

NOTIFY

17

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK SS.

SUPERIOR COURT
CIVIL ACTION NO.1984CV2176

COMMONWEALTH OF MASSACHUSETTS

Plaintiff,

v.

RICHARD CAPACHIONE, an individual; and
NEW ENGLAND HARDSCAPES, INC.,
AQUA OUTDOOR ENVIRONMENTS, and
R AND R CONSULTING, LLC., corporations

Defendants.

FINAL JUDGMENT BY CONSENT

Plaintiff, the Commonwealth of Massachusetts (the "Commonwealth"), by and through its Attorney General, Maura Healey and Defendants, Richard Capachione, New England Hardscapes, Inc., Aqua Outdoor Environments, and R and R Consulting, LLC (collectively, the "Defendants"), agree to the entry of this Final Judgment by Consent ("Consent Judgment") and its provisions in order to resolve this litigation in advance of trial or further adjudication.

WHEREAS, the Commonwealth filed this action in Suffolk Superior Court on July 9, 2019 (the "Complaint") and alleges that the Defendants engaged in unfair and deceptive acts and practices related to taking hundreds of thousands of dollars in consumer deposits and progress payments for home improvement projects from Massachusetts consumers when the Defendants knew or should have known that they would be unable to complete the projects in violation of G.L. c. 93A, § 2 and the Home Improvement Contractor Act, G.L. c. 142A;

WHEREAS, the Parties consent to the entry of this Consent Judgment and this consent is not an admission of any guilt, liability, or wrongdoing, but is expressly understood and agreed that it is being entered into in order to amicably resolve the Commonwealth's Complaint and avoid the cost and uncertainty of litigation;

WHEREAS, the parties agree that the facts alleged in the Complaint establish all elements necessary to sustain an action by or on behalf of the Commonwealth pursuant to Section

ALSO ENTERED ON DOCKET Jan 25 02
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. PROC.
AND NOTICE SEND TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS.

523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Consent Judgment will have collateral estoppel effect for such purposes for the monetary payment contemplated under this Consent Judgment;

WHEREAS, the Defendants waive all rights to appeal or otherwise challenge or contest the validity of this Consent Judgment;

WHEREAS, the Defendants acknowledge that this Court has subject matter jurisdiction over this case and personal jurisdiction over them, and agree to the entry of this Consent Judgment in the above-captioned case to fully and finally resolve the allegations and claims raised in the lawsuit against them;

NOW, THEREFORE, upon consent of the Parties, it is hereby adjudged, ordered and decreed, as follows:

I. PARTIES

1. Plaintiff in this action is the Commonwealth of Massachusetts represented by the Office of the Attorney General.

2. Defendant Richard Capachione is a natural person residing in Acton, Massachusetts.

3. Defendant New England Hardscapes, Inc., is a Massachusetts corporation that had a principal place of business at 930 Main Street, Acton, MA 01720. New England Hardscapes, Inc. was voluntarily dissolved on April 13, 2018.

4. Defendant Aqua Outdoor Environments is not a Massachusetts corporation but is a d/b/a of New England Hardscapes, Inc.

5. Defendant R and R Consulting, LLC is a Massachusetts corporation that had a principal place of business at 930 Main Street, Acton, MA 01720. R and R Consulting, LLC was dissolved by Court Order or at the direction of the Secretary of the Commonwealth of Massachusetts on June 30, 2021.

6. At all times relevant to the Commonwealth's Complaint, Capachione was the owner and/or managing agent of New England Hardscapes, Inc., Aqua Outdoor Environments, and R and R Consulting, LLC; and was responsible for and personally participated in all acts and practices of each entity.

II. JURISDICTION & VENUE

7. This Court has jurisdiction over the subject matter of this action pursuant to G.L. c. 93A, § 4 and G.L. c. 12, § 10, and over the Defendants pursuant to G.L. c. 223A, § 3.
8. Venue in this court is proper pursuant to G. L. c. 223, § 5 and G.L. c. 93A, § 4.

III. DEFINITIONS

9. "AGO" shall mean the Massachusetts Attorney General's Office.
10. "Designated Trustee" and/or "Trustee" refers to the individual who was previously appointed to serve as Bankruptcy Trustee in Bankruptcy Action No. 19-40200 and Adversary Proceeding No. 19-04028, currently pending in the United States Bankruptcy Court for the District of Massachusetts.
11. "Capachione" shall mean Richard Capachione, in his individual capacity, unless otherwise specified.
12. "Defendant" and/or "Defendants" shall mean the named Defendants in ¶¶ 2-5.
13. "Effective Date" shall mean the date the Consent Judgment is entered by the Court.
14. "IRC" shall mean the Internal Revenue Code contained in Title 26 of the United States Code.

IV. CONSUMER RESTITUTION

15. Pursuant to G. L. c. 93A, § 4, a judgment is hereby entered against Defendants, jointly and severally, for the sum of \$150,000 (the "Judgment Amount").
16. The Judgment Amount shall consist of the following:
 - a) A monetary payment of \$150,000, of which Capachione shall pay \$30,000 within ten (10) days of the Effective Date (the "Monetary Payment").
 - b) Capachione shall pay quarterly installments of at least \$2,400 for three years following the Effective Date, with the first quarterly installment to be paid within ninety (90) days of the Effective Date, and then on a quarterly schedule as determined by the Trustee (the "Quarterly Installment Payments").
 - c) Capachione shall pay any remaining balance within three (3) years of the Effective Date.

d) Capachione may make additional payments, in excess of the Quarterly Installment Payments, at any point until the Judgment Amount is satisfied in full in accordance with the terms of this Consent Judgment.

17. The Parties acknowledge that the Judgment Amount is expressly premised upon the truthfulness, accuracy, and completeness of the Defendants' sworn financial statements and related documents submitted to the AGO, namely, the written financial disclosures made by Richard Capachione and his wife, Renee Capachione, to the AGO dated October 1, 2021.

18. The Parties acknowledge that a portion of the funds received by Capachione to satisfy the Judgment Amount will be set aside and reserved to allocate to the costs of the administration of this settlement, including, but not limited to, costs for the compensation of the Trustee or fund administrator.

19. Monetary Payments. Capachione shall pay the Monetary Payment, Quarterly Installment Payments, and any other payments required under this Consent Judgment to the Trustee in a form and fashion deemed appropriate by the Trustee. *See Attachment 1.* In the event the Trustee is unable to obtain the Bankruptcy Court's permission to administer the distribution of the Judgment Amount, the Defendants shall pay the Monetary Payment and any other payments required under this Consent Judgment by wire transfer or certified check payable to Commonwealth of Massachusetts and delivered to the Consumer Protection Division, One Ashburton Place, 18th Floor, Boston, Massachusetts 02108.

20. In the event the Trustee is unable to obtain the Bankruptcy Court's permission to administer the distribution of the Judgment Amount, the AGO will place the Monetary Payment in a fund, to be established and maintained by the AGO or in an account/fund deemed appropriate by the Trustee. This sum shall be distributed at the Attorney General's sole discretion, and in accordance with guidance by the Trustee and applicable law, to those consumers who the AGO and Trustee determine were harmed by the unfair or deceptive acts or practices alleged in the AGO's Complaint. If funds remain after the AGO and/or Trustee distributes restitution to such identified consumers, the remainder of the funds shall be allocated to the Commonwealth's local consumer aid fund established by G. L. c. 12, § 11G or to the Commonwealth's General Fund.

21. Capachione shall make good faith efforts to satisfy the remaining Judgment Amount after the Monetary Payment and Quarterly Installment Payments.

22. Good faith efforts to satisfy the remaining Judgment Amount include, but are not limited to, making reasonable attempts to access equity in his residence at 21 Independence Road, Acton, MA 01720 through a refinance by:

- a) submitting at least three complete applications to refinance between the second and third anniversaries of the Effective Date;
- b) each application shall be submitted through a different lender, and one application may be submitted through the existing mortgage lender.

23. In the event that, despite good faith efforts and through no fault of his own, Capachione is unable to refinance his residence within three years following the Effective Date, the Parties may agree to extend the deadline for Capachione to satisfy the remaining Judgment Amount in six (6) month increments, for up to one (1) calendar year.

24. Any extension beyond the time set forth in ¶ 23, shall be subject to the approval of both parties in writing.

25. Capachione shall continue making Quarterly Installment Payments of at least \$2,400, until the full Judgment Amount is satisfied.

26. Until the Judgment Amount has been satisfied in full, Capachione shall notify the AGO within five (5) days of (1) refinancing or listing for sale any real property where he retains a financial interest and (2) if he receives an inheritance, payout, windfall, new employment, or any other source of income that could be applied to the outstanding Judgement Amount. Further, the parties acknowledge and agree that the amount of the Quarterly Installment Payments may increase based on any change in ability to pay, as described in this paragraph.

V. INJUNCTIVE TERMS

27. Defendants, whether acting directly or indirectly, through employees, officers, subsidiaries, agents, representatives, affiliates, successors, and/or assigns or through any corporate or other device, hereby agree to comply with the following injunctive terms:

- a) Defendants shall comply with G.L. c. 93A, all provisions of the Attorney General's Regulations contained within section 940 of the Code of Massachusetts Regulations, and G.L. c. 142A, the Home Improvement Contractor Act.

- b) Defendants are prohibited from owning, managing, and/or actively participating in the decision-making of any organization that provides any type of construction services to Massachusetts consumers.
- c) Defendants are prohibited from soliciting business from Massachusetts consumers with respect to any home improvement construction, except that, Capachione may seek employment in the industry as long as he is not involved in the day-to-day management of any entity that offers construction services, is not overseeing contractors or subcontractors, is not involved in contracting with Massachusetts consumers in relation to construction services; and notifies the AGO in writing within ten (10) calendar days of beginning any such employment.
- d) Defendants are prohibited from holding consumer advance deposits for any goods or services.
- e) Within thirty (30) days following the Effective Date, to the extent that they are actively registered and/or operating in Massachusetts, Defendants shall dissolve New England Hardscapes, Inc., Aqua Outdoor Environments, R and R Consulting, LLC, and any other companies and/or entities Capachione owns or co-owns that provide contracting services in Massachusetts.
- f) To the extent any Defendant is a shareholder, manager, agent, or in any way affiliated with the management or oversight of any entity that provides construction-related services in the Commonwealth of Massachusetts, Capachione shall relinquish his interest in such entities within thirty (30) days of entry of this consent judgment.

- g) The Defendants shall provide additional documents to the AGO and Trustee upon its request and on an ongoing basis to assist in the identification of consumers affected by the conduct described in the amended complaint in order to facilitate the payment of restitution within five business days of a request.
- h) Until Capachione satisfies the full Judgment Amount, he shall not voluntarily incur or assume any new debts or lines of credit without prior approval from the AGO, unless it is incurred for the sole purpose of paying restitution. Such debt shall include but is not limited to: (1) obtaining a loan; and/or (2) entering into any oral or written contract for which payments must be made. In addition, Capachione is further prohibited from serving as a co-signor or guarantor on any debt or liability.

28. Compliance Measures. Capachione further agrees that he shall:

- a) Report to the AGO on a quarterly basis via affidavit, signed under the pains and penalties of perjury, regarding the status of his financial ability to contribute to restitution. Said affidavits shall indicate: (1) all income (as the term is defined in IRC §61(a)) and gifts Capachione and his wife Renee Capachione are receiving (whether active or passive); (2) his employment status; (3) all of his employers regardless of whether he is an employee, contractor, or freelancer; and (4) all of his expenses. Moreover, Capachione shall notify the AGO within fourteen (14) calendar days of any major changes in his or his wife's income and/or financial situation;
- b) Provide notice to the AGO and Trustee within five (5) calendar days upon the submission of each application to refinance his residence at 21 Independence Road, Acton, MA. In addition, Capachione shall furnish; (1) a copy of the full application (2) any correspondence from the financial institution reviewing the application, including any review outcome and refinance terms or denials, inclusive of all reasons for denial;

c) Until Capachione satisfies the full Judgment Amount, he shall submit an updated financial disclosure form within fourteen (14) calendar days following a request by the AGO or the Trustee. The disclosure shall be submitted in the form of an affidavit, signed under the pains and penalties of perjury and shall indicate: (1) all gross income (as the term is defined in IRC §61(a)) and gifts Capachione and his wife Renee Capachione are receiving (whether active or passive); (2) his employment status; (3) all of his employers regardless of whether he is an employee, contractor, or freelancer; and (4) all of his expenses.

29. Within thirty (30) days of the Effective Date, Defendants shall certify compliance with the terms and practices set forth in this Section.

VI. NOTICES

30. All notices and documents required by this Consent Judgment shall be provided in writing by email and first-class mail, to the parties as following, unless otherwise directed in writing.

- a) The AGO:
Carlos Wilder
Assistant Attorney General
Consumer Protection Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2200
Carlos.Wilder2@mass.gov
- b) The Defendants:
Richard A. Mestone
Mestone & Associates LLC
435 Newbury Street, Suite 217
Danvers, MA 01923
(617) 381-6700
Richard.Mestone@mestoneassociatesllc.com

VII. RECORD RETENTION AND REPORTING

31. Until Capachione satisfies the full Judgment Amount, Defendants are required to create and retain all records and documents necessary to demonstrate full compliance with each provision of this Consent Judgment, including, but not limited to, all reports and the records relied upon to compile such reports required by this Consent Judgment and records related to the Consumer Relief provision. The parties may agree to extend a longer period of time for retaining records should the parties agree to extend the deadline for Capachione to satisfy the Judgment Amount, as noted in ¶ 21.

32. Until Capachione satisfies the full Judgment Amount, the Defendants will report biannually on compliance with the provisions of this Consent Judgment.

VIII. ADDITIONAL PROVISIONS

33. Continuing Jurisdiction. The parties to this Consent Judgment consent to the continuing jurisdiction of the Suffolk County Superior Court for the purpose of enforcing or modifying the terms of this Consent Judgment or for granting such further relief as the Court deems just and proper. The injunctive relief provisions of this Consent Judgment place Defendants under the restraint of a direct order of the Court that they comply with the requirements of this Consent Judgment, refrain from doing the particular acts stated in ¶ 27 and conform with the compliance measures outlined in ¶ 28.

34. Governing Law. The provisions of this Consent Judgment shall be construed in accordance with the laws of the Commonwealth of Massachusetts.

35. Severability. The provisions of this Consent Judgment shall be severable, and should any provisions be declared by a Court of competent jurisdiction to be unenforceable; the other provisions of this Consent Judgment shall remain in full force and effect.

36. Conduct Not Condoned. Consent to this Consent Judgment does not constitute an approval by the AGO of any of Defendants' acts or practices, and Defendants shall make no representations to the contrary.

37. Entire Agreement. This Consent Judgment contains the complete agreement between the AGO and Defendants. No promises, representations, or warranties other than those

set forth in this Consent Judgment have been made between the AGO and Defendants. This Consent Judgment supersedes all prior communications, discussions, or understandings, if any, between the AGO and Defendants, whether oral or in writing.

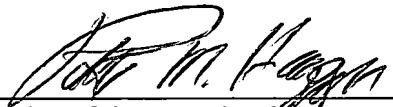
38. Modification. No waiver, modification, or amendment of the terms of this Consent Judgment shall be valid or binding unless made in writing, agreed to by all Parties, and approved by the Court, and then only to the extent specifically set forth in such written waiver, modification or amendment.

39. Requirements Maintained. It is the intention of the parties that the provisions of this Consent Judgment do not contravene Defendants' obligation to comply with all applicable state and Federal laws and regulations.

40. Release. Subject to ¶ 41 below, upon entry of this Consent Judgment and in consideration of the Defendants' compliance with its terms, the AGO shall release the Defendants and their officers, directors, affiliates, predecessors, successors and assigns (collectively, the "Released Parties") from the following: all civil claims, causes of action, damages, restitution, fines, costs and penalties, and other relief arising from or related to the claims alleged in the Complaint pursuant to G.L. c. 93A, § 2, as to conduct occurring on or before the complaint filing date.

41. This Consent Judgment does not resolve, settle, or release any other actual or potential claims against the Defendants, or their officers, directors, affiliates, predecessors, successors and assigns, including without limitation claims arising from conduct occurring after the complaint filing date, claims by any agency, board, authority or instrumentality other than the AGO; claims by any person or entity other than the AGO; claims that may be brought by the AGO against any other person or party; any claims that are not civil in nature; or any claims by third parties, including individual consumers. This Consent Judgment further does not bar the AGO, or any third party, including individual consumers, from seeking to enjoin any party, including Defendants and their assignees or successors-in-interest, from collecting any undischarged consumer deficiency balances on any grounds whatsoever, including the conduct set forth in the Complaint.

APPROVED AND ORDERED:



Justice of the Superior Court

Dated: 1/12/22

EXHIBIT 2

CONSENT OF RICHARD CAPACHIONE

Defendant, Richard Capachione admits to the continuing jurisdiction of the Suffolk Superior Court as to the personal and subject matter jurisdiction of this action and, subject to the approval of the Court, consents to the entry of the Consent Judgment. The undersigned is represented by counsel in this matter, has personally read and understands the terms of this Consent Judgment, has consulted with counsel regarding this matter, and is duly authorized to consent to such Consent Judgment on behalf of himself, New England Hardscapes, Inc., Aqua Outdoor Environments, and R and R Consulting, LLC.

CONSENTED, WAIVING ALL RIGHTS OF APPEAL:

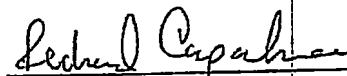


Richard Capachione
21 Independence Road
Acton, MA 01720

CONSENT OF NEW ENGLAND HARDSCAPES, INC.

Defendant, New England Hardscapes admits to the continuing jurisdiction of the Suffolk Superior Court as to the personal and subject matter jurisdiction of this action and, subject to the approval of the Court, consents to the entry of the Consent Judgment. The undersigned is represented by counsel in this matter, has personally read and understood the terms of this Consent Judgment, has consulted with counsel, and is duly authorized to consent to such Consent Judgment on behalf of New England Hardscapes, Inc., Aqua Outdoor Environments, and R and R Consulting, LLC.

CONSENTED, WAIVING ALL RIGHTS OF APPEAL:

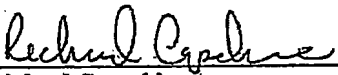


Richard Capachione
PRESIDENT
New England Hardscapes, Inc.
930 Main Street
Acton, MA 01720

CONSENT OF AQUA OUTDOOR ENVIRONMENTS

Defendant, Aqua Outdoor Environments d/b/a New England Hardscapes, Inc. admits to the continuing jurisdiction of the Suffolk Superior Court as to the personal and subject matter jurisdiction of this action and, subject to the approval of the Court, consents to the entry of the Consent Judgment. The undersigned is represented by counsel in this matter, has personally read and understood the terms of this Consent Judgment, has consulted with counsel, and is duly authorized to consent to such Consent Judgment on behalf of New England Hardscapes, Inc., Aqua Outdoor Environments, and R and R Consulting, LLC.

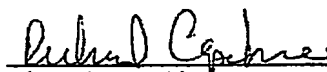
CONSENTED, WAIVING ALL RIGHTS OF APPEAL:


Richard Capachione
PRESIDENT
Aqua Outdoor Environments d/b/a
New England Hardscapes, Inc.
930 Main Street
Acton, MA 01720

CONSENT OF R AND R CONSULTING, LLC

Defendant, R and R Consulting, LLC admits to the continuing jurisdiction of the Suffolk Superior Court as to the personal and subject matter jurisdiction of this action and, subject to the approval of the Court, consents to the entry of the Consent Judgment. The undersigned is represented by counsel in this matter, has personally read and understood the terms of this Consent Judgment, has consulted with counsel, and is duly authorized to consent to such Consent Judgment on behalf of New England Hardscapes, Inc., Aqua Outdoor Environments, and R and R Consulting, LLC.

CONSENTED, WAIVING ALL RIGHTS OF APPEAL:



Richard Capachione

MANAGER

R and R Consulting, LLC

930 Main Street

Acton, MA 01720

ATTACHMENT 1

ATTACHMENT 1: RESTITUTION PROGRAM

1. Pursuant to the Consent Judgment, the Defendants, Richard Capachione, New England Hardscapes, Inc., Aqua Outdoor Environments, and R and R Consulting, LLC (the "Defendants") shall pay \$150,000.00 to a Carve-out Fund ("Fund") for the purpose of consumer restitution. The administration of the Fund shall be overseen by a designated trustee (the "Designated Trustee" or "Trustee") to be agreed upon by the Attorney General's Office ("AGO").
2. The Trustee shall deposit the Fund into a single non-interest-bearing checking account in one of the five largest banks in the Commonwealth of Massachusetts, the selection of which shall be at the discretion of the Trustee with the assent of the AGO. The Fund shall be fully guaranteed by the Federal Deposit Insurance Corporation. The Trustee shall not make disbursements from the Fund without first obtaining the written consent of the AGO. It is anticipated that the Trustee shall make pro rata distributions from the Fund on a periodic basis. Until final distribution, the Trustee shall withhold a reserve for administrative costs. All administrative costs/fees, including the fees of the Trustee shall be approved by the AGO prior to payment.
3. At a date to be agreed upon, but in no event later than sixty (60) days after the effective date of this Agreement, the Defendants shall provide to the AGO and the Trustee a copy of the Consumer List, and any related information, which would lead to the identification of consumer complaints.
4. To the extent further information is necessary to allow for the administration of the Fund, the Defendants shall comply with each request by the Trustee or the AGO for additional information and documentation as may be available within ten (10) business days after receiving said request.
5. The term "**consumer**" as used herein, means any individual who, primarily for a personal, family or household purpose, entered into an agreement or contract, whether orally or in writing, with Richard Capachione, New England Hardscapes, Inc., Aqua Outdoor Environments, and/or R and R Consulting, LLC for the

performance of residential contracting work, including all labor, goods, and services.

6. The term “**restitution**” as used herein, is defined as repayment, on a pro rata basis, to consumers who rendered deposits and/or payments to one or more of the Defendants in exchange for services to be performed by one or more of the Defendants but which, in fact, were either never performed by the Defendants to the customers or were partially and/or fully preformed and resulted in one or more of the following: damage, unsanitary conditions, citation by a city/town authority, or the resumption of construction with another vendor at the expense of the consumer.
7. Under the Defendant’s Restitution and Relief Plan pursuant to the Consent Judgment, (the “Plan”), the Trustee, with the cooperation of the Defendants and the AGO, shall solicit the submission of claims by consumers harmed by the Defendants. Consumers will be encouraged to file proofs of claim in *In re Richard Capachione*, Case No. 19-40200 which is currently pending in the United States Bankruptcy Court, District of Massachusetts (the “Bankruptcy Case”). However, previously, Consumers may have submitted claims directly to the AGO and to the Defendants. Accordingly, the Trustee will identify and compile a list of all valid Consumer claims (1) by a review and analysis of the proofs of claim filed in the Bankruptcy Case and (2) by a review and analysis of additional claims submitted directly to the AGO and/or the Defendants.
8. Following expiration of the claims bar date as set in the Bankruptcy Case, the Trustee shall begin the restitution process by sending letters regarding the Agreement and the Carve-out Fund to all valid Consumer claimants together with pro rata check distributions as approved by the AGO. The distribution letter shall include in prominent type and font a statement that if any check for payment of restitution sent to a Consumer remains un-cashed for ninety (90) days after the check issuance date, the Trustee will permanently stop payment on the check and the Consumer shall be deemed to have waived his/her rights to restitution.

9. Following the final distribution and payment of administrative expenses, any remaining monies in the Fund shall then be distributed pro rata to the pool of Consumer claimants.
10. In this instance, since the Fund provides for the restitution and return of consumer deposits, the distributions do not constitute income to the recipients. Accordingly, the Trustee will not be seeking to obtain W-9 Forms from recipients or issue IRS Form 1099-Misc. Forms to recipients.
11. The Trustee, the Defendants and the AGO shall maintain and secure records of all communications with Consumers regarding the Defendant's Restitution and Relief Program, for a period of at least two years. Each shall make such records available for inspection by the others on fifteen (15) business days' notice.