

Docketed 03/25/2026

COMMONWEALTH OF MASSACHUSETTS

THE TRIAL COURT

SUPERIOR COURT DEPARTMENT

NORFOLK, ss.

Civil Action No. 2582CV00364

DANY ABOUELHKIER, Pro Se,
By Special Appearance and Reservation of Rights,

Plaintiff,

v.

**MARINA BAY RESIDENCES, LLC, BOZZUTO
MANAGEMENT CO., and DELANEY BARRETT**,
Defendants,

**PLAINTIFF'S MOTION TO VACATE DISMISSAL AND JUDGMENT
WITH MEMORANDUM OF LAW AND EXPRESS PRESERVATION OF APPELLATE
RIGHTS**
Pursuant to Mass. R. Civ. P. 60(b)(1), 60(b)(6), and 41(b)(2)

SPECIAL APPEARANCE AND EXPRESS NON-WAIVER

Plaintiff appears specially and solely for the purpose of seeking vacatur of the February 17, 2026 dismissal and judgment. Plaintiff expressly does not waive, concede, or abandon any rights presently pending before the Massachusetts Appeals Court, including but not limited to Plaintiff's appeal challenging severance and related jurisdictional rulings.

This Motion is brought strictly to prevent claim-preclusive consequences arising from a dismissal entered while appellate review remains pending. Plaintiff does not seek merits

adjudication at this time and does not concede the propriety of severance, jurisdiction, or the procedural posture presently under appellate review.

Vacatur will restore the procedural status quo without affecting the Appeals Court's jurisdiction or authority to resolve the pending appeal.

INTRODUCTION

On February 17, 2026, this Court entered dismissal with prejudice and judgment for Defendants based on failure to prosecute.

Plaintiff respectfully submits that vacatur is warranted because Plaintiff did not abandon his claims, did not engage in contumacious conduct, and did not disregard this Court's authority. Instead, Plaintiff provided written notice to both Defendants and the Court explaining that his procedural posture was governed by a pending appeal directly affecting the legal status and jurisdictional basis of this severed docket.

Dismissal with prejudice under these circumstances constitutes a disproportionate sanction inconsistent with Massachusetts law, which strongly favors adjudication on the merits and disfavors claim-preclusive dismissal absent clear abandonment or willful misconduct.

MEMORANDUM OF LAW

I. Legal Standard Under Mass. R. Civ. P. 60(b)

Mass. R. Civ. P. 60(b) authorizes the Court to vacate a judgment where necessary to achieve justice and fairness.

Rule 60(b)(1) permits relief based on "mistake, inadvertence, surprise, or excusable neglect."

Rule 60(b)(6) permits relief for "any other reason justifying relief from the operation of the judgment," including extraordinary circumstances.

Massachusetts courts apply Rule 60(b) liberally to ensure that cases are decided on their merits whenever reasonably possible. See *Berube v. McKesson Wine & Spirits Co.*, 7 Mass. App. Ct. 426, 430 (1979).

II. Plaintiff's Conduct Constitutes Excusable Neglect Under Rule 60(b)(1)

Plaintiff did not abandon his claims.

Instead, Plaintiff affirmatively notified both the Court and Defendants that his procedural posture was governed by a pending appeal concerning severance and jurisdiction.

Massachusetts courts recognize that procedural misunderstandings, reasonable caution to preserve appellate rights, and good-faith litigation conduct constitute excusable neglect.

See *Berube v. McKesson Wine & Spirits Co.*, 7 Mass. App. Ct. 426, 430 (1979).

Plaintiff's conduct falls squarely within the definition of excusable neglect recognized in Massachusetts case law.

III. Extraordinary Circumstances Justify Relief Under Rule 60(b)(6)

Dismissal with prejudice permanently extinguishes claims and creates claim-preclusive effects. Massachusetts courts therefore treat such sanctions with caution and favor resolution of disputes on their merits whenever reasonably possible. See *Berube v. McKesson Wine & Spirits Co.*, 7 Mass. App. Ct. 426, 430–31 (1979). Relief may be granted under Rule 60(b)(6) in extraordinary circumstances where justice requires reopening the judgment. See *Chavoor v. Lewis*, 383 Mass. 801, 806 (1981). Because dismissal with prejudice is a drastic sanction reserved for extreme situations, courts must ensure that such relief is proportionate and fair. See *Monahan v. Washburn*, 400 Mass. 126, 128–29 (1987).

IV. Dismissal With Prejudice Was Disproportionate Under Rule 41(b)(2)

Mass. R. Civ. P. 41(b)(2) governs dismissal for failure to prosecute. The Supreme Judicial Court has made clear that “[d]ismissal with prejudice is a drastic sanction and should be employed only in extreme circumstances.” See *Monahan v. Washburn*, 400 Mass. 126, 128–129 (1987). Massachusetts courts therefore reserve such dismissals for situations involving serious delay, disregard of court orders, or conduct demonstrating abandonment or contumacious behavior. See *Greenleaf v. Massachusetts Bay Transportation Authority*, 22 Mass. App. Ct. 426, 429 (1986). No such circumstances exist here. Plaintiff filed notices, preserved rights, and acted in good faith throughout the proceedings. Dismissal with prejudice was therefore a disproportionate sanction.

Massachusetts appellate courts repeatedly emphasize that dismissal with prejudice should be reserved for extreme circumstances where lesser sanctions would be ineffective.

V. Vacatur Will Not Moot or Affect the Pending Appeal

Trial courts retain limited authority to address post-judgment motions, including motions for relief under Mass. R. Civ. P. 60(b), even while appellate proceedings are pending. See *Commonwealth v. Cronk*, 396 Mass. 194, 198 (1985). Granting vacatur would simply restore the procedural status quo and allow the matter to proceed on a proper record. Such relief would not waive or impair Plaintiff’s appellate rights, which are expressly preserved. Vacatur therefore preserves, rather than undermines, the orderly appellate process.

VI. Defendants Will Not Suffer Prejudice From Vacatur

Vacatur merely restores this case to active status. No trial has occurred and no reliance interest exists.

Massachusetts courts strongly favor resolution on the merits. See *Berube v. McKesson Wine & Spirits Co.*, 7 Mass. App. Ct. 426, 430 (1979).

CONCLUSION

Plaintiff acted in good faith and did not abandon his claims.

Dismissal with prejudice constitutes excusable neglect and extraordinary circumstances under Mass. R. Civ. P. 60(b)(1), 60(b)(6), and 41(b)(2).

Vacatur will preserve fairness, protect appellate rights, and allow adjudication on the merits.

WHEREFORE, Plaintiff respectfully requests that this Court:

1. VACATE the February 17, 2026 dismissal and judgment;
2. Restore this action to active status;
3. Confirm that vacatur does not waive or moot Plaintiff's pending appellate rights;
4. Grant such further relief as justice requires.

Respectfully submitted,

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Date: March 05, 2026

/s/ Dany Abouelkhier

Dany Abouelkhier (Pro Se)

CERTIFICATE OF SERVICE

I hereby certify that on March 05, 2026 a copy of the foregoing was served electronically on all counsel of record.

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