

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

NORFOLK, ss

Civil Action No. 26H82CV00011

LENOX FARMS LIMITED PARTNERSHIP,
Plaintiff,

v.

DANY ABOUELKHIER,
Defendant.

**DEFENDANT'S RENEWED MOTION TO DISMISS AND LIMITED OPPOSITION TO
PAPER NO. 30, WITH INCORPORATED MEMORANDUM OF LAW
(REQUEST THAT PAPER NO. 28 BE DETERMINED FIRST)**

Now comes Defendant Dany Abouelkhier, pro se, and respectfully moves for a determination and dismissal without prejudice under Mass. R. Civ. P. 4(j), 12(b)(2), 12(b)(4), and 12(b)(5). To the extent necessary, Defendant also requests revision under Mass. R. Civ. P. 54(b) of the prior interlocutory, non-merits denial of those preserved defenses. Defendant further submits this limited opposition to Plaintiff's Motion for Enforcement and Entry of Judgment for Possession, Paper No. 30, solely so that Paper No. 30 is not treated as unopposed, and requests that the Court determine Defendant's earlier-filed Motion to Dissolve Injunction, Paper No. 28, before taking any action on Paper No. 30.

This filing does not answer the Complaint, submit the underlying possession or occupancy merits, concede any allegation of noncompliance, or seek adjudication of any claim in a related docket. It raises questions concerning process, service, and personal jurisdiction; requests the proper order of decision between Papers 28 and 30; and preserves the existing procedural boundaries among the related dockets.

MOTION

1. Plaintiff commenced this separate civil action on January 16, 2026. Under Rule 4, a civil summons was required to issue, and a copy of that summons and the Complaint was required to be served upon Defendant.

2. Defendant states under the penalties of perjury that he has never been served with a court-issued summons in Civil Action No. 26H82CV00011 and has never signed or returned a waiver or acknowledgment of service. The docket identifies returns concerning notice of hearings on Plaintiff's request for preliminary injunctive relief; it does not identify issuance or service of a civil summons with the Complaint.

3. Defendant timely raised objections to process, service, and personal jurisdiction through Paper No. 6 and later Papers 18, 20, and 22. The June 12, 2026 Findings and Order states that the prior motion to dismiss and related requests were denied for failure to prosecute. That denial followed Defendant's nonappearance at the June 1 hearing after the Court denied his written motion to continue; it did not follow a finding that a summons issued, that the summons and Complaint were served, that Defendant waived service, or that Plaintiff established good cause under Rule 4(j).

4. Rules 12(g) and 12(h)(1) do not bar these defenses as omitted defenses because Defendant raised them in his original Rule 12 motion. To the extent the prior interlocutory denial must be revisited, Defendant relies upon Rule 54(b). Any asserted forfeiture by conduct is fact specific and should be determined expressly before final or execution-level relief is entered.

5. Paper No. 28 was filed on June 22, 2026. Paper No. 30 was filed afterward, on July 1, 2026, and seeks judgment for possession and execution based upon the injunction challenged in Paper No. 28. If the action is not dismissed, Paper No. 28 should be determined first.

6. Paper No. 30 should be denied without prejudice or held in abeyance pending a written ruling and disposition of Paper No. 28. Defendant does not, through this limited opposition, submit any factual issue concerning possession, occupancy, compliance, use and occupancy, or the merits of claims in Docket No. 26H82CV00143.

7. This motion is being served fewer than seven days before the presently scheduled July 28, 2026 hearing. If the Court determines that the renewed affirmative motion cannot be adjudicated at that hearing under Mass. R. Civ. P. 6(c), Defendant requests that it be scheduled for the next available date and that Paper No. 30 remain in abeyance, with no judgment for possession or execution entering, until the renewed motion and Paper No. 28 are determined.

RELIEF REQUESTED

1. require Plaintiff to identify and file the court-issued summons, any waiver or acknowledgment of service, and the return or other competent proof showing service of the summons together with the Complaint in this action;
2. allow the renewed motion and dismiss the Complaint without prejudice under Mass. R. Civ. P. 4(j), 12(b)(2), 12(b)(4), and 12(b)(5), if Plaintiff cannot establish timely valid service or good cause;
3. alternatively, enter a specific written ruling identifying the process served, the manner and date of service, and the legal basis upon which personal jurisdiction was acquired before considering Paper No. 30;
4. if the renewed motion cannot be adjudicated on July 28, 2026 under Rule 6(c), schedule it for the next available date and hold Paper No. 30 in abeyance in the interim;
5. if the action is not dismissed, determine Paper No. 28 before Paper No. 30;

6. deny Paper No. 30 without prejudice or hold it in abeyance, and enter no judgment for possession or execution, until the threshold matters and Paper No. 28 are determined;
7. state that this filing and any order entered upon it are confined to Docket No. 26H82CV00011 and do not adjudicate, consolidate, or resolve any claim, defense, counterclaim, or cross-claim in Docket No. 26H82CV00143 or Docket No. 24H82SP03575; and
8. grant such other relief as is just and proper.

INCORPORATED MEMORANDUM OF LAW

I. THIS FILING PRESSES A DEFENSE AND DOES NOT DUPLICATE PAPER NO. 28

Paper No. 28 challenges the continued validity and practical finality of the June 12 injunction. This motion does not refile, amend, or reproduce that challenge. It raises the antecedent question whether this separate civil action acquired personal jurisdiction through issuance and service of the process required by Rule 4, and it responds narrowly to Plaintiff's later-filed request for judgment and execution.

A motion is not a pleading. Mass. R. Civ. P. 7(a). Defendant's limited response to Paper No. 30 is therefore not an answer to the Complaint and does not admit any allegation. Its purpose is to press the previously raised Rule 4 and Rule 12 defenses and to prevent Paper No. 30 from being treated as uncontested while those defenses and Paper No. 28 remain unresolved.

II. RULE 4 REQUIRED ISSUANCE AND SERVICE OF A SUMMONS WITH THE COMPLAINT

Rule 4(a)-(d) requires a court-issued summons and service of a copy of the summons together with the complaint. Rule 4(j) provides that, if service of the summons and complaint is not made within ninety days after filing and the plaintiff cannot show good cause, the action shall be

dismissed as to that defendant without prejudice. The ninety-day period measured from January 16, 2026 expired on April 16, 2026.

Rule 4(f) provides that the mere absence of proof of service from the docket does not, standing alone, invalidate otherwise valid service. Defendant does not rely on docket silence alone. His accompanying affidavit affirmatively states that no court-issued civil summons was served upon him and that he executed no waiver or acknowledgment of service. The docket entries referring to service of preliminary-injunction hearing notices corroborate, but do not independently establish, the absence of Rule 4 process.

Once service is specifically disputed by competent affidavit or other competent evidence, the plaintiff bears the burden of establishing valid service, and disputed issues of material fact ordinarily cannot be resolved by assumption alone. See *Dumas v. Tenacity Construction, Inc.*, 95 Mass. App. Ct. 111, 118-120 (2019) (affidavits challenging service required the plaintiff to establish service; factual disputes may require an evidentiary hearing). Proper service of process, or a legally recognized substitute, is ordinarily necessary to acquire personal jurisdiction. See *Wang v. Niakaros*, 67 Mass. App. Ct. 166, 169-172 (2006). Awareness of a preliminary-injunction hearing does not itself establish that the summons and Complaint were served as Rule 4 requires.

Plaintiff should therefore be required to identify the summons, the date of issuance, the person who served it, the date and manner of service, any waiver or substitute relied upon, and the return or other competent proof. If Plaintiff cannot establish timely service or good cause, Rule 4(j) requires dismissal without prejudice.

III. DEFENDANT RAISED THE RULE 12 DEFENSES AT THE OUTSET; THEY WERE NOT OMITTED

Rules 12(b)(2), 12(b)(4), and 12(b)(5) authorize defenses based upon lack of personal jurisdiction, insufficiency of process, and insufficiency of service. Rule 12(h)(1) addresses waiver when those defenses are omitted from the first Rule 12 motion or responsive pleading. Defendant did not omit them. The docket records a motion to dismiss on March 2, 2026, followed by Paper No. 18 preserving jurisdictional objections and procedural boundaries, Paper No. 20 expressly seeking dismissal for lack of timely service and a threshold jurisdictional determination, and Paper No. 22 objecting to further proceedings absent that determination.

Rules 12(g) and 12(h)(1) therefore do not bar these defenses as omitted defenses. The present motion does not add a new Rule 12 defense; it asks the Court to revisit and adjudicate defenses previously placed before it. To the extent revision of the prior interlocutory denial is required, Defendant relies upon Rule 54(b).

Although a defendant may preserve a jurisdictional or service defense by timely asserting it, the defense may later be forfeited through litigation conduct inconsistent with maintaining the objection. Whether such forfeiture has occurred is a fact-specific inquiry. See *American International Insurance Co. v. Robert Seuffer GmbH & Co. KG*, 468 Mass. 109, 113-120 (2014); *Raposo v. Evans*, 71 Mass. App. Ct. 379, 383-386 (2008). Unlike the defendant in *American International*, Defendant did not wait eighteen months to raise the defense after extensive merits litigation. He moved to dismiss at the outset; the docket does not reflect an answer or counterclaims by him in this separate injunction docket; and his later filings repeatedly sought threshold rulings, preserved procedural boundaries, or addressed emergency injunctive relief. At minimum, service

and any asserted forfeiture should be determined expressly and in writing before final or execution-level relief is entered.

IV. THE COURT MAY REVISE THE PRIOR INTERLOCUTORY, NON-MERITS DENIAL

The June 12 order states in a footnote that Defendant's motion to dismiss and related requests were denied for failure to prosecute. That denial followed Defendant's nonappearance at the June 1 preliminary-injunction hearing after the Court denied his written motion to continue. The order does not identify an issued summons, find that the summons and Complaint were served, find a waiver of service, determine that Plaintiff showed good cause under Rule 4(j), or otherwise adjudicate the Rule 12 defenses on their merits.

The ruling is interlocutory. In the absence of a final judgment under Rule 54(b), an order adjudicating fewer than all claims or the rights and liabilities of fewer than all parties remains subject to revision before entry of judgment disposing of all claims and parties. *Gibbs Ford, Inc. v. United Truck Leasing Corp.*, 399 Mass. 8, 11-12 (1987). Defendant relies on Rule 54(b) only insofar as it recognizes the Court's continuing authority to revisit that non-final order and resolve the preserved Rule 4 and Rule 12 defenses. Defendant does not seek entry or certification of a separate final judgment under Rule 54(b). It is not a request for entry or certification of a separate final judgment.

The changed posture makes a threshold ruling especially necessary. Plaintiff is no longer seeking only preliminary relief; Paper No. 30 requests judgment for possession and execution. Before taking that step, the record should identify how process issued, how service occurred, and on what basis the Court acquired personal jurisdiction.

V. PAPER NO. 28 SHOULD BE DETERMINED BEFORE PAPER NO. 30

Paper No. 28 was filed on June 22, 2026 and asks the Court to dissolve the June 12 injunction. Plaintiff filed Paper No. 30 afterward, on July 1, 2026. Paper No. 30 is derivative of the injunction whose continuing validity and enforceability Paper No. 28 directly challenges.

If the action is not dismissed, the orderly sequence is to decide Paper No. 28 before deciding whether the same injunction should generate a judgment for possession and execution. Deciding Paper No. 30 first would permit enforcement to overtake the earlier-filed challenge and could deprive Paper No. 28 of practical effect. Defendant does not reargue Paper No. 28 here; he requests only that it be determined first in a written ruling.

VI. THE NOTICE PERIOD DOES NOT JUSTIFY PROCEEDING ON PAPER NO. 30 FIRST

Mass. R. Civ. P. 6(c) ordinarily requires a written motion and notice of hearing to be served at least seven days before the hearing unless the rules or a court order fix a different period. This renewed motion is being served fewer than seven days before the presently scheduled July 28 hearing because Paper No. 30 seeks immediate judgment and execution and Defendant must ensure that the request is not treated as unopposed.

Defendant does not ask the Court to disregard Rule 6(c). If the Court determines that the renewed affirmative motion cannot be adjudicated on July 28, the appropriate course is to schedule it for the next available date and hold Paper No. 30 in abeyance. The notice period should not be used to allow the later-filed enforcement request to overtake the renewed motion and the already-pending Paper No. 28.

VII. PAPER NO. 30 SHOULD BE DENIED WITHOUT PREJUDICE OR HELD IN ABEYANCE

The June 12 order states that Plaintiff may seek enforcement by requesting entry of judgment for possession and execution. That language authorized Plaintiff to file a motion; it did not make judgment automatic or eliminate Defendant's right to insist upon threshold jurisdiction and a ruling on the earlier-filed Motion to Dissolve.

General Laws c. 184, § 18 does not make summary process the exclusive means of recovering possession, but it requires either an action under G.L. c. 239 or another proceeding authorized by law. In *Dacey v. Burgess*, 491 Mass. 311 (2023), the qualifying "other proceeding" consisted of a voluntary stipulation to vacate, approved by a Housing Court judge and entered as a binding consent judgment. Unlike *Dacey*, no comparable final adjudicatory basis has been identified here that would constitute an "other proceeding authorized by law" within the meaning of § 18. Defendant entered no stipulation, consented to no judgment, and waived no right to final adjudication. The June 12 order expressly allowed only a preliminary injunction and stated that Plaintiff "may seek" judgment and execution; it did not itself enter a final judgment for possession. Paper No. 30 therefore must identify and establish the completed lawful proceeding that authorizes final judgment and execution on this contested record. It does not do so.

Accordingly, Paper No. 30 should be denied without prejudice if the action is dismissed. If dismissal is not immediately allowed, Paper No. 30 should be held in abeyance, with no judgment for possession or execution entering, until the Court has determined process, service, personal jurisdiction, any asserted forfeiture, and Paper No. 28.

This limited opposition does not admit or deny Plaintiff's factual assertion concerning compliance with the injunction. Defendant deliberately does not submit that factual or possession-

related issue in this filing. The only issue presented as to Paper No. 30 is whether final and execution-level relief may proceed before the threshold defenses and Paper No. 28 are resolved.

VIII. THIS FILING AND ANY RULING SHOULD BE CONFINED TO THIS DOCKET

This injunction action is separate from the closed summary-process docket, No. 24H82SP03575, and the transferred civil docket, No. 26H82CV00143. This filing concerns only Docket No. 26H82CV00011 and does not request adjudication of any claim, defense, counterclaim, or cross-claim in either related docket.

To preserve a clear record, any order entered upon this motion should state that it is confined to Docket No. 26H82CV00011 and does not consolidate or resolve any matter in Docket No. 26H82CV00143 or Docket No. 24H82SP03575. Defendant further objects to any dispositive, preclusive, or cross-docket use of this filing or of interlocutory findings from this action without separate notice and a full opportunity to address the proposed use in the affected docket.

CONCLUSION

Defendant raised the absence of Rule 4 process and service at the outset and repeatedly requested a ruling. His affidavit states that no civil summons was served, and the docket identifies service of preliminary-injunction hearing notices rather than service of a summons and Complaint. The prior dismissal request was denied for failure to prosecute after a nonappearance, not through a written determination identifying valid process or service. Plaintiff now seeks judgment for possession and execution while Paper No. 28 remains pending.

The Court should require Plaintiff to establish issuance and service of the summons and Complaint, dismiss without prejudice if timely valid service or good cause is not shown, and otherwise determine Paper No. 28 before Paper No. 30. If the renewed motion cannot be

adjudicated at the presently scheduled hearing, Paper No. 30 should remain in abeyance until the renewed motion and Paper No. 28 are determined.

Respectfully submitted,

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Dated: July 24, 2026

/s/ Dany Abouelkhier

Dany Abouelkhier, Pro Se

CERTIFICATE OF SERVICE

I certify that on July 24, 2026, I served a true copy of the foregoing Defendant's Renewed Motion to Dismiss and Limited Opposition to Paper No. 30, with Incorporated Memorandum of Law, upon counsel for Plaintiff by electronic mail at the address below:

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