

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION No.

19-2176 E

<p>COMMONWEALTH OF MASSACHUSETTS</p> <p>Plaintiff,</p> <p>v.</p> <p>RICHARD CAPACHIONE, an individual; and NEW ENGLAND HARDSCAPES, INC., AQUA OUTDOOR ENVIRONMENTS, and R AND R CONSULTING, LLC., corporations</p> <p>Defendants.</p>	<p><b>COMPLAINT</b></p>
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**I. INTRODUCTION**

1. The Commonwealth of Massachusetts, (the "Commonwealth"), by and through its Attorney General, Maura Healey, brings this action in the public interest pursuant to G. L. c. 93A, § 4. The Commonwealth seeks injunctive relief, restitution, civil penalties, and reasonable attorney fees and costs.

2. Richard Capachione ("Capachione"), acting individually and through three closely held corporations New England Hardscapes, Inc., Aqua Outdoor Environments, Inc., and R and R Consulting, LLC. (collectively "Defendants"), violated the Massachusetts Consumer Protection Act, G. L. c. 93A, § 2, by taking hundreds of thousands of dollars in consumer deposits and progress payments for home improvements projects; when Defendants knew or should have known that they would be unable to complete the projects in the manner or timeframe agreed upon, and then failed to refund consumer deposits when Defendants became unable or unwilling to complete the projects.

3. Defendants' actions caused consumers to suffer monetary losses and property damage and forced consumers to hire new contractors to fix or complete the work Defendants had agreed to and been paid to complete.

4. Since 2003, Capachione and his corporations have provided home improvement and construction services in the Commonwealth of Massachusetts—specifically, installation and construction of in-ground swimming pools and pool decks (including related plumbing and electric components), construction of outdoor living spaces, and retaining walls.

5. During this time, neither Capachione, nor his corporations have been continuously registered as home contractors with the Office of Consumer Affairs and Business Regulation (“OCABR”).

6. Typically, Capachione required a large payment at the contract signing, a so-called “mobilization payment,” and another large payment before or at the start of a project.

7. In connection with these projects, Capachione often required consumers to make periodic payments (*i.e.*, “progress payments”). The written agreements between Defendants and consumers indicated that Defendants would perform the specified home improvement work in exchange for the progress payment. Capachione usually insisted on a progress payment at the outset of each phase of work, or, at least, prior to completion of a particular phase of work—purportedly to be used to purchase materials or cover the cost of labor.

8. Defendants collected hundreds of thousands of dollars in progress payments that Capachione represented would be used complete the projects in the particular manner promised and within certain time frames. Capachione typically represented—orally and in writing—that these progress payments would be used to obtain requisite building permits, arrange for,

supervise and pay third-party contractors to perform work, and obtain materials necessary for the projects.

9. Defendants failed to provide customers with home improvement services in exchange for these progress payments and then failed to refund their deposits and progress payments after failing to perform the agreed-upon work.

10. In numerous instances—particularly after January of 2016—Capachione induced consumers to enter into agreements and make progress payments when, given Defendants existing, outstanding and/or unfinished projects and the precarious financial condition of his corporations, Capachione, in fact, lacked the ability to perform the projects in the timeframe and in the manner agreed upon.

11. Through these unfair and deceptive practices, Defendants wrongfully obtained hundreds of thousands of dollars from Massachusetts consumers, damaged consumers properties, and caused unsafe and unsanitary conditions to persist on their properties in violation of G. L. c. 93A, § 2.

12. Defendants' unfair and deceptive conduct also violates the Home Improvement Contractor Act ("HICA"), G. L. c. 142A, which prohibits Defendants from, inter alia: (1) offering home improvement services without registering as a home improvement contractor, (2) abandoning and/or failing to complete home improvement projects without justification, (3) failing to credit homeowner payments made to Defendants in connection with residential contracting transactions, (4) materially misrepresenting the timeframe for completing home improvement projects, (5) failing to pay for materials or services where Defendants received sufficient funds for the work, (6) failing to include statutorily mandated information and disclosures in the home improvement contract, and (7) demanding and receiving deposits to be

paid in advance of the commencement of work that exceeded the amounts allowed by G. L. c. 142A, § 2(a)(6).

13. Under G. L. c. 142A, § 17, Defendants' violations of the HICA constitute additional unfair and deceptive acts in violation of the Consumer Protection Act, G.L. c. 93A, § 2.

## **II. JURISDICTION AND VENUE**

14. The Attorney General is authorized to bring this action pursuant to G. L. c. 12, § 10 and G.L. c. 93A, § 4.

15. This Court has jurisdiction over the subject matter of this action pursuant to G. L. c. 12, § 10; G. L. c. 93A, § 4; G.L. c. 214, § 1; and G. L. c. 223A, § 3(a), (b), (c) and (d).

16. Venue is proper in Suffolk County pursuant to G. L. c. 223, § 5; G. L. c. 93A, § 4.

## **III. PARTIES**

17. The plaintiff is the Commonwealth of Massachusetts, represented by Attorney General Maura Healey, who brings this action in the public interest.

18. Defendant Richard Capachione is a natural person last known to reside at 21 Independence Road, Acton, Massachusetts. At all relevant times, he was the sole owner and managing agent of New England Hardscapes, Inc. and Aqua Outdoor Environments, and, at present, is the owner and managing agent of R and R Consulting, LLC.

19. Defendant New England Hardscapes, Inc., was a Massachusetts corporation that prior to April 13, 2018, operated as a home improvement contractor with a principal place of business at 930 Main Street, Acton, Massachusetts. New England Hardscapes, Inc., On April 13, 2018, Richard Capachione, President of New England Hardscapes, Inc. filed voluntary dissolution paperwork with an effective date of December 31, 2017.

20. Defendant Aqua Outdoor Environments has a mailing address of P.O. Box 1214, Littleton, Massachusetts and is not incorporated in Massachusetts. Aqua Outdoor Environments appears as a d/b/a for both New England Hardscapes, Inc. and R and R Consulting, LLC.

21. Defendant R and R Consulting, LLC, is a Massachusetts corporation, incorporated on August 10, 2017, with a principal place of business at 930 Main Street, Acton, Massachusetts.

22. Capachione is liable for the misconduct alleged herein both in his individual capacity for his own direct participation in the violations and in his capacity as owner/managing agent of the corporations which, at all relevant times, were under his sole direction and control.

#### IV. FACTS

##### *Capachione's Business Practices*

23. At all relevant times, Capachione was the sole owner and managing agent of New England Hardscapes, Inc., Aqua Outdoor Environments, and R and R Consulting, LLC, through which he purported to offer construction and home improvement services to Massachusetts homeowners, primarily the construction of in-ground swimming pools, including plumbing/filters and electrical components, retaining walls, pergolas, and patios.

24. Capachione had at least two additional full-time employees—his wife, Renee Capachione, and a “scheduler” to handle the scheduling of jobs.

25. Capachione hired subcontractors to perform specific aspects of a home improvement project, including masonry, stonework, and electrical work. Capachione represented to homeowners that he both selected and supervised those contractors.

26. Until April 11, 2018, Capachione was registered with OCABR to do business as a home improvement contractor under the name of New England Hardscapes, Inc.<sup>1</sup>

27. Capachione represented to homeowners that he could construct and implement construction of in-ground pools and outdoor “environments” for consumers to enjoy and for improvement of their property values.

28. In at least one instance, Capachione represented that he was capable and equipped to install a handicap-accessible ramp into a pool for a consumer’s daughter who was disabled, used a wheelchair and needed a ramp to use the swimming pool for water therapy.

29. Capachione represented himself as experienced in supervision and selection of contractors and vendors for home improvement projects.

30. Capachione often used written agreements when contracting with consumers. These agreements usually, if not always, lacked key disclosures required by the Massachusetts Home Improvement Contractor Act, including: (a) a clear description of any other documents that are part of the agreement; (b) the social security number and registration number of the contractor; (c) the calendar date when work under the contract is scheduled to begin; (d) the calendar date on which the work is scheduled to be substantially completed; (e) a detailed description of the work to be done and the materials to be used in the performance of the contract; (f) a time schedule of payments to be made under the contract and the amount of each payment, stated in dollars, including all finance charges; (g) the actual cost of any materials or equipment of a special order or custom-made nature, which must be ordered in advance of the commencement of the work, in order to ensure that the project will proceed on schedule; (h)

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<sup>1</sup> New England Hardscapes, Inc. was registered and licensed with OCABR as a home improvement contractor under two different license numbers, the first expired on January 9, 2012 and the second expired on April 11, 2018.

notice that the contractor was required to be registered and that inquiries about the registration should be directed to the director of OCABR; (i) a description of the owner's three-day cancellation rights under G. L. c. 142A; (j) a warning, in ten point or larger bold type, "do not sign this contract if there are any blank spaces"; (k) information regarding any and all necessary permits needed to perform the Specifications; and (l) notification that homeowners who secure their own permits shall be excluded from the Guaranty Fund under G. L. c. 142A.

31. Further, in his written agreements with consumers, Capachione typically included a paragraph containing project "specifications" or a breakdown of particular aspects or phases of a project—with a dollar amount accompanying each phase. He represented the cost for each phase to be a "progress payment" or a sum to cover the particular work described, including his purchase of the materials.

32. Capachione—orally and in writing—represented to consumers that the progress payments in the agreement would cover labor and materials. However, in multiple instances, progress payments were not used for that particular purpose.

33. After soliciting and accepting large initial deposits and progress payments from homeowners, Capachione repeatedly engaged in a pattern of delays and excuses, ultimately failing to perform the home renovations or deliver the necessary materials which he had already received payment to procure.

34. Capachione continued to solicit new work, enter into new agreements and accept new deposits from consumers while simultaneously failing to complete scheduled tasks for his existing consumers.

35. Defendants repeatedly failed to complete residential contracting projects they had been hired and paid to complete and failed to deliver the materials they were required to purchase under the agreement with the “progress payments” paid by consumers.

36. Likewise, Capachione repeatedly failed to provide refunds to consumers who prepaid for the work Defendants never completed—even where consumers made a demand under G. L. c. 93A, or when consumers have obtained court judgments.

37. Capachione failed to refund or account for his failure to refund over \$250,000 of his clients’ deposits.

***Capachione’s Undercapitalization of His Corporations and Insolvency***

38. Capachione knew or should have known that his business was undercapitalized and in a precarious financial position, making it highly likely he would not have the financial resources to complete these home improvement projects in the manner and in the timeframes agreed upon.

39. For example, in 2017 and 2018, the Internal Revenue Service attempt to make several withdrawals from Capachione’s business account to satisfy a \$13,081.28 tax lien. Those withdrawals were unsuccessful due to insufficient funds in his account.

40. Capachione’s banks charged him thousands of dollars in fees from July 2016 through August 2018 for having insufficient funds to satisfy drafts to a multitude of his creditors.

41. Moreover, on November 9, 2017, Capachione executed an “Assignment for the Benefit of Creditors” on behalf of New England Hardscapes, Inc., which owed “priority tax liens to taxing authorities in the amount of approximately \$35,000” and “owes approximately \$67,000 to about twenty creditors.” Capachione sold five motor vehicles, namely two dump trucks, a flatbed truck, and a 6-wheel diesel truck, purportedly to pay creditors.



42. Capachione's businesses had no employees by August of 2017.

43. In April 2018, Capachione filed for voluntary dissolution of New England Hardscapes, Inc. with the Secretary of the Commonwealth, listing an effective date for dissolution of December 31, 2017.

44. Consumers have filed more than nine lawsuits against Capachione and obtained over \$22,749.14, in judgments, most of which he failed to pay.

45. Likewise, vendors and suppliers filed lawsuits against him and have also obtained judgments against Capachione.

46. Capachione took consumers' money and made them promises that he knew or should have known he could not deliver due to the fact that his business, New England Hardscapes, Inc. had ceased to operate in July or August 2017, and he had sold off a large amount of equipment to pay creditors.

47. Nevertheless, Capachione continued to accept deposits and progress payments from consumers, even taking on new home improvement projects, while failing to disclose to consumers Defendants were unlikely to perform the contracts in the manner or time agreed upon due to the undercapitalization and financial instability of his corporations.

48. All told, over the past decade, Capachione has engaged in a systemic pattern of unfair and deceptive conduct.

***Notice of Intent to File Action***

49. Pursuant to G. L. c. 93A, § 4, on the Commonwealth mailed notice of its intent to file this action to Capachione, subject to relief from the Automatic Stay by the Bankruptcy Court of the District of Massachusetts (Central Division) by sending such notice, postage prepaid, to Capachione's attorney, by certified and electronic mail.

## **V. CAUSES OF ACTION**

### **Count I: Unfair and Deceptive Acts of Practices in Violation of G. L. c. 93A, § 2**

50. The allegations in the paragraphs above are re-alleged and incorporated herein.

51. General Laws chapter 93A, § 2(a) declares unlawful “unfair or deceptive acts or practices in the conduct of trade or commerce[.]”

52. Defendants conduct trade and commerce in Massachusetts and with Massachusetts consumers.

53. Each Defendants is an individual, corporation or other legal entity, and is therefore a “person” as defined under G. L. c. 93A, § 1(a).

54. By initiating and engaging in the conduct described above, Capachione, individually and/or through his corporations, New England Hardscapes, Inc., Aqua Outdoor Environments, and R and R Consulting, LLC, engaged in unfair or deceptive acts and practices that violated G. L. c. 93A, § 2(a) and the regulations promulgated thereunder by, without limitation:

- a. making material misrepresentations and omissions regarding his ability to deliver products and perform services related to home improvement transactions in violation of G. L. c. 93A, § 2(a) and 940 CMR 3.09(2);
- b. taking consumer deposits and progress payments for home improvement projects when Capachione knew or should have known he would not complete the project in the contracted timeframes;
- c. failing to return consumer deposits and progress payments for labor and materials that Capachione failed to provide; and

- d. engaging in violations of G. L. c. 142A, § 1 *et. seq.* (the Home Improvement Contractor Act), each of which constitutes a violation of G. L. c. 93A, § 2, including, *inter alia*:
- i. abandoning and failing to complete home renovations without justification in violation of G. L. c. 142A, § 17(2);
  - ii. failing to credit homeowner deposits and progress payments made to Capachione in connection with residential contracting transactions in violation of G. L. c. 142A § 17(3);
  - iii. making material misrepresentations in the procurement of contracts and making false promises of a character likely to influence, persuade or induce the procurement of a contract in violation of G. L. c. 142A, § 17(4);
  - iv. failing to pay for materials and services rendered in connection with his operating as a contractor after he received sufficient funds as payment for the particular work, in violation of G. L. c. 142A, § 17(14); and
  - v. failing to include statutorily required information and disclosures in the home improvement contract including but not limited to; the calendar date when work under the contract is scheduled to begin, the calendar date on which the work is scheduled to be substantially completed; and the actual cost of any materials or equipment of a special order or custom-made nature, which must be ordered in advance of the commencement of the work, in order to ensure that the project will proceed on schedule, in violation of G. L. c. 142A § 2.

55. Defendants knew or should have known that the acts and practices described above are unfair and/or deceptive, in violation of G. L. c. 93A, § 2.

**Count II: Misrepresentation/False Pretenses**

56. The allegations in the paragraphs above are re-alleged and incorporated herein.

57. Capachione wrongfully induced consumers pay him progress payments for home improvement projects by falsely representing both orally and by way of written agreements that he would complete (and intended to complete) the project in a certain timeframe and according to certain specifications;

58. Capachione falsely represented his intention and his ability to complete projects in particular manner and pursuant to particular timeframes—causing consumers to rely on those representations and pay him lump sums, or “progress payments”;

59. Consumers’ reliance was justified because Capachione continued to reassure them that he would complete projects in the timeframe agreed upon and, in numerous instances, the work started out in a satisfactory manner.

60. Capachione continued to enter into new agreements for home improvement projects while his existing projects were already failing to meet specifications and timelines and while his corporations were undercapitalized and in a precarious financial state.

61. Capachione knew or should have known he could not meet the timeline or specifications of the projects in the agreements when he solicited new consumers for work and had those consumers been aware of his inability to perform and his outstanding work for other consumers they would have been unlikely to enter into an agreement and make payments to him for home improvement work.

62. As a direct result of the unfair and/or deceptive conduct described hereinabove, Capachione was unjustly enriched by hundreds of thousands of dollars.

63. Capachione knew or should have known that the acts and practices described above are unfair and/or deceptive, in violation of G. L. c. 93A, § 2.

## **VI. PRAYER FOR RELIEF**

**WHEREFORE**, the Commonwealth requests that this honorable Court grant the following relief, after trial on the merits:

- a. Enter judgment in favor of the Commonwealth;
- b. Issue an appropriate permanent injunction to enjoin Defendants from:
  - i. Undertaking, offering to undertake, or agreeing to perform residential contracting, landscape design and/or home improvement services; and
  - ii. Performing, supervising, offering to undertake, or agreeing to perform construction, reconstruction, alteration, repair, removal, or demolition on residential dwellings;
- c. Order Defendants to provide restitution Massachusetts consumers' ascertainable losses resulting from Defendants' conduct in violation of G. L. c. 93A, § 2;
- d. Order Defendants to pay civil penalties of \$5,000 for each violation of G. L. c. 93A;
- e. Award attorneys' fees and costs to the Commonwealth; and
- f. Enter such other relief as the Court deems just and reasonable.

Respectfully submitted,

COMMONWEALTH OF  
MASSACHUSETTS

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