

**COMMONWEALTH OF MASSACHUSETTS
HOUSING COURT DEPARTMENT
METRO SOUTH DIVISION**

NORFOLK, SS.

DOCKET No. 24H82SP03575

LENOX FARMS LIMITED PARTNERSHIP,

Plaintiff,

v.

MOHAMED KASSEM, DANNY ABOUELKHIER,

Defendants.

**DEFENDANT DANNY ABOUELKHIER'S POST-FINDINGS MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION; TO VACATE THE APRIL 15,
2026 FINDINGS AND ORDER AS VOID AB INITIO PURSUANT TO MASS. R. CIV. P.
60(b)(4); TO STAY AND PROHIBIT CROSS-DOCKET USE OF FINDINGS; AND TO
REQUIRE ADJUDICATION OF PENDING DISPOSITIVE MATTERS**
(With Incorporated Memorandum of Law and Request for Hearing)

INTRODUCTION

This Motion presents a threshold question of subject matter jurisdiction and the limits of judicial authority that must be resolved before any further proceedings may properly occur.

On April 15, 2026, this Court determined that no tenancy exists, no lease relationship exists, and that the summary process claim is moot, while indicating that Plaintiff may pursue relief in a separate civil action. Those findings were issued only after the Court's February 17, 2026 Order enforcing use and occupancy, denying reconsideration, striking Defendant's jury demand, and structuring the matter for bench

adjudication—an order that remains subject to a pending motion under Mass. R. Civ. P. 60(b).

This sequence presents a dispositive question: whether the Court possessed subject matter jurisdiction at the commencement of this action and, if not, whether any findings issued thereafter may be given operative, binding, or preclusive effect. Because subject matter jurisdiction cannot be supplied by consent, waiver, or subsequent proceedings, and because mootness extinguishes the Court’s authority to issue determinations affecting the parties’ rights, the issue must be addressed as a threshold matter.

STATEMENT OF RELEVANT FACTS

Plaintiff commenced this matter as a cause-based summary process action under G.L. c. 239, alleging a lease violation based on the presence of an “unauthorized occupant,” while simultaneously asserting that Defendant is not a tenant. This dual and internally inconsistent position framed the case from its inception.

The constable’s Return of Service, dated November 22, 2024, certifies service of a “No Trespass Order.” It does not certify service of a Notice to Quit or any legally sufficient termination notice. The record does not reflect—and the Court has not identified—the existence of any valid Notice to Quit served prior to commencement.

The Court’s April 15 Findings nevertheless reference an alleged “notice terminating tenancy.” The only competent proof of service in the record contradicts that premise. No legally sufficient Notice to Quit appears anywhere in the record.

On February 17, 2026, the Court entered an order enforcing use and occupancy, denying reconsideration, and striking Defendant’s jury demand. The docket reflects that Defendant filed an affidavit regarding financial condition and inability to comply. The

Court made no findings regarding Defendant's ability to pay or whether any nonpayment was willful.

At that time, discovery remained incomplete, a motion to compel was pending, and the dispositive issue of Defendant's status had not been fully developed.

Plaintiff simultaneously sought dispositive relief through motion practice, including a motion in limine seeking dismissal of counterclaims and issuance of execution.

On April 6, 2026, the matter proceeded in a bench-trial posture created by the February 17 Order.

On April 15, 2026, the Court issued findings that no tenancy exists and that the summary process claim is moot, while indicating that Plaintiff may pursue relief in a separate civil action, including Metro South Civil Action No. 26H82CV00011. Those findings rely on what the Court described as "undisputed testimony" and are already being invoked in related proceedings.

No final judgment has entered.

MEMORANDUM OF LAW

I. THE ABSENCE OF A VALID NOTICE TO QUIT DEPRIVES THE COURT OF SUBJECT MATTER JURISDICTION AND REQUIRES DISMISSAL UNDER MASS. R. CIV. P. 12(h)(3)

A summary process action exists only by virtue of compliance with the statutory framework set forth in G.L. c. 239. In landlord-tenant cases, a valid Notice to Quit is a critical statutory prerequisite to recovery of possession and is not a mere procedural formality. See *Bank of New York Mellon v. King*, 485 Mass. 37, 147 N.E.3d 449 (2020).

The record here reflects no such notice. The constable's Return of Service certifies service of a "No Trespass Order," not a Notice to Quit. This is not a case of a defective notice; it is a case in which the statutory predicate is entirely absent.

The Court's Findings reference an alleged termination notice, but no such notice appears anywhere in the record. The Court's jurisdictional premise is therefore contradicted by the record itself.

Subject matter jurisdiction is a threshold requirement that cannot be created by agreement or litigation conduct and must exist before the Court may exercise authority over the action. See *Konstantopoulos v. Whately*, 384 Mass. 123, 129, 424 N.E.2d 210 (1981). Under Mass. R. Civ. P. 12(h)(3), whenever it appears that the Court lacks subject matter jurisdiction, "the court shall dismiss the action." The requirement is mandatory.

Because no valid Notice to Quit was served, jurisdiction never attached. The action must be dismissed.

II. THE COURT MUST IDENTIFY A VALID STATUTORY PREDICATE OR DISMISS

The Court cannot proceed without first identifying the legal basis for its authority. It must identify the Notice to Quit relied upon and determine whether it satisfies G.L. c. 239. If no such notice exists, dismissal is required.

Failure to resolve this threshold issue leaves the case without a lawful foundation and produces a record that cannot support further proceedings or meaningful appellate review.

III. THE FEBRUARY 17 ORDER VIOLATED DAVIS v. COMERFORD AND CONSTITUTES CLEAR ERROR OF LAW

Under *Davis v. Comerford*, 483 Mass. 164, 137 N.E.3d 341 (2019), a court may not strike a jury demand for nonpayment of use and occupancy unless it first makes explicit findings that the defendant had the actual ability to pay and that nonpayment was willful.

Defendant submitted a sworn affidavit of indigency. That filing triggered a mandatory obligation to assess ability to pay. The Court made no such findings.

Striking a constitutional jury right under those circumstances constitutes clear error of law.

The contradiction is structural. The Court imposed a sanction based on failure to pay lease-derived use and occupancy, and then subsequently found that no lease or tenancy existed. A sanction cannot be predicated on an obligation the Court later determines did not exist.

IV. THE PROCEDURAL POSTURE PREVENTED DEVELOPMENT OF A FULL FACTUAL RECORD

The procedural posture of this case resulted in a restriction on Defendant's ability to develop a complete evidentiary record.

The matter was treated as cause-based to limit defenses, while monetary obligations were imposed to justify sanctions. Discovery remained incomplete, yet the Court proceeded to findings on the dispositive issue of status.

The Court relied on "undisputed testimony," but that testimony was obtained after the jury was struck and before discovery was completed. Testimony cannot be deemed undisputed where the procedural posture prevented meaningful challenge.

The Findings further rely on statements attributed to Defendant during hearings without the benefit of full discovery or trial protections. Such statements cannot serve as the sole basis for dispositive findings.

Plaintiff's attempt to obtain execution and dismissal through a motion in limine further demonstrates that dispositive relief was pursued outside the normal trial framework.

**V. THE APRIL 15 FINDINGS ARE VOID AB INITIO AND MUST BE VACATED
UNDER MASS. R. CIV. P. 60(b)(4)**

Because the Court lacked subject matter jurisdiction, the April 15 Findings are void ab initio.

Under Mass. R. Civ. P. 60(b)(4), a void order must be vacated.

The findings were also produced through a procedurally defective framework that deprived Defendant of a full and fair opportunity to litigate.

The record further reflects materially inconsistent use and occupancy figures, including \$72,048.00 referenced in the Court's Findings and higher amounts asserted in subsequent motions. These discrepancies demonstrate the instability of the factual record and further undermine any claim that the findings may be given preclusive effect.

A void and non-final determination cannot form the basis for collateral estoppel or any preclusive use in another proceeding.

**VI. MOOTNESS ELIMINATES THE COURT'S AUTHORITY TO ISSUE OR
PRESERVE FINDINGS**

The Court has declared the claim moot.

Once moot, no live controversy remains, and the Court's authority is limited to dismissal. Findings issued after mootness serve no adjudicative purpose within the action and operate only to influence rights outside it.

Such findings exceed the Court's authority and cannot be retained or used.

VII. EQUITABLE POWERS DO NOT PERMIT CIRCUMVENTION OF STATUTORY LIMITS

The Court's equitable authority under G.L. c. 185C, § 3 does not permit it to bypass statutory requirements or preserve findings from a jurisdictionally defective proceeding.

Equity cannot supply jurisdiction where it is absent.

VIII. CROSS-DOCKET USE OF THESE FINDINGS MUST BE PROHIBITED

The April 15 Findings are already being invoked in Metro South Civil Action No. 26H82CV00011.

Even assuming arguendo that factual development occurred, those findings cannot have preclusive effect where they were issued in a proceeding lacking subject matter jurisdiction and after the Court declared the claim moot. They are neither final nor essential to a valid judgment, nor were they produced under conditions affording a full and fair opportunity to litigate.

Their use in another proceeding would constitute a structural bypass of the summary process framework.

Such use must be prohibited.

IX. IRREPARABLE HARM AND LOSS OF APPELLATE REVIEW

The findings are already being executed in practice across multiple proceedings.

Because issues have been displaced across dockets, there may be no single appealable judgment capturing the full scope of the Court's rulings. By the time a final judgment enters, the findings may already have been used to determine rights in another proceeding.

This creates irreparable harm and renders appellate review ineffective.

Defendant expressly preserves all jurisdictional, constitutional, and appellate rights, including objections to the use of these findings in any other proceeding.

REQUESTED RELIEF

WHEREFORE, Defendant respectfully requests that this Court:

- Dismiss the Summary Process Complaint with prejudice as to possession for lack of subject matter jurisdiction pursuant to Mass. R. Civ. P. 12(h)(3);
- Vacate the April 15, 2026 Findings and Order as void ab initio pursuant to Mass. R. Civ. P. 60(b)(4);
- Prohibit any cross-docket use or reliance upon those findings;
- Stay all further proceedings and any transfer of claims;
- Adjudicate the pending Rule 60(b) motion;
- Require explicit findings regarding jurisdiction;
- Schedule an expedited hearing; and
- Grant such further relief as justice requires.

FINAL STATEMENT

The Court cannot proceed without jurisdiction, cannot retain findings after mootness, and cannot permit those findings to determine rights elsewhere. Any such action exceeds its authority and prevents meaningful appellate review.

Respectfully submitted,

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Dated: April 20, 2026

/s/ Dany Abouelkhier

Dany Abouelkhier (Pro Se)

CERTIFICATE OF SERVICE

I hereby certify that on April, 2026 a copy of the foregoing was served electronically on all counsel of record.

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Respectfully submitted,

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