

**Deutsche Bank Natl. Trust Co. v Hafeez**

2026 NY Slip Op 31119(U)

March 16, 2026

Supreme Court, Kings County

Docket Number: Index No. 506066/2016

Judge: Menachem M. Mirocznik

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At IAS Part FRP5 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 16<sup>th</sup> of March 2026

**PRESENT:** HON. MENACHEM M. MIROCZNIK  
JUSTICE OF THE SUPREME COURT

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR AMERIQUEST MORTGAGE SECURITIES INC., ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2005-R6,

Plaintiff,

-against-

BISMILLAH ABDUL HAFEEZ A/K/A BISMILLAH HAFEEZ A/K/A BISMILLAH HAFIS; ET AL

Defendants.

Index No. **506066/2016**

**Decision, Order and Judgment  
(Motion Seq. 2, 3, 4, 5, 6, 8 and 9)**

<b>Papers</b>	<b>Numbered</b>
Notice of Motion (Seq. 2)	NYSCEF Doc. 33-57
Notice of Cross-Motion (Seq. 3)	NYSCEF Doc. 83-95
Opposition to Cross-Motion/Reply (Seq. 2 and 3)	NYSCEF Doc. 96-100
Reply to Cross-Motion (Seq.3)	NYSCEF Doc. 101-105
Notice of Motion (Seq. 4)	NYSCEF Doc. 113-120
Notice of Motion (Seq. 5)	NYSCEF Doc. 134-139
Notice of Cross-Motion (Seq. 6)	NYSCEF Doc. 141-160
Opposition to Cross-Motion/Reply (Seq. 3 and 6)	NYSCEF Doc. 168-170
Reply Papers (Seq. 6)	NYSCEF Doc. 178
Notice of Motion (Seq. 8)	NYSCEF Doc. 180-189
Opposition Papers (Seq. 8)	NYSCEF Doc. 186-189
Reply Papers (Seq. 8)	NYSCEF Doc. 195
Opposition Papers (Seq. 4)	NYSCEF Doc. 200
Notice of Cross-Motion (Seq. 9)	NYSCEF Doc. 204-211
Opposition Papers (Seq. 9)	NYSCEF Doc. 225-226
Reply Papers (Seq. 4)	NYSCEF Doc. 228-229
Reply Papers (Seq. 9)	NYSCEF Doc. 230
Reply Papers (Seq. 5)	NYSCEF Doc. 231
Reply Papers (Seq. 4, 5 and 9)	NYSCEF Doc. 232

Upon the foregoing papers, the motion(s) is/are determined in accordance with this Decision, Order and Judgment as follows:

### Relevant Factual and Procedural History

This ten year old action was commenced on April 15, 2016, seeking to foreclose a mortgage (the “mortgage”) executed by Bismillah Abdul Hafeez A/K/A Bismillah Hafeez A/K/A Bismillah Hafis (“Bismillah” or the “defendant”) and Joyce M. Philip A/K/A Joyce Philip (“Joyce”) encumbering the real property known as 44 Herkimer Place, Brooklyn, NY 11216 (the “property”). Title to the property is held solely by defendant Bismillah.

On April 25, 2016, defendant was allegedly served personally with the summons and complaint at 236 Katham Drive, Newport News, VA 23605.

On April 29, 2016, Richard Jackson was personally served with the summons and complaint as John Doe #1 at the property

On January 30, 2017, the Court granted plaintiff’s motion for a default judgment and order of reference.

On February 11, 2019, plaintiff moved (Seq. 2) to confirm the referee’s report and for a judgment of foreclosure and sale. Defendant cross-moved (Seq. 3) to vacate the default judgment and order of reference and to dismiss this action for lack of personal jurisdiction pursuant to CPLR 3211[a][8] and separately pursuant to CPLR 3012-b[e], RPAPL 1302(a), RPAPL 1303 and RPAPL 1304 and for an award of attorneys fees pursuant to RPL 282.

On September 11, 2019, the Court granted defendant’s cross-motion to the extent of ordering a traverse hearing and held the remainder of the defendant’s cross-motion and plaintiff’s motion in abeyance pending resolution of the traverse.

On December 22, 2020, plaintiff moved (Seq. 4) for an extension of time to serve defendant to the extent service is found to be improper and to deem service at certain addresses to be proper for service. Plaintiff contends it demonstrated an extension of time is warranted for good cause and in the interests of justice. In opposition to the motion defendant argues that plaintiff failed establish an extension is warranted for good cause or in the interest of justice and that defendant would suffer substantial prejudice if an extension is granted.

On March 2, 2021, plaintiff filed a hardship declaration signed by defendant.

Between December 2020 and January 2023, the traverse hearing was held.

On June 9, 2023, prior to issuance of the referee’s report, defendant moved (Seq. 5) for, in effect, a directed verdict of dismissal after the traverse hearing and for the relief sought in its cross-motion filed under motion seq. 3. Defendant contends that the testimony at the hearing proves defendant was not served and plaintiff failed to offer any evidence of proper service and did not produce the process server.

On July 28, 2023, plaintiff cross-moved (Seq. 6) to amend the affidavit of service on Richard Jackson as John Doe #1 to reflect service was completed on defendant because the description in the affidavit of service is similar to the description of defendant. In opposition to the cross-motion defendant argues that such an amendment is not permitted, would be prejudicial, that

plaintiff failed to establish that the person served and defendant are the same person and in any case the description of the person served is not similar to defendant.

On August 28, 2023, plaintiff moved (Seq. 7) to renew the order dated September 11, 2019, due to defendant's alleged waiver of the jurisdictional objection with the filing of the hardship declaration. The motion was subsequently withdrawn.

On October 26, 2023, plaintiff moved again (Seq. 8) to renew the order dated September 11, 2019, due to defendant's alleged waiver of the jurisdictional objection with the filing of the hardship declaration. In opposition to the motion defendant again argues that the filing of the hardship declaration is not a formal or informal appearance that waives jurisdictional defenses, let alone jurisdictional relief that was already ordered.

On October 20, 2024, the referee issued report finding that defendant was not properly served and sustained the traverse.

On November 18, 2024, defendant cross-moved (Seq. 9) to confirm the referee's report and to dismiss the action for lack of personal jurisdiction. In opposition to the motion, plaintiff argues it's motion for extension of time is pending, again that defendant allegedly waived the jurisdictional objection and was allegedly uncooperative at the traverse hearing.

### Discussion

#### **A. Plaintiff's Motion (Seq. 8) For Renewal of the September 11, 2019 Order Is Denied.**

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination". CPLR 2221[e][2]. "A clarification of the decisional law is a sufficient change in the law to support renewal." *Dinallo v DAL Elec.*, 60 AD3d 620 [2d Dept 2009]; See also *U.S. Bank N.A. v Mongru*, 241 AD3d 970 [2d Dept 2025]

"A defendant may waive the issue of lack of personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of personal jurisdiction in an answer or pre-answer motion to dismiss...A defendant appears formally in an action 'by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer...A defendant 'may appear informally by actively litigating the action before the court...When a defendant participates in a lawsuit on the merits, he or she indicates an intention to submit to the court's jurisdiction over the action, and by appearing informally in this manner, the defendant confers in personam jurisdiction on the court." *Nationstar Mtge., LLC v Stroman*, 202 AD3d 804, 806 [2d Dept 2022][internal citations and quotation marks omitted]

Here, plaintiff contends that defendant waived the jurisdictional objection by filing a hardship declaration which amounts to an "informal appearance" which waives jurisdictional objections. Plaintiff's argument is patently baseless.

Defendant raised the jurisdictional objections long before the filing of the hardship affidavit. Therefore, it could not waive the jurisdictional objection already asserted in its previous

motion and in fact after the court already granted directional relief.

In any case, defendant is correct that the filing of a hardship declaration does not amount to informal appearance. “The electronic filing of a hardship declaration did not constitute active litigation of the action or participation in the action on the merits...and, consequently, did not constitute an informal appearance that would have waived a personal jurisdiction objection.” *U.S. Bank Trust, N.A. v. Lane*, 241 AD3d 745, 747 [2d Dept 2025] [internal citations and quotation marks omitted]

Accordingly, plaintiff’s motion seeking renewal is denied.

**B. Plaintiff’s Motion (Seq. 6) to Amend the Affidavit of Service Nunc Pro Tunc Is Denied**

“Pursuant to CPLR 305(c), a court, “[a]t any time, in its discretion and upon such terms as it deems just, ... may allow any ... proof of service of a summons to be amended, if a substantial right of a party against whom the summons is issued is not prejudiced” *Jampolskaya v Ilona Genis, MD, P.C.*, 205 AD3d 785, 787 [2d Dept 2022]

Here, plaintiff seeks to amend the affidavit of service on Richard Jackson served as John Doe #1 to reflect service was completed on defendant because the description in the affidavit of service is similar to the description of defendant and because of defendant’s alleged “elusive; contradictory and incredible” testimony at the traverse hearing.

However, such a substantial amendment to an affidavit of service is prejudicial and is not permitted or warranted pursuant to CPLR 305[c].

Defendant is correct that plaintiff failed to establish that Richard Jackson and defendant are the same person. Plaintiff offers nothing but speculation solely based on alleged similarities in the description of Richard Jackson, which as accurately noted, defendant was described as 31-49 years old when defendant is substantially older at 65 years old. More importantly, even if the description of Richard Jackson was exactly the same as defendant, that does not mean that Richard Jackson and defendant are the same individual. It is very possible that two people can exist with matching descriptions especially when the descriptions contain large ranges the descriptions. (i.e. 31-49 years of age, 5’8”-5’11” in height and 175-199 pounds in weight).

Moreover, such an amendment to the identity of the person served is not permitted by CPLR 305[c]. The Appellate Division has “previously held that certain defects in an affidavit of service, which are related to a defendant’s substantial right to notice of the proceeding against him or her, ... may not be corrected by an amendment...These defects include an erroneous address...and an erroneous mailing date.” *Doe v Mesivtha, Inc.*, 226 AD3d 971, 973 [2d Dept 2024][internal citations and quotation marks omitted]; See also *HSBC Bank USA, N.A. v Rini*, 218 AD3d 664 [2d Dept 2023][“However, similar to an erroneous address contained in an affidavit of service...an erroneous mailing date “affects a defendant’s substantial right to notice of the proceeding against him or her, and may not be corrected by an amendment”]

The Court finds that an attempt to amend the affidavit of service to entirely change the identity of the person allegedly served is an even more substantial and prejudicial than an attempt

to change the address of service or the mailing date contained in affidavit of service. Therefore, an amendment of such magnitude is not permitted by CPLR 305[c] and even if it were the Court in its discretion would deny same. See *Grimes v Figueroa*, 238 AD3d 721, 722-23 [2d Dept 2025][“amended affidavit of service changing the identity of individual served “could not cure the deficiencies in the original affidavit of service, regardless of whether leave to amend the proof of service was sought”]

Therefore, plaintiff motion to amend the affidavit of service nunc pro tunc pursuant to CPLR 305[c] is denied.

**C. Plaintiff’s Motion (Seq. 4) for An Extension of Time to Serve Pursuant to CPLR 306-b is Denied.**

CPLR 306-b provides in relevant part “Service of the summons and complaint...shall be made within one hundred twenty days after the commencement of the action...If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.”

“Pursuant to CPLR 306–b, a court may, in the exercise of discretion, grant a motion for an extension of time within which to effect service for good cause shown or in the interest of justice...Good cause’ and ‘interest of justice’ are two separate and independent statutory standards...To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service. Good cause will not exist where a plaintiff fails to make any effort at service...or fails to make at least a reasonably diligent effort at service. By contrast, good cause may be found to exist where the plaintiff’s failure to timely serve process is a result of circumstances beyond the plaintiff’s control.” *State of New York Mtge. Agency v Braun*, 182 AD3d 63 [2d Dept 2020]

However, “an attempt at service that later proves defective cannot be the basis for a “good cause” extension of time to serve process pursuant to CPLR 306-b” *Estate of Fernandez v Wyckoff Hgts. Med. Ctr.*, 162 AD3d 742, 743 [2d Dept 2018]; *Citibank, N.A. v Martinez*, 197 AD3d 1086 [2d Dept 2021][“The record demonstrates that there was no good cause shown for an extension of time to serve the summons and complaint upon the defendant pursuant to CPLR 306–b, since the plaintiff’s attempt at service was defective.”]

Moreover, plaintiff failed to show reasonable diligence in its service of defendant. The submitted affidavit of diligence does not demonstrate reasonable diligence in serving defendant and amounts to nothing more than an internet search reflecting an address in Virginia where defendant was allegedly served and has since been found to be defective at the traverse hearing. While, the affiant also proffers an alleged postmaster request for defendant’s address, the same is not signed, does not demonstrate it was sent to the postmaster and even if it did, plaintiff did not await a response before attempting service in another state.

Therefore, plaintiff failed to demonstrate an extension should be granted for good cause.

“If good cause for an extension is not established, courts must consider the broader interest

of justice standard of CPLR 306-b...In considering the interest of justice standard, “the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant.” *State of New York Mtge. Agency v Braun*, 182 AD3d 63, 66-67 [2d Dept 2020]; “No one factor is determinative—the calculus of the court’s decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served” *Wells Fargo Bank, NA v Barrella*, 166 AD3d 711 [2d Dept 2018]

“Where the plaintiff’s delay in serving a defendant is protracted, and the defendant has no notice of the action for a protracted period of time, an inference of substantial prejudice arises” *Id*

Here, an extension in the interest of justice is not warranted.

First, plaintiff offers no proof or evidence that defendant had actual notice of this action prior to July of 2019 when he filed his motion seeking dismissal thereby failing to rebut the inference of substantial prejudice. See *Wells Fargo Bank, NA v Barrella*, 166 AD3d 711 [2d Dept 2018][“The plaintiff failed to rebut the inference of substantial prejudice that arose due to its protracted delay in serving Joseph, as it failed to come forward with any proof that Joseph had notice of this action”]

Second, plaintiff failed to serve defendant for an inordinate amount of time. This action was commenced on April 15, 2016, the initial service was found to be defective and plaintiff apparently attempted service by nail and mail on December 16, 2020, more than four years after the 120-day deadline to serve defendant expired. See *HSBC Bank USA, N.A. v Lev*, 181 AD3d 938, 941 [2d Dept 2020][denying interest of justice extension where “factors are outweighed by the lack of diligence by the plaintiff”]; See also *Nationstar Mtge. LLC v Wilson*, 176 AD3d 1087 [2d Dept 2019]; *Mid- 9 Island Mtge. Corp. v Drapal*, 175 AD3d 1289 [2d Dept 2019]

Third, plaintiff was extremely dilatory in seeking an extension of time. Defendant moved to dismiss on July 13, 2019, and plaintiff did not move for an extension of time until on December 22, 2022, over 17 months after being being on notice of the lack of service and over 15 months after the Court granted defendant’s motion and directed the traverse. See *Wells Fargo Bank, N.A. v Kaul*, 180 AD3d 956 [2d Dept 2020][ denying interest of justice extension where plaintiff was on notice for more than eight months before seeking an extension of time]; *Nationstar Mtge., LLC v Wilson*, 176 AD3d 1087, [2d Dept 2019][denying interest of justice extension where plaintiff moved “16 months after the expiration of the 120-day period” and one year after being on notice of the service defect]; See also *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 107 [2001][eight month delay unreasonable]

Fourth, “[a]lthough the statute of limitations had expired by the time the plaintiff moved for an extension of time to effectuate service, a factor that usually would weigh in the plaintiff’s favor, the record demonstrates that the lengthy delay in this action was attributable to the plaintiff’s overall extreme lack of diligence.” *US Bank N.A. v Fink*, 206 AD3d 858, 861 [2d Dept 2022]. Here, plaintiff was on notice of the alleged defect in service within the relevant limitations period, and assuming arguendo the statute began to run upon commencement, plaintiff did not seek an

extension until December 22, 2022, over eight months after the limitations period had run.

Lastly, plaintiff failed to demonstrate is has a meritorious cause of action. *See Kowlessar v Darkwah*, 172 AD3d 837 [2d Dept 2019]; *Jung Hun Cho v Bovasso*, 166 AD3d 868 [2d Dept 2018]. Here, Plaintiff relies solely on the affidavit of Claribel Lopez, a purported vice president of Ocwen Loan Servicing LLC the alleged attorney in fact for plaintiff. However, the proffered power of attorney is expressly limited by certain servicing agreements which have not been proffered. Therefore, Ms. Lopez failed to demonstrate she has authority to act for plaintiff. *See HSBC Bank USA, N.A. v Betts*, 67 Ad3d 735 [2d Dept 2009]; *Citibank, N.A. v Herman*, 215 AD3d 626 [2d Dept 2023]; *US Bank N.A. v Cusati*, 185 AD3d 870 [2d Dept 2020]; *See also U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022][“the limited power of attorney submitted...restricted and conditioned its authority based on the terms of other agreements which were not provided by the plaintiff. Thus, the limited power of attorney was insufficient to demonstrate that Nationstar possessed the authority to act on behalf of the plaintiff”]<sup>1</sup>

Therefore, weighing all the relevant factors, the Court in its broad discretion determines that an extension of time in the interest of justice is not warranted. Accordingly, plaintiff’s motion for an extension of time to serve defendant is denied.

**D. Defendant’s Motion (Seq. 9) to Confirm the Referee’s Report and for Dismissal Is Granted.**

“CPLR 4403 provides that, “[u]pon the motion of any party...the judge required to decide the issue may confirm or reject, in whole or in part...the report of a referee to report”...The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility” *U.S. Bank N.A. v Maher*, 219 AD3d 1372 [2d Dept 2023][internal citations and quotation marks omitted]

“At a hearing to determine the validity of service of process, the burden of proving personal jurisdiction is upon the party asserting it, and that party must sustain that burden by a preponderance of the credible evidence...As a general rule, courts will not disturb the findings of a referee as long as they are substantially supported by the record and the referee has clearly defined the issues and resolved matters of credibility” *Deutsche Bank Natl. Tr. Co. v Bueno*, 222 AD3d 940 [2d Dept 2023] [internal citations and quotation marks omitted]

“A referee's credibility determinations are entitled to great weight because, as the trier of fact, he or she has the opportunity to see and hear the witnesses and to observe their demeanor.” *U.S. Bank N.A. v Kaur*, 177 AD3d 1016 [2d Dept 2019]; *See also Matter of Taub v Taub*, 94 AD3d 901, 901 [2d Dept 2012][“The Judicial Hearing Officer is in the best position to evaluate the credibility of the witnesses”]; *Eur. Am. Bank & Trust Co. v H. Frenkel, Ltd.*, 163 AD2d 154 [1st Dept 1990][“Generally, New York courts will look with favor upon a Referee's report, inasmuch as the Referee, as trier of fact, is considered to be in the best position to determine the issues

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<sup>1</sup> Although defendant may not have raised every argument and contention it should have, the Court notes that the burden in establishing entitlement to relief lays with plaintiff and the Court has an independent obligation to weigh the relevant factors in considering whether relief is warranted regardless of the sufficiency of the opposition papers. *See e.g. 21st Mtge. Corp. v Akter*, 234 AD3d 900 [2d Dept 2025][affirming denial of plaintiff’s unopposed motion for an extension of time pursuant to CPLR 306-b]

presented.”]

After reviewing the hearing transcript and exhibits, the Court finds no basis to disturb the Referee’s findings. The Referee findings are fully supported by the record.

Plaintiff’s arguments pertaining to the alleged waiver of the jurisdictional objection with the filing of the hardship declaration and the pendency of its motion for an extension are rejected. As noted above, the filing of the hardship declaration was not a waiver in any sense, and the Court denied the request for an extension of time to serve pursuant to CPLR 306-b.

Lastly, it “is well established that the burden of proving that personal jurisdiction was acquired rests at all times upon the plaintiff in the action” *Fed. Natl. Mtge. Assn. v Castoldi*, 187 AD3d 988, 989 [2d Dept 2020]. Its failure to meet its burden at the traverse cannot be blamed on defendant’s alleged cooperation or lack thereof and its attempt to discredit the witnesses does not overcome the deference owed to the Referee’s determinations. Nor does the process server’s affidavit restore the presumption of proper service once that presumption has been rebutted by specific and credible testimony.

Therefore, the referee’s report is confirmed, the Court lacks personal jurisdiction over defendant, and this action must be is dismissed.

However, a dismissal for lack of personal jurisdiction is not on the merits and therefore defendant is not entitled to an award of attorneys fees.

The Court notes that defendant is a necessary and indispensable party to this action. Therefore, the complaint must be dismissed in its entirety. See *LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223 [2d Dept 2018][“Chittra, as a fee owner of the property which was subject to the mortgage, was a necessary and indispensable party to the action...Once the complaint was dismissed against Chittra, the plaintiff could not continue the action against the other defendants”]; *Newton v Evers*, 215 NY 198 (1915)[“Julia E. Ferguson was the owner of the equity of redemption under her deed...She was a necessary party to any action brought to foreclose that mortgage, and without her presence the action could not proceed.”]; see also *MTGLQ Inv'rs, L.P. v Shay*, 190 AD3d 527 [1st Dept 2021][“Dismissal of the action as against Eaton requires discontinuation of the action as against Meldal as well”]; *Green Tree Servicing, LLC v Jean*, 2025 NY Slip Op 06997 [2d Dept Dec. 17, 2025][“As a fee owner of the property and mortgagor, [defendant] was an indispensable party to this foreclosure action...The absence of an indispensable party mandates dismissal of the action, and the plaintiff cannot maintain the action as against the other defendants...Therefore, contrary to the plaintiff’s contention, once the complaint was dismissed insofar as asserted against [defendant], the plaintiff could not continue the action against the remaining defendants.”][internal citations omitted]

Lastly, given the dismissal of the complaint, the notices of pendency filed herein must also be cancelled. See CPLR 6514; See also generally, *Nationstar Mtge., LLC v Davis*, 240 AD3d 790 [2d Dept 2025]; *Bayview Loan Servicing, LLC v Starr-Klein*, 193 AD3d 807 [2d Dept 2021]

All other arguments and contentions of the parties either need not be reached in light of the Court’s determinations or have been considered and determined to have been without merit.

Accordingly, it is hereby

**ORDERED**, that defendant's cross-motion to dismiss and to confirm the referee report filed under Motion Seq. 3 and Motion Seq. 9 are GRANTED to the extent that the Referee's Report dated October 20, 2024, is CONFIRMED and the action is DISMISSED; and it is further

**ORDERED**, that plaintiff's motions filed under Motion Seq. 4 for an extension of time pursuant to CPLR 306-b, under Motion Seq. 6 to amend the affidavits of service pursuant to CPLR 305(c) and under Motion Seq. 8 for leave to renew are DENIED; and it is further

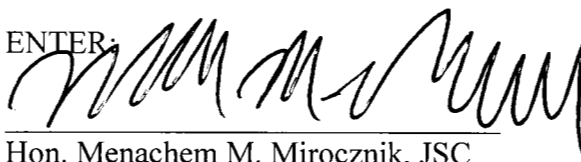
**ORDERED**, that plaintiff's motion for a judgment of foreclosure and sale filed under Motion Seq. 2 and defendant's motion for directed verdict filed under Motion Seq. 5 are DENIED as moot; and is further

**ORDERED AND ADJUGED**, that this action is DISMISSED IN ITS ENTIRETY; and it is further

**ORDERED**, the Clerk is directed to cancel the Notices of Pendency filed on April 15, 2016, February 13, 2019, January 5, 2022, and December 11, 2024.

This constitutes the decision, order and judgment of the Court.

ENTER:



Hon. Menachem M. Mirocznik, JSC