fraud in the procurement of the judgment itself, not for the fraud alleged in the pleadings.").

The lower court did not identify any conduct showing that Midtown committed a fraud in procuring the judgment entered in September 2006. Instead, it based its order entirely on improper, post-judgment statements that Midtown had committed a fraud *in the underlying transaction*. The court ruled that Midtown purportedly made false statements in an August 2002 e-mail about the oil spill, that "Midtown failed" to "disclose documents in its custody or control that Jericho request[ed]" during the contractual Study Period in June through September 2002, and that Midtown purportedly "misled Jericho" regarding the Amtrak exhibits in September 2002. (R.20-22). Even if the Court were to assume that the lower court's analysis of these claims were justified—and it is not—none of this shows fraud in procuring the judgment entered *in September 2006*, and it therefore cannot

form a basis for vacatur under CPLR 5015(a)(3). *Compare Burgos v. Burgos*, 304 A.D.2d 475, 475, 757 N.Y.S.2d 733, 733 (1st Dep't 2003) (vacating judgment due to fraud where party "impersonated plaintiff who forged plaintiff's signatures on the documents underlying the divorce judgment").

The lower court strained to identify something that could be deemed "fraud on the Court" and thereby provide an excuse for enabling Jericho to re-litigate this action.[4] The lower court stated that "Midtown repeatedly said to this Court that it had complied with its disclosure obligation in 2002 when it clearly had not." (R.20). But that is *not* a fraud on the Court in litigating this action; it is counsel asserting a defense, and a meritorious one at that, on the basis of the parties' contemporaneous conduct in the underlying transaction. The lower court cannot bootstrap its post-judgment statements on the merits of Jericho's unsupported claims into a basis for asserting that Midtown's counsel committed a "fraud" in *this action*. This is a textbook example of a would-be fraud in the underlying transaction, which does not provide a basis for vacating a judgment. *See Marine Midland Bank v. Hall*, 74 A.D.2d 729, 729-30, 425 N.Y.S.2d 693, 695 (4th Dep't

[4] There is no allegation, either by Jericho or Justice Ramos, that the judgment should be vacated because Midtown concealed documents in this action. To the contrary, Jericho's post-judgment theory regarding the DEC documents is based entirely on documents that Midtown timely made available to Jericho in October 2005 (R.713-25; R.1337), in response to Jericho's request for documents served one month prior (and one *year* after Jericho filed its complaint). (R.748-55; R.726).

1980) ("[A]llegations of fraud or duress as defenses to the merits of the underlying action do not bring into play the provisions of CPLR 5015 (subd. (a), par. 3) which pertain to fraud 'practiced in the very act of obtaining the judgment.'").

The lower court similarly tried to bootstrap Jericho's post-judgment theory regarding the Amtrak exhibits. According to the lower court, it could vacate the judgment due to fraud under CPLR 5015(a)(3) because "Midtown communicated to Jericho, to this Court and to the Appellate Division that the Exhibits did in fact exist when it stated that 'it did not now have the exhibits' or that it 'misplaced' the Exhibits." (R.21). The lower court gets this badly wrong on the facts. *See supra* pp. 32-33. The more fundamental error for present purposes, however, is that the "communicat[ions]" the court referred to were made to Jericho in 2002, on the final day of the Study Period, not "to this Court and to the Appellate Division." (R.21; R.544; R.850 ¶25). Such statements that Midtown allegedly made two years before this action commenced cannot show that Midtown defrauded *the Court in procuring the judgment* in September 2006. *See Feldstein v. Rounick*, 295 A.D.2d 398, 399, 743 N.Y.S.2d 735, 736 (2d Dep't 2002) (vacatur under CPLR 5015(a)(3) denied where movant "failed to establish that the judgment was procured by fraud").

III. JERICHO HAS NOT, IN ANY EVENT, SHOWN THAT MIDTOWN BREACHED THE CONTRACT OR COMMITTED "FRAUD"

For all of the reasons stated above, this Court need not, and in the interest of judicial economy should not, address Jericho's new allegations that Midtown committed a "fraud" in performing the parties' contract. Apart from all of the other independent grounds for reinstating the judgment, however, the Court should also know that Jericho's new allegations do not amount to fraud or breach.

A. The Copy Of The Amtrak Agreement Attached To The Contract Was A "True Copy"

As noted, Midtown did not breach the contract or commit a fraud by "failing to disclose" that the Amtrak exhibits do not exist. There is no evidence that they do, and so the contract accurately states that the copy of the Amtrak agreement attached to it, which did not include the exhibits, was a "true copy." (R.104 ¶31). Also, when Jericho asked Midtown for the exhibits on the day before the Study Period expired, Midtown truthfully stated it did not have them. (R.543-44; R.850-51 ¶¶25-26).

B. Midtown Did Not Breach The Contract By "Failing To Disclose" The DEC Documents

As to documents concerning the oil spill, both Jericho and the lower court fixate on how Midtown purportedly committed a "fraud" by failing to disclose that there had been an oil spill on adjacent land, and all documents concerning it. (R.19-21; R.44-47 ¶¶63-69; R.51-52 ¶83(a)). The contract did not, however,

impose an open-ended obligation on Midtown to disclose all environmental conditions or all documents that might conceivably pertain to the property. Instead, the "AS IS" contract provided that Midtown was to disclose only those "documents" in its current possession or control that Jericho "reasonably requests." (R.98 ¶29(b); R.101-02 ¶29(c)). Jericho's "new" evidence does not and, in light of the record, cannot show a breach of the contract.

The lower court stated that Midtown "failed" to comply with its obligation to "disclose documents in its custody or control that Jericho requests," but curiously never mentioned Jericho's actual request. (R.21). That request *was* before this Court on the prior appeal. Only four days before the Study Period expired, Jericho asked Midtown to "advise, immediately, if there is any truth to [the] information," which Jericho characterized as "scuttlebutt," that "there may have been an oil spill on the properties which may or may not have been cleaned up" and also to "advise" whether Midtown had ever "received any notice, written or oral, from the City of New York or any agency thereof, or from any third party" about the spill and its disposition. (R.547, emphasis in original).

Midtown's response to this request cannot, as a matter of law, be deemed a breach of the contract. First, Jericho expressly agreed in the contract that Midtown "has made *no representations [and] is unwilling to make any representations*" about the property or its condition. (R.106 ¶38 (emphasis added); *see also* R.95

¶25 ("neither party" is "relying upon any statement or representation, not embodied in this contract, made by the other")). Accordingly, Midtown was not contractually obligated to "advise" Jericho in any manner, let alone "immediately." (R.547). No matter what new facts Jericho claims it uncovered regarding the oil spill, Jericho cannot avoid that, under the plain language of the contract, Midtown was not required to make the requested representations about the oil spill. As this Court has already ruled, Jericho's allegations of breach—including its allegations about the oil spill—"are either contradicted by the documentary evidence submitted on the motion or premised on a misreading of Midtown's obligations" under the contract. (R.414).

Second, even if Jericho's request concerning the oil spill might be considered a "reasonabl[e] request[]" for "documents" (and it was not), Jericho was asking Midtown about "*any notice*" to Midtown from the "City of New York or any agency thereof, or from any third party" about the oil spill. (R.101-02 ¶29(c); R.547). *There is no such document*, because, as discovery showed, Midtown has never received any notice from the City, State, any City or State agency, or any "third party" about the oil spill, most likely because the spill did not emanate from Midtown's property and Midtown has never been held to be responsible for cleaning it. (R.852 ¶30). Indeed, in its entire bulky submission on its motion to vacate, Jericho could not point to a *single document* about the oil spill

that, according to it, Midtown should have disclosed in response to Jericho's request that Midtown "advise" Jericho about a "notice" to Midtown. (R.547). Nor was Jericho's principal able to identify such a document at his deposition, even after he used the very information that Midtown provided to him to obtain documents concerning the spill from the DEC. (R.658).

Third, Jericho may not, as a matter of law, contend that it relied on Midtown's purported misrepresentations regarding the DEC documents. Not only did Jericho agree that it would *not* rely on Midtown's representations (R.95 ¶25), but the then-four-year-old documents (all dated 1998 or earlier, R.198-272) that Jericho contends Midtown withheld in September 2002 were all publicly available to Jericho, in the files of the DEC. "Since the plaintiff could have promptly searched the public records to learn that the defendant [] [made alleged misrepresentations], his delay in doing so renders reliance on the defendants' alleged misrepresentation unjustified." *Parkway Woods, Inc. v. Petco Enters., Inc.*, 201 A.D.2d 713, 713, 608 N.Y.S.2d 314, 315 (2d Dep't 1994); *see also Shao v. 39 Coll. Point Corp.*, 309 A.D.2d 850, 851, 766 N.Y.S.2d 75, 76 (2d Dep't 2003) (no actionable fraud where plaintiff "failed to take any action" to obtain purportedly withheld information, including by searching "readily available public document[s]").

Fourth, even assuming that Midtown was required to make representations and Jericho was entitled to rely on them, Midtown's conduct cannot be characterized as "willful or deliberate," and thus could not, under this Court's Final Order, provide a basis for reviving Jericho's claim for specific performance of a cancelled contract. (R.414). As this Court noted on the prior appeal, Midtown promptly informed Jericho in response to its request for a representation about the oil spill that there had been an oil spill on properties neighboring Midtown's sites and

> gave Jericho the name of a contact person at the New York Department of Environmental Conservation, his telephone number, and a project number and spill number for the incident at issue, so that Jericho could find out the status of any spill and/or cleanup.

(R.410). Midtown also promptly responded to each of Jericho's inquiries during the Study Period, even after it became apparent that Jericho did not have a genuine interest in information regarding the property but was only seeking to protract the Study Period after the parties could not come to terms on an extension. (R.543-50).

Thus, as this Court noted in its opinion, "the record is plain that Midtown provided Jericho with information in its possession, and that it alerted Jericho as to additional sources of information as to the . . . alleged oil spill." (R.416). Although Jericho now contends that Midtown did not disclose every scrap of

information Jericho had requested in its flurry of eleventh-hour letters, Midtown's conduct in promptly responding to Jericho's inquiry about the oil spill, disclosing that there had been a spill on adjacent properties, and giving Jericho detailed instructions on how to obtain current information about it directly from the DEC, cannot be deemed "willful or deliberate" in the circumstances of this case. *See, e.g.*, *Dauria v. City of N.Y.*, 127 A.D.2d 459, 460, 511 N.Y.S.2d 271, 273 (1st Dep't 1987) ("[P]laintiffs have not conclusively shown that [defendant's] actions were willful or in bad faith" where "[t]he record indicates that [defendant] attempted to comply with plaintiffs' discovery requests.").

Finally, Jericho's conduct in waiting until four days before the Study Period expired to inquire about the oil spill refutes its conclusory complaint allegation that information about the oil spill was "materially relevant" to Jericho. (R.461 ¶5). Jericho, as the buyer, was responsible to conduct its own environmental due diligence on the property. (R.97-98 ¶29(a)). Any serious buyer of these properties would have started that inquiry at the outset of the contractual Study Period by commissioning a so-called "Phase One" report. *See* Andrew N. Jacobson, *Narrative Real Estate Acquisition Due Diligence*, 17 PRACTICAL REAL ESTATE LAWYER 7, 8 (2001) (item "I.A" on "Due Diligence Checklist" is a "Phase One Environmental Assessment" to "identify actual and potential problems (e.g., . . . hazardous materials contamination)"; "[i]t is important for the buyer to initiate

work on the Phase One report early in the due diligence process"). Through that process Jericho could have informed itself of the current status of the remediation of the spill without relying on representations by Midtown that, as the contract makes plain, Midtown was "unwilling" to make (R.106 ¶38). *See id.* ("Phase One Environmental Assessment" is "based primarily on a review of historical documentation, regulatory databases and a walk-through inspection").

Jericho did not order a Phase One report. (R.1081). Nor did it conduct anything that might be called environmental "due diligence" on the property. (R.1081-86). Instead, it waited for last-minute "scuttlebutt" to inform itself about the environmental condition of four acres of undeveloped property that is in a formerly industrial area, traversed by a rail line, and near a rail yard.[5] (R.547). Jericho's failure to engage in any form of systematic, professional inquiry regarding this commercial property shows that its requests for information as the Study Period was about to expire were only a pretext and that the DEC documents in Midtown's possession cannot be deemed material to Jericho's decision whether

[5] The lower court took it on faith that Jericho had no notice of what it now calls a "massive" oil spill until four days before the Study Period expired. (R.21, "Jericho could not have inquired earlier as it had no notice of the oil spill prior to four days before [the end of the Study Period]."). The record contradicts that assumption. (R.852-53 ¶¶29, 31; R.938; R.941). But even if Jericho's principal were being truthful, the lower court might have trained its lens on Jericho for just a moment before vacating a judgment and asked why Jericho waited for *more than 70 days* after signing the contract to make *any* inquiry concerning the environmental condition of a property it had agreed to purchase for $28 million.

to proceed with the contract. *See Wong v. Weissman*, 133 A.D.2d 821, 822, 520 N.Y.S.2d 198, 200 (2d Dep't 1987) (specific performance claim dismissed where "plaintiffs used the [] issue as a meritless, bad-faith pretext to obtain a delay"); *CFJ Assocs. of N.Y. Inc. v. Hanson Indus.*, 274 A.D.2d 892, 894-95, 711 N.Y.S.2d 232, 235-36 (3d Dep't 2000) (plaintiff cannot, as a matter of law, establish fraudulent environmental disclosures where contract provided that plaintiff was to perform its own due diligence on the "environmental condition of the property" and had the right to terminate contract in its "sole and absolute discretion").

IV. JERICHO'S HARASSING TACTICS ARE AN INDEPENDENT BASIS FOR REINSTATING THE JUDGMENT OF DISMISSAL

There is one further ground on which the lower court's order vacating the judgment should be reversed. A judgment should not be vacated where, as in this case, the party seeking vacatur has acted in a bad faith or dilatory manner. *See Greenwich Sav. Bank*, 126 A.D.2d at 452, 510 N.Y.S.2d at 596 ("[D]iscretion [on a motion to vacate a judgment] should not be exercised where, as here, the moving party has demonstrated a lack of good faith, or been dilatory in asserting its rights."); *Diaz-Tirado v. Rivera*, 169 A.D.2d 576, 577, 565 N.Y.S.2d 705, 705 (1st Dep't 1991) (same); *Spodek v. Feibusch*, 259 A.D.2d 693, 693, 687 N.Y.S.2d 171, 172 (2d Dep't 1999) (vacatur denied where "[t]he record is replete with evidence of the plaintiff's lack of good faith and failure to timely assert his rights").

Jericho's bad faith on this motion began with its conduct leading up to it. From before Jericho filed its appeal brief on December 7, 2005, Jericho had in its possession all of the DEC documents that underlie its motion to vacate the judgment. (R.405 ¶3; R.710; R.713-725; R.1266; R.1337 ¶8). Yet Jericho did not even try to call these documents to the attention of the Court. Indeed, Jericho did not even include these DEC documents in its motion to supplement the record on the prior appeal. (R.629-35). That motion to supplement did include the *same documents* that Jericho invoked on its vacatur motion as a basis for asserting that it had not, in fact, cancelled the contract. (R.631; R.44; R.186-88). But Jericho withdrew that motion before this Court could decide it. (R.634-35). Thereafter, Jericho sat silently and waited, *for ten months*, until after the Court issued its opinion before making a motion for reargument on the basis of so-called "newly discovered evidence." (R.762-827).

Jericho's reargument motion marked its first unsuccessful effort in this Court to stave off the final judgment. On an emergency basis in this Court—but on the last day of the thirty-day period to move for reargument—Jericho sought an interim stay of entry of the judgment pending this Court's decision on Jericho's reargument motion that it filed the same day. (R.626-27). The Court summarily denied Jericho's application for interim relief. (R.627). Shortly thereafter, but only after first putting Midtown to the task of opposing Jericho's frivolous

reargument motion, Jericho once again withdrew a motion in this Court. (R.828-29; R.624). Jericho's professed ground for doing so was that it had "due concern for prudent use of the Court's resources" and that it had "conclude[d]" it was "appropriate to withdraw this motion before this Court and present the documents and arguments of fraud in the Supreme Court." (R.828).

That was telling. Even though Jericho's theory of "fraud on the Court" was that Midtown had defrauded *this Court* in connection with the prior appeal, Jericho did not move in this Court to vacate the judgment. *See Cohoes Realty Assocs. v. Lexington Ins. Co.*, 292 A.D.2d 51, 54, 745 N.Y.S.2d 1, 3 (1st Dep't 2002) ("[A]n appellate court has inherent and plenary authority to exercise its discretion to review a previous order obtained by means of misconduct by a party toward the court."); *McMahon v. City of N.Y.*, 105 A.D.2d 101, 104, 483 N.Y.S.2d 228, 230 (1st Dep't 1984). Instead, Jericho proceeded with a motion to vacate in the lower court, where it apparently liked its chances better. (R.26-28).

The bad faith did not end with Jericho's making its frivolous motion to vacate in the lower court. The *only* claim that Jericho had any basis for re-asserting on the strength of the lower court's order was its claim for specific performance due to Midtown's alleged breach of its disclosure obligations during the Study Period. Jericho's claims for damages, fraud, and breach of a non-existent amendment to extend the Study Period—all of which were *dismissed* by

this Court—are wholly unaffected by the lower court's basis for vacating the judgment. But that did not stop Jericho from starting its *entire case* all over again, as if this Court had never issued its final order of dismissal. In its new, seven-count complaint, Jericho asserts not only all of the causes of action that this Court had already dismissed, but also *new* causes of action for a "declaratory judgment" on the very issues that this Court has already decided. *See* Verified Compl., *Jericho Group, Ltd. v. Midtown Dev't, L.P.*, Index No. 07600566 (Sup. Ct. N.Y. Cty.); *see also* R.391-98 (causes of action in proposed second amended complaint submitted to lower court on motion to vacate, asserting all the same claims).

Most egregiously, in this regard, Jericho's new complaint is seeking a declaration that it did *not* cancel the contract. (R.396). But Jericho has repeatedly acknowledged, in its verified amended complaint, in sworn statements by its principal, at oral argument before the lower court on the motion to dismiss, in its brief to the lower court on Midtown's motion to dismiss, and in its brief to this Court on the prior appeal that *Jericho cancelled the contract*.[6] *This Court also*

[6] *See* R.471 ¶45 (Jericho's verified complaint alleged that "Jericho terminated the Original Contract of Sale due to Midtown's material breach"); R.578 ¶23 (affidavit by Jericho's principal in support of Jericho's opposition to the motion to dismiss, stating "Jericho . . . exercised its rights under Paragraph 29(a) of the Contract [the cancellation provision]"); R.434 (Jericho's counsel in response to lower court's question at oral argument on motion to dismiss, "what happened, you withdrew from the deal or you went through with the deal?": "[o]ur client" "ultimately exercised his right to terminate"); Brief for Plaintiff-Respondent, *Jericho Group, Ltd. v. Midtown Dev't, L.P.*, No. 0113274/2004, 2005 WL

expressly ruled that "Jericho cancelled the contract and recovered its down payment," on the basis of Jericho's September 12, 2002 letter to Midtown expressly stating that "our letter on behalf of Jericho dated September 3, 2002, requesting the return of Jericho's down payment was intended as the exercise of Jericho's right under paragraph 29(a) of the referenced contract *to cancel said contract*." (R.413; R.536, emphases added).

Flying in the face of this Court's final order and Jericho's own repeated prior admissions, Jericho now contends that its September 12, 2002 cancellation letter was "ineffectual" because its counsel purportedly "did not have authority" to send it. (R.42 ¶55; R.43 ¶56). Jericho has no explanation for why, if this story were true, it accepted the return of its down payment from Midtown. More importantly for present purposes, however, there is no conceivable ground for re-opening litigation on this already-decided issue. There is no "new" evidence of "fraud" by Midtown regarding Jericho's cancellation of the contract. The basis for Jericho's new claim that its cancellation was "ineffectual" is a handful of post-cancellation letters that *it sent* to Midtown in 2002 and early 2004, after it accepted its down

(continued…)

5249488, at *35 (1st Dep't Dec. 7, 2005) ("To accomplish the return of the Downpayment pursuant to Paragraph 29(a) of the Original Contract of Sale Jericho was required to terminate the Original Contract of Sale pursuant thereto.").

payment back without returning it but *well before Jericho commenced this action in September 2004*. (R.44 ¶¶60-61).

There is thus no basis, even under the lower court's expansively accommodating rationale, for Jericho to re-litigate the issue of whether it cancelled the contract. That Jericho is seeking to do just that reflects not only its bad-faith refusal to accept the finality of this Court's decision, but also the duplicitous nature of its tactics throughout this litigation. Indeed, the only thing consistent about Jericho's positions on the dispositive issues in this case is that its positions will change if Jericho perceives that, by doing so, it can keep Midtown's property encumbered by litigation.[7]

Jericho is not only a vexatious litigant. It is a chronic abuser of the court system that will resort to any and all improper means to try to maintain its hold on property that does not belong to it, without regard for the contemporaneous record,

[7] As another example of such conduct, Jericho admitted in verified interrogatory responses that it did not have financing to purchase the property at the time of the scheduled closing, but stated that it "could have" or "would have" arranged for it. (R.1091 ¶7). After Jericho's claim for specific performance in another case was dismissed in December 2005, *see infra* n.8, in part because Jericho did not show it was able to purchase the property (R.1122-24), Jericho did an about-face here. In January 2006, Jericho's principal revised his responses to state that he had reached an agreement in July 2002 with a developer to finance the property, but purportedly could not find an executed copy of a writing embodying that agreement. (R.1098 ¶8; R.1072-75).

Court orders, or the rules of civil litigation.[8] For this reason alone, the Court should reverse the lower court's order vacating the judgment and direct the Clerk to enter a final judgment dismissing Jericho's complaint on the merits. Enough is enough.

[8] Though neither Jericho nor its principal Mr. Pfeiffer has ever purchased any commercial real property, (R.1071), they recently brought two other now-dismissed lawsuits claiming a right to property they did not own. In *Pfeiffer v. Jacobowitz*, 29 A.D.3d 661, 662, 815 N.Y.S.2d 165, 166 (2d Dep't 2006), the court dismissed Jericho's principal's claim for a "constructive trust" on property that he did not purchase. And, in *Jericho Group, Ltd. v. Pioneer Management & Realty*, Index No. 600887/2004 (Sup. Ct. N.Y. Cty.), Justice DeGrasse dismissed Jericho's claim for specific performance of a contract that Jericho had, as in this case, cancelled. (R.1122-24).

CONCLUSION

The Court should reverse the IAS Court's order vacating the judgment, with full costs to Midtown, and direct the Clerk to enter a final judgment dismissing Jericho's amended complaint on the merits.

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