

**Lis v Lancaster**

2024 NY Slip Op 31727(U)

May 13, 2024

Supreme Court, New York County

Docket Number: Index No. 650855/2019

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60M

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ANDREW J. LIS,

Plaintiff,

- v -

JASON M LANCASTER, DEBBIE LANCASTER, CECIL  
SIMMONS, DEE CHASE-UNNO, GULF PREMIER  
LOGISTICS LLC, OVERLAND DISTRIBUTION CO.,  
INC., OVERLAND EXPRESS CO., INC., JAL  
ENVIRONMENTAL SERVICES PROGRAMS, BANK OF  
AMERICA NA, JP MORGAN CHASE BANK NA,

Defendant.

INDEX NO. 650855/2019

MOTION DATE 04/06/2023,  
04/05/2023

MOTION SEQ. NO. 015 016

**DECISION + ORDER ON  
MOTION**

-----X

JASON LANCASTER, JAL ENVIRONMENTAL SERVICES  
PROGRAMS

Plaintiff,

-against-

JAL ENVIRONMENTAL SERVICES PROGRAMS LLC

Defendant.

Third-Party  
Index No. 595376/2019

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HON. MELISSA A. CRANE:

The following e-filed documents, listed by NYSCEF document number (Motion 015) 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 687, 688, 689, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 733, 734, 735, 736, 737, 738

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 016) 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 702, 703, 704, 705, 706, 739

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

This is an action involving a business dispute between plaintiff Andrew Lis (“Lis”) and defendant Jason Lancaster (“Lancaster”), as well as his companies, defendants Gulf Premier Logistics LLC (“Gulf Premier”) and defendant/counterclaimant/third-party plaintiff JAL Environmental Services Programs d/b/a JAL Environmental Services Programs, Inc. (“JAL-TX”) (collectively, “defendants”). From this case’s outset, the parties have disagreed about whether Lis was a partner in or employee of JAL-TX. The central material fact in dispute is whether, as Lis asserts, a valid and enforceable oral partnership formed between the parties.

Motion Sequence Nos. 015 and 016 are consolidated for disposition.

In Motion Sequence No. 015, Lis moves, pursuant to CPLR 3212, for summary judgment on his first cause of action in the second amended complaint (“SAC”) (NYSCEF Doc No. 497) for a declaratory judgment that he and Lancaster were partners, and on his eighth cause of action for an accounting of the alleged partnership. Lis also moves for summary judgment dismissing all of the counterclaims and third-party claims that survived this court’s May 14, 2021 order (NYSCEF Doc No. 303), that dismissed every claim Lancaster asserted, and two claims asserted by JAL-TX.

In Motion Sequence No. 016, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the SAC on the ground that Lis has not suffered any direct injury, rather JAL-TX suffered the harm.

For the reasons set forth below, both motions are denied. There are multiple material issues of fact, especially whether Lis and Lancaster formed an oral partnership, or whether Lis was merely an employee of JAL-TX.

### **FACTUAL BACKGROUND**

The following facts are undisputed. Lancaster formed JAL-TX and was its only shareholder (*see* JAL-TX certificate of formation [NYSCEF Doc No. 357]; Lis dep [NYSCEF Doc

No. 577], at 50-52, 63, 85). In early 2016, Lis and Lancaster agreed to go into business together. Shortly after Lis joined JAL-TX, he advised Lancaster that he was hesitant to move forward with any business partnership because U.S. Ecology had offered him a position that he was considering (5/9/19 Lancaster declaration [NYSCEF Doc. No. 97], ¶ 9; 5/4/23 Lancaster aff [NYSCEF Doc No. 707], ¶ 8). Ultimately, Lis did not take the U.S. Ecology position, but in May 2016, his former employer, Amlon, Inc. (“Amlon”), sent a letter to Gulf Premier noting that it had a two-year non-compete agreement with Lis (*see* NYSCEF Doc No. 600). Amlon demanded that Lis cease and desist any activities in violation of that agreement (*see* NYSCEF Doc No. 601). Due to that non-compete agreement with his former company, Lis agreed not to be an owner of JAL-TX until 2018, when he and Lancaster would once again discuss formalizing a partnership in writing (Lis dep at 140-142).

In May 2016, some of Lis’ business contacts reported to him that “Amlon was using the [non-compete] clause to saber-rattle” (4/5/23 Lis aff [NYSCEF Doc No. 619], ¶ 28; *see* e-mail chain between Lis and Wendy Fett [NYSCEF Doc No. 642]; e-mail chain between Robbie Luo, Lancaster and Lis [NYSCEF Doc No. 643]). Some of the new business’ clients stated that, out of an abundance of caution, they preferred if Lis kept himself out of the spotlight (*see id.*). Both Lis and Lancaster agreed (*see* transcript of text messages between Lis and Lancaster [NYSCEF Doc No. 644]). As a result, the partners sometimes had Lancaster sign contracts rather than Lis (Lis aff, ¶ 29; *see* 2/29/2016 emails between Lis and Lancaster [NYSCEF Doc No. 645]).

JAL-TX had several employees, including Michael Kendall and Michelle Esteva, an assistant for Lis (Lis dep, at 108, 111). The customers were JAL-TX’s customers or clients and paid for the services Lis and Lancaster rendered to JAL-TX (*id.* at 113, 123, 134).

Neither Lis nor Lancaster personally invested any money in JAL-TX (*id.* at 63-64). JAL-TX received a loan from Lancaster's parents for start-up capital (*id.* at 64-65). Lis received a salary from the beginning of his relationship with JAL-TX (*id.* at 66, 74; SAC, ¶¶ 51, 69). Lis' starting salary was \$150,000, and he received periodic bonuses (Lis dep, at 66-67, 76-77). Indeed, Lis admits that JAL-TX paid him over the 3 years from 2016 through 2018 as follows: \$412,500 in salary and \$360,000 in bonuses for a total of \$772,500 (*see* expert report [NYSCEF Doc No. 715]). Lis also admits that he received medical benefits for himself and his daughter from JAL-TX, including premiums for the health insurance that totaled \$32,277 (Lis dep, at 74-76).

The parties dispute the remainder of the operative facts. Lis claims in the SAC that “[t]his is a dispute between two partners, plaintiff Andrew J. Lis and defendant Jason M. Lancaster. Their partnership began doing business in February 2016. In 2018, they stopped getting along and parted ways” (SAC, ¶ 1). Lis further alleges that “[n]on-party JAL Environmental Services Programs [JAL-NY] is a de facto partnership under New York law, which was formed by Lis on April 25, 2018” (SAC, ¶ 11). This non-party partnership “only ever had two partners: Lis and Lancaster” and “was dissolved in October 2018” (*id.*). According to Lis, “[t]he Lis-Lancaster partnership simply used the Texas corporation to do business with customers and third parties” (*id.*, ¶ 37). Lis also alleges that he “believed himself to co-own” JAL-TX (*id.*, ¶ 60).

In early October 2018, Lis started doing business on JAL-NY's behalf (Lis dep, at 158). All JAL-TX's customers continued to do business with Lis through his new company (*id.* 170-172, 188-189). Although Lis admits that there were no formation documents or legal structure for the partnership (*id.*, ¶ 80), he alleges that he and Lancaster agreed to split “every dollar of profit...50 cents yours and 50 cents mine” (*id.*, ¶ 93; *see also* Lis aff, ¶ 23). Lis also alleges that, while they both co-managed, Lis made most business decisions, including strategy. Lis claims he

found, hired and managed the employees (Lis aff, ¶ 24). However, there are no allegations and no evidence that the partnership ever had any independent books, records, other accounting or financial documents, or other indicia of its existence.

Lis and Lancaster agreed that, initially, only Lis would receive regular payments from the business (*id.*, ¶ 49). This was because Lis was devoting all his time and energies to making deals and managing the business, while Lancaster continued to work full time for his parents' businesses (*id.*). Lis and Lancaster understood that, eventually, Lancaster would also devote himself fully to the new venture, at which time he too would take a regular salary (*id.*). Earnings were to be split equally (*id.*, ¶ 23).

Despite the partnership's dissolution in October 2018, Lis testified that, thereafter, he would deposit funds JAL-TX (which was still in existence) received into an escrow account held by a CPA, Kenneth Lipner of KVLMS, that he had hired (Lis dep, at 153-154, 156). According to Lis, funds due to JAL-TX were then escrowed into JAL-NY's account (*id.* at 156). Lis also admitted that he used JAL-TX funds to pay the lease for JAL-NY's office space in November and December 2018, as well as January 2019 (Lis dep, at 238-239).

The following facts are offered by defendants: In early January 2016, Lis and Lancaster discussed entering into a venture in the industrial waste business that would utilize their respective expertise (Lancaster aff, ¶ 3). The planned business would act as an intermediary by purchasing recycled materials from producers in the United States and reselling the products to vendors nationally and overseas (*id.*). Lancaster alleges that, contrary to Lis' statements, Lis was not the mastermind of the business plan for JAL-TX, and that Lancaster never expressed concern about what his contribution to the company would be (*id.*, ¶ 4). Lancaster further alleges that Lis did not formulate a business strategy for JAL-TX with which he expected Lancaster to cooperate without

contribution (*id.*). In fact, Lis himself testified that “I made every strategic decision (admittedly very often in consult with my 50% partner, Jason Lancaster)” (4/2/19 Lis aff [NYSCEF Doc No. 153]), ¶ 5 [f]).

Lancaster alleges that, at all times, the parties had discussed that Lis had experience in sales and marketing of these types of services, while Lancaster had expertise in freight forwarding, logistics, and related matters. According to Lancaster, the parties had agreed that Lis would be responsible for efforts to acquire customers, and for invoicing the various projects (*id.*, ¶ 5). Lancaster, or his staff at Gulf Premier, would then handle all matters from that point forward. Gulf Premier was a freight forwarding company that only Lancaster owned (*id.*). This included all administrative duties, coordinating transport from the facility to the Port at Houston, booking ocean freight carriers, providing freight forwarding services, and creating legal export documentation for the customers, as well as contracting with third-party companies to provide trucking and warehouse services (*id.*). According to Lancaster, he oversaw JAL-TX’s finances, and the plan, at all times, was for Lis and Lancaster to work collaboratively in building the business (*id.*).

JAL-TX was formed in February 2016. At the same time, Lis began working for it (*id.*, ¶ 7). For payroll purposes, Gulf Premier was Lis’ employer, but Lis performed all his work and services for JAL-TX’s benefit, which paid all his compensation and benefits (Lis dep, at 66, 74-76; Lancaster aff, ¶ 7). In May 2016, when Amlon sent the cease and desist letter to Gulf Premier, Lancaster alleges that he first learned that Lis had misrepresented that he did not have a non-compete, and had no restrictions to join JAL-TX (Lancaster aff, ¶¶ 9, 11).

According to Lancaster, there was never an agreement between Lancaster and Lis to share JAL-TX’s profits and losses equally, and, in fact, Lis never shared in any of JAL-TX’s profits or

losses (*id.*, ¶¶ 13, 17). Lancaster asserts that, at no time from 2016 until his departure in 2018, was Lis a 50/50 owner of JAL-TX (*id.*, ¶ 1).

Lancaster alleges that he was responsible for managing the company's general and overall activities; handling the executive operations; overseeing the accounting, auditing and primary cash management functions; directing the corporate decisions, including legal functions; administering transactions; supervising business development, including communications with current and prospective clients; tracking corporate accounts and sales; and implementing and developing JAL-TX's corporate policies (*id.*, ¶ 20). According to Lancaster, Lis was involved in sales and business development for JAL-TX, but he did not have authority to (and did not) enter into contracts on JAL-TX's behalf (*id.*, ¶ 22). JAL-TX hired three employees. Lancaster was involved in all three hires (*id.*, ¶ 29).

As described earlier, JAL-TX was in the business of recycling byproducts of industrial waste and acted as an intermediary by purchasing recycled materials and reselling those materials (*id.*, ¶ 18). To perform its work, JAL-TX would contract with third-party carriers for transportation services, including Gulf Premier (*id.*). Gulf Premier held licenses to act as a non-vessel operating common carrier ("NVOCC"), and to book freights with steamship lines. This was a selling factor for JAL-TX's customers (*id.*, 18). JAL-TX would contract with Gulf Premier to provide freight forwarding and NVOCC services for which Gulf Premier would charge a \$125 administrative handling fee, plus the costs associated with booking, warehousing and shipping the materials (*id.*, ¶ 19).

JAL-TX did business with a company called Nickelhuettenwerke Aue GmbH ("NHA") (*id.*, ¶ 26). Lancaster alleges that NHA contracted with Gulf Premier, rather than JAL-TX, for the services that it was seeking, and that Gulf Premier invoiced NHA for services provided (*id.*). Gulf

Premier, in turn, would remit the payments it received, less fees for its services, to JAL-TX (*id.*). Lancaster alleges that NHA had advised him that it preferred working with Gulf Premier because Gulf Premier's services were similar to Amlon's, and NHA was concerned about disrupting its business relationship with Amlon if it partnered with JAL-TX (*id.*, ¶ 27). According to Lancaster, NHA never stated that it wanted to do business through Gulf Premier rather than JAL-TX due to Amlon's non-compete, or to distance itself from Lis (*id.*).

Lancaster alleges that Lis would not have been able to start or build JAL-TX to its success without Lancaster and his affiliated companies (*id.*, ¶ 31)

### DISCUSSION

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1021 [2016]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and “is inappropriate in any case where there are material issues of

fact in dispute or where more than one conclusion may be drawn from the established facts” (*Friends of Thayer Lake LLC v Brown*, 27 NY3d 1039, 1043 [2016]; see also *Brunetti v Musallam*, 11 AD3d 280, 280 [1st Dept 2004] [citations omitted] “summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits”). The role of the court on a motion for summary judgment is issue finding not issue resolution and it cannot make credibility determinations (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]). All inferences must be drawn in favor of the non-movant (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 496 [2019]).

**1. Lis’ Motion for Summary Judgment (Motion Sequence No. 015)**

**a. Motion to Dismiss First and Eighth Causes of Action**

Lis moves for summary judgment on his first cause of action for a declaratory judgment, which seeks a declaration that “Lis and Lancaster were coequal partners in a partnership” (SAC, ¶ 119). Lis argues that he and Lancaster were partners and asserts that each factor to determine if a partnership exists “favors an inference that Lis was a partner” (Lis memorandum [NYSCEF Doc No. 585], at 41-43). However, there are disputed issues of fact as to whether Lis and Lancaster were indeed partners, warranting denial of summary judgment.

Lis alleges that he and Lancaster entered into a “joint venture” wherein they agreed to utilize JAL-TX as a vehicle to do business with customers and third-parties (SAC, ¶ 37). Lis also alleges that he “believed himself to co-own” JAL-TX (SAC, ¶ 60). More specifically, Lis argues that he and Lancaster were partners “between themselves,” who used JAL-TX to do business with customers and other third parties.

Under New York law, “individuals” may “act[] as partners between themselves and as a corporation to the rest of the world” (*Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d

288, 300 [1st Dept 2003] [citation and quotation marks omitted]; *see also Rossner v Parson*, 300 AD2d 102, 102 [1st Dept 2002] [“How the parties appeared to others is of little relevance to their liabilities inter se”]). According to Lis, this is exactly how Lis and Lancaster acted: as partners “between themselves.”

“A partnership is an association of two or more persons to carry on as co-owners a business for profit” (NY Partnership Law § 10 [1]). A partnership can exist by written agreement, but also by conduct that satisfies the legal criteria for a partnership “in fact” (*see Czernicki v Lawniczak*, 74 AD3d 1121, 1124 [2d Dept 2010] [“When there is no written partnership agreement...the court must determine whether a partnership in fact existed from the conduct, intention and relationship between the parties”]; *see also R.G. Group, Inc. v Horn & Hardart Co.*, 751 F2d 69, 74-75 [2d Cir 1984] [to determine if a partnership was formed, “(w)hat matters are the parties’ expressed intentions, the words and deeds which constitute objective signs in a given set of circumstances”]).

Courts determine whether a partnership-in-fact existed by searching for various “indicia of partnership.” Under New York law, “[t]he indicia of partnership include: (1) sharing losses; (2) joint management and control; (3) ownership of partnership assets; (4) contribution of capital; and (5) sharing profits” (*Naughtright v Weiss*, 826 F Supp 2d 676, 695 [SDNY 2011]). The question of whether a joint venture or partnership exists is usually a question of fact (*see Bamira v Greenberg*, 256 AD2d 237, 239 [1st Dept 1998]; *Olson v Smithtown Medical Specialists, P.C.*, 197 AD2d 564, 565 [2d Dept. 1993]). Thus, this is not an issue that can be resolved on a summary judgment motion (*see Cobblah v Katende*, 275 AD2d 637, 639 [1st Dept 2000]).

Here, a review of the key factors to determine an oral partnership demonstrates that there are significant questions of fact. Lis argues that he and Lancaster formed a partnership “in fact,” and in his affidavit in support of the motion, he attempts to explain his contributions to JAL-TX’s

business that shows that he was Lancaster's partner in that business. Lis argues that Lancaster specifically admitted to him that he had agreed that the business belonged to both of them. According to Lis, on October 16, 2018, Lis and Lancaster spoke by telephone and, during the conversation, Lancaster stated: "This whole thing was ours. We made that agreement at the very beginning. Regardless of a piece of paper, regardless of what anybody else says, that was the agreement we made" (*see* transcript of 10/16/2018 conversation [Lis aff, ¶ 55, exh 2]). Lis also argues that Lancaster admitted to others that he had promised to give shares in JAL-TX to Lis.

Lis further argues that the parties agreed to share in profits and losses 50/50 (*see* Lancaster dep, at 204-205 ["When Andrew and I discussed a partnership, I had always referenced that our partnership agreement would be 51/49, but I would split profits with him"]). Indeed, Lis alleges that he personally bore approximately \$100,000 in losses during JAL-TX's wind-up (Lis aff, ¶ 56 ["As I wound up the partnership after its dissolution in October 2018, the partnership had a shortfall of nearly \$100,000. I covered that shortfall with my own money. Specifically, on February 8, 2023, I covered a payment of \$72,663.72 that JAL Environmental Services Programs, Inc. had owed to US Ecology since October 2018. I was forced to use a personal credit card to make the payment. And on March 25, 2019, I covered a payment of approximately \$25,800 that JAL Environmental Services Programs, Inc. owed to Robbie Luo as commission, which I paid by wire transfer"]).

As to joint management and control, Lis argues that he was JAL-TX's principal manager. According to Lis, at the very outset, he formulated the first, provisional list of customers, prepared checklists and action items for setting up the business, found, hired and managed the business's employees, formulated the business's strategy, and forged and handled the execution of the business's deals, while Lancaster did none of those things (*see* Lis aff, ¶¶ 37-45).

Finally, as to contribution of capital, Lis argues that neither of the two partners put up cash to start the business and, as such, in this regard they were equals. Lis contends that all of these facts, taken together, favor an inference that he was a partner of JAL-TX.

However, Lancaster's affidavit in opposition, as well as his deposition testimony, completely contradicts Lis on these key factors with Lancaster ultimately contending that Lis was nothing more than JAL-TX's employee.

Lancaster asserts that Lis was JAL-TX's employee, and that they had specifically decided to hold off on becoming partners until Lis' non-compete with Amlon expired in 2018. Lancaster alleges that "[g]iven the circumstances (Non-compete), we agreed that we could not proceed with any sort of partnership, but that Mr. Lis would continue as an employee of Gulf Premier seeking to source business for JAL-TX, which would remain solely owned by me" (Lancaster aff, ¶12). Lancaster further alleges that "[w]e also agreed that he would continue to draw the same \$150,000.00 salary we had agreed to and that discussions of any formal partnership would be put off for at least two years (*id.*; *see also* Lis dep, at 140-142; Lancaster dep, at 226, 227, 231). Although, in 2018, the parties began discussions about becoming partners in JAL-TX and memorializing their agreement in writing (Lancaster dep, at 227), the parties' relationship began to sour (Lancaster aff, ¶¶ 35-40). Consequently, the partnership never materialized. Lis stopped working for JAL-TX in 2018 (Lancaster declaration, ¶ 29).

Lancaster also asserts that the parties never agreed to share profits and losses, and had no formal agreement to do so. "The parties' agreement to share in the profits and losses is an 'indispensable essential of a contract of partnership or joint venture'" (*Rosenshein v Rose*, 2008 NY Misc. LEXIS 7100, \* 11 [Sup Ct, NY County 2008]), quoting *Matter of Steinbeck v Gerosa*, 4 NY2d 302, 317 [1958], and citing *Chanler v Roberts*, 200 AD2d 489, 491 [1st Dept 1994] [to

agree to share in profits without submitting to burden of making good the losses renders the purported partnership agreement a nullity]; *Moses v Savedoff*, 96 AD3d 466, 470 [1st Dept 2012] [“(i)t is axiomatic that the essential elements of a partnership must include an agreement between the principals to share losses as well as profits”).

According to Lancaster, “[a]t this juncture, we did not agree to split profits or losses of JAL-TX given the noncompete Mr. Lis had with Amlon. Ultimately, Mr. Lis did not share in either the profits or losses. Rather, Mr. Lis received an annual salary plus bonus each year for the services he performed for JAL-TX” (Lancaster aff, ¶ 13). Moreover, “[a]t no time, was Mr. Lis a 50/50 owner of JAL-TX with me. At no time did Mr. Lis share in 50% of the profits or 50% of the losses of JAL-TX. Moreover, Mr. Lis never agreed to share in any of the losses of JAL-TX. Mr. Lis never offered to invest any capital into JAL-TX. Rather, Mr. Lis was a salaried employee hired by me to perform certain duties for the benefit of JAL-TX” (*id.*, ¶ 17). Indeed, according to Lancaster, in 2016, during the first year of its business, JAL-TX had a loss of \$22,052, which Lancaster shouldered alone (*id.*).

With respect to management and control, Lancaster refutes Lis’ argument that “he was the mastermind for the business plan for JAL-TX,” and that Lis formulated “a business strategy for JAL-TX with which he expected me to cooperate without contributing to the strategy” (Lancaster aff, ¶ 4). Rather, “Mr. Lis and I had agreed that he would be responsible for efforts to acquire customers and for invoicing the various projects. All matters from that point forward would be overseen or handled by myself or my staff at Gulf Premier” (*id.*). Lancaster further alleges that Lis “never had any responsibility for JAL-TX’s finances, although for much of our relationship he had access to the company’s accounts [because] [t]hose areas were principally my

responsibility. Likewise, while he was involved in sales, he never had any authority for entering into contracts on JAL-TX's behalf. Any contracts needed to be approved by me" (*id.*, ¶ 22).

Finally, with respect to capital contribution, Lancaster argues that Lis contributed no capital to the "partnership," and that the only capital contribution was in the form of a loan from Lancaster's parents, which Lis admits (*see* Lis dep, at 64-65).

Accordingly, there are substantial questions of fact concerning whether or not Lis and Lancaster ever formed an oral partnership, foreclosing summary judgment on the first cause of action for a declaratory judgment. Given this determination, summary judgment is also denied with respect to the eighth cause of action for an accounting of the alleged partnership. Until it is determined that there was an enforceable oral partnership (or fiduciary relationship between Lis and Lancaster), there is no basis to order an accounting (*Simon v Ross*, 309 AD2d 667, 667 [1st Dept 2003] ["(i)n the absence of an existing partnership or other fiduciary relationship, plaintiff was not entitled to an equitable accounting"]).

**b. Motion to Dismiss Counterclaims and Third-Party Complaint**

Lis moves for summary judgment dismissing all of the counterclaims and third-party claims that survived this court's May 14, 2021 order. However, questions of fact also preclude summary dismissal of the counterclaims and third-party complaint.

**i. Misappropriation of Trade Secrets (Fifth Counterclaim)**

JAL-TX alleges in the fifth counterclaim for misappropriation of trade secrets that Lis took its confidential business practices and customers to create an identically named company in New York to service JAL-TX's customers using its same business practices, which resulted in JAL-NY successfully building a multi-seven figure revenue in one year (counterclaims [NYSCEF Doc No. 575], ¶¶ 82-90, 120-129).

Lis raises three bases to dismiss this counterclaim as a matter of law: (1) Lis and not JAL-TX is the owner of the alleged trade secrets; (2) Lis never signed a non-disclosure agreement to maintain the confidentiality of the trade secrets; and (3) Lancaster abandoned JAL-TX, so that it could not have suffered any injury. However, there are significant factual disputes that warrant denial of the motion.

“To establish a claim for misappropriation of trade secrets, the plaintiff must demonstrate that it ‘possessed a trade secret, and [] that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means’” (*Informa Bus. Intelligence v Reich*, 2022 NY Misc LEXIS 5645, at \* 7 [Sup Ct, NY County 2022], quoting *Schroeder v Pinterest Inc.*, 133 AD3d 12, 27 [1st Dept 2015]). A trade secret is defined as “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it” (*Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993] [citation and quotation mark omitted]). “Where customers are not known in the trade or are discoverable only by extraordinary efforts, the courts do not hesitate[] to protect customer lists and files as trade secrets” (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 393 ([1972])). Further, if “one discloses or uses another’s trade secret without a privilege to do so” knowing (or when one should know) that the disclosure is made in confidence, “the disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him,” sufficient to satisfy the second element of misappropriation (*Zylon Corp. v Medtronic*, 2015 WL 1779010, \* 12, 2015 NY Misc LEXIS 1276, \* 27 [Sup Ct, NY County 2015]).

Lis does not challenge the information that JAL-TX claims are its trade secrets are, in fact, trade secrets, and therefore qualify for trade secret protection. Rather, Lis argues that the

misappropriation of trade secret counterclaim fails as a matter of law because the trade secrets “belonged to Lis before he teamed up with Lancaster, and Lancaster never sought any agreement to change that fact” (Lis memorandum, at 45). However, Lis fails to provide any factual support for this conclusory argument.

Moreover, Lancaster raises issues of fact as to whether the trade secrets were developed by JAL-TX over the course of its business. Lancaster alleges that he was involved in developing the business strategy and pricing for JAL-TX, as well as developing and maintaining its customers (Lancaster aff, ¶¶ 18-34; *see also* 4/2/19 Lis aff, ¶ 5 [f] [“I made every strategic decision (admittedly very often in consult with my 50% partner, Jason Lancaster)”]). Indeed, the mere fact that Lis may have participated in the development of those trade secrets as either JAL-TX’s employee or partner, does not alter the fact that the trade secrets could belong to JAL-TX (*see Wieder v Chemical Bank*, 202 AD2d 168, 169 [1st Dept 1994] [“it is axiomatic that materials or products developed by an employee in the course of his or her employment, absent any agreement to the contrary, belong to his or her employer”]).

Lis next argues that the misappropriation of trade secret claim fails because “Lancaster never asked Lis to sign any agreement to keep any of the alleged trade secrets confidential” (Lis memorandum, at 45). However, whether or not Lis was asked to sign a confidentiality agreement by JAL-TX is not dispositive of whether or not Lis and JAL-NY misappropriated its trade secrets. Rather, JAL-TX is only required to show that it took measures to protect the secrecy of its confidential information (*see Schroeder*, 133 AD3d at 28). Lancaster alleges that the confidential information about JAL-TX’s customers’ names and contact information of its customers, vendors and suppliers were available to Lis, but were not readily ascertainable to others. For instance, it could not be looked up online or in a phonebook (Lancaster aff, ¶

32). Indeed, Lancaster specifically testifies that JAL-TX expected Lis to keep that information confidential (Lancaster dep, at 223-224; *see also* Lancaster aff, ¶ 32 [it was always JAL-TX's understanding that Lis would maintain the confidentiality of its customers, vendors, pricing and business strategy]). Accordingly, Lis' contention that JAL-TX took no steps to protect its trade secrets currently involves questions of fact that cannot be resolved on summary judgment.

Lis also argues that Lancaster abandoned JAL-TX, and that, therefore, there can be no injury arising from the misappropriation of trade secrets (Lis memorandum, at 45). However, by contrast Lancaster contends that it was Lis who sabotaged JAL-TX, and ensured that its business would be decimated, so that only JAL-NY would benefit from JAL-TX's business efforts from 2016 through 2018. According to Lancaster, Lis specifically told JAL-TX's customers to suspend business with JAL-TX (Lancaster aff, ¶ 36; *see also* counterclaims, ¶ 62). Lancaster further alleges that Lis also informed him that "every effort would be made to steer customers away as long as Lancaster was the owner of JAL[-TX]" (counterclaims ¶ 62; Lancaster aff, ¶ 36). According to Lancaster, Lis also had JAL-TX invoices sent to its customers with the EIN number of JAL-NY to ensure payment went to that EIN number (Lancaster declaration [NYSCEF Doc No. 97], ¶ 32). Accordingly, the events surrounding the end of JAL-TX's business present questions of fact that cannot be resolved on summary judgment.

**ii. Unjust Enrichment (Third Counterclaim)**

In the third counterclaim for unjust enrichment, Lancaster alleges that Lis and JAL-NY were unjustly enriched because they "improperly obtained and retained from JAL the value of JAL's trade secrets and/or confidential information without just compensation to JAL" (counterclaims, ¶ 108). An unjust enrichment claim requires that a party was enriched at the other

party's expense and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]).

Lis argues that the unjust enrichment counterclaim fails because it is “derivative of the trade secret counterclaim” and “because the trade secret counterclaim should be dismissed, the unjust enrichment claim should also be dismissed” (Lis memorandum, at 46). However, it is clear that, even though some of the allegations may overlap, the unjust enrichment claim is not duplicative of the trade secret counterclaim, and can stand alone (*see Travelsavers Enterp., Inc. v Analog Analytics, Inc.*, 145 AD3d 1003, 1007 [2d Dept 2017] [permitting both a cause of action for misappropriation of trade secrets, and an unjust enrichment claim alleging that the defendant obtained the plaintiff's trade secret information by deception]; *see also Richmond Global Compass Fund Capital Mgt. Gp v Nascimento*, 224 AD3d 558, 559 [1st Dept 2024]).

iii. **Breach of Duty of Loyalty (First Counterclaim), Diversion of Corporate Opportunity (Seventh Counterclaim), Constructive Trust (Eighth Counterclaim)**

Lis argues that, because Lancaster testified that JAL-TX had an agreement with Gulf Premier pursuant to which it merely “contracted [Lis]” (Lancaster dep, at 106), Lis was a Gulf Premier employee and Gulf Premier is not a party to the counterclaims or third-party complaint. Thus, Lis argues, JAL-TX's counterclaims for breach of the duty of loyalty, diversion of corporate opportunity, and constructive trust all fail (Lis memorandum, at 46-47).

However, this argument is in complete contradiction to Lis' central position in this litigation – that he was a partner in, or part owner of, JL-TX. For instance, Lis has already stated in a sworn affidavit that “[t]here can be no dispute that I was partners with Mr. Lancaster” (4/2/19 Lis aff, ¶ 2). Lis also alleged “[c]learly the ‘A’ [in JAL] stood for my name as [Lancaster's] 50/50 co-venture partners” (*id.*). Lis further alleged that “[f]rom the outset, it is clear JAL was a company

belonging to two co-venture partners operating under 50/50 doctrine” (*id.*). According to Lis, to facilitate his salary for his work on JAL-TX’s behalf, he “would be paid through Resourcing Edge, the third-party payroll company that administered benefits and payroll for [Gulf Premier], Overland Distribution and Overland Express” (*id.*, ¶ 35). The purpose of doing so was that “[t]his would simplify payroll for our budding company and allow JAL[-TX] to leave the payroll administrative work to Ms. Barbe Woeste of Overland Distribution” (*id.*).

In 2017, the parties decided to switch from Resourcing Edge, and to consolidate the JAL-TX and Gulf Premier payroll accounts (*id.*, ¶ 37). Lis clarified that “[a]t no point in 2016 was I an ‘employee’ of Resourcing Edge, who generated my W2” and “I was at no point an ‘employee’ of [Gulf Premier] or any other entity within the Overland family. Rather I worked for myself and for my partner, in the 50/50 co-venture JAL[-TX]” (*id.*, ¶¶ 38-39). According to Lis, it was “absurd” and a “ridiculous notion” that he was Gulf Premier’s employee (*id.*, ¶ 3). Lis alleged that “at no time was I ever an ‘employee’ of anyone in or affiliated with the Lancaster family” (*id.*, ¶ 5 [b]). Lis specifically alleges that he never had access to any of Gulf Premier’s files, documents, records, customer lists, never had a Gulf Premier email or login, was not listed on Gulf Premier’s website, and never collaborated with the only other person who worked there besides Lancaster (*id.*, ¶ 4). Indeed, according to Lis, the allegation that he was employed by Gulf Premier was a “fictitious arrangement” for which “Mr. Lancaster provides no proof [], as it does not exist” (*id.*).

Given Lis’ own allegations, there are significant questions of fact as to whether or not Lis was a partner or employee in JAL-TX or Gulf Premier that must be resolved before the court can even consider dismissing any of these counterclaims.

**iv. Unfair Competition (Second Counterclaim)**

Lis argues that JAL-TX cannot maintain its second counterclaim for unfair competition, because, as “Lancaster abandoned the enterprise...there remained nothing for Lis to ‘unfairly compete’ with” (Lis memorandum, at 47). Lis also argues that the trade secrets claim must also be dismissed on this basis because there was “no goodwill for Lis to coopt by misusing a trademark” (*id.* at 48). However, as previously discussed, there are issues of fact as to whether Lancaster “abandoned” JAL-TX, or whether, as Lancaster asserts, Lis sabotaged JAL-TX, to ensure that JAL-NY would be successful. As such, the motion to dismiss these counterclaims is denied.

**v. Tortious Interference with Contractual Relations (Sixth Counterclaim)**

In their sixth counterclaim for tortious interference with existing and prospective contractual relations, Lancaster and JAL-TX allege that “Lis actively conspired with malice to, and did, intentionally and unjustifiably interfere with JAL’s business relationships by: (a) obtaining JAL’s confidential client data during his employment at Gulf Premier/JAL; (b) contacting and soliciting clients from said lists for JAL-NY during and following his employment with Gulf Premier/JAL; (c) diverting existing and future business of JAL to JAL-NY; and, (d) engaging in other unfair or improper means and with the intent to interfere with JAL’s business relationships” (counterclaims, ¶ 133). Lis moves for dismissal of the tortious interference counterclaim on the ground that “this counterclaim is not about any existing contract, because there is no indication that any contract between the Texas corporation and any third party that was ever breached” (Lis memorandum, at 48).

“In order to state a cause of action for tortious interference with contractual relations plaintiffs must show that defendants intentionally and through improper means induced the breach

of a contract between plaintiff and a third party” (*WFB Telecomms., Inc. v NYNEX Corp.*, 188 AD2d 257, 257 [1st Dept 1992]). “The related tort of interference with business relations applies to those situations where the third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant” (*id.*). Lis argues that there was no specific contract that was breached and “given that Lancaster never even tried to make a contract with any customer after Lis left, [thus], there can be no prospective contract that Lancaster thinks he should have but did not get” (Lis memorandum, at 48-49).

However, JAL-TX does not have to show a written contract with any specific customer to sustain this claim (*see Hannex Corp. v GMI, Inc.*, 140 F3d 194, 205 [2d Cir 1998] [“it is well-settled that a plaintiff can recover if that plaintiff can prove that the defendant tortiously interfered with ‘a continuing business or other customary relationship not amounting to a formal contract’”] [citation omitted]).

Moreover, JAL-TX does not have to show that it made specific efforts to obtain future business, but only that Lis and JAL-NY intentionally took steps to interfere with its future business relationship (*see Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004] [“conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship”]; *534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011] [“A claim for tortious interference with a prospective business relationship (i.e., an economic advantage) must allege: (1) the defendant's knowledge of a business relationship between the plaintiff and a third party; (2) the defendant’s intentional interference with the relationship; (3) that the defendant acted by the use of wrongful means or with the sole purpose of malice; and (4) resulting injury to the business relationship”]).

Moreover, there are issues of fact as to whether Lis and JAL-NY engaged in tortious interference, given Lancaster's allegations that Lis diverted existing business that it had with U.S. Ecology and Clean Harbors from JAL-TX to JAL-NY (Lancaster aff, ¶¶ 30-31).

**2. Lancaster's Motion for Summary Judgment (Motion Sequence No. 016)**

Despite his position in opposition to Lis' motion for summary judgment that there are material factual issues with respect to whether the parties entered into a partnership, Lancaster brings a separate motion for summary judgment in which he asserts that Lis' complaint must be dismissed on the ground that this court's prior decision dismissing Lancaster's direct claims also precludes any direct claims by Lis. Lancaster reasons that, because Lis is not a shareholder of JAL-TX, he cannot bring derivative claims on JAL-TX's behalf. Lancaster bases his motion on this court's May 14, 2021 order, which dismissed the sixth and tenth causes of action, both asserted by JAL-TX (violations of GBL §§ 349, 360-L), and all of Lancaster's individual counterclaims.

Lancaster's motion for summary judgment is denied, as Lis is not bringing suit as JAL-TX's shareholder. Rather, Lis has always claimed the rights of a general partner in a two-person de-facto partnership comprising himself and Lancaster, and has argued in this litigation that New York partnership law applies to this relationship, rather than Texas corporation law. Lis has repeatedly stated his position: (1) that he and Lancaster had a de-facto New York partnership while they co-managed the Texas corporation; (2) that the parties did not observe any corporate formalities; and that (3) JAL-TX was nothing more than a tool for the New York partnership. Moreover, Lis has always sought, as damages, the final distribution of what is owed to each partner.

Indeed, Lancaster's argument makes little sense at this late state of litigation, after discovery has been completed, and a note of issue filed. Lancaster's position has always been to

contest Lis’ claim that the parties had an oral partnership, and to assert that Lis was merely JAL-TX’s employee. Lancaster’s new argument is completely inconsistent with his prior position. Now, Lancaster appears to concede that Lis was a shareholder in JAL-TX, arguing that “each and every one of Lis’s claims arise from Lis accusing Lancaster of violating JAL-TX’s rights,” and “[t]he only alleged harm here is that Defendants ‘misappropriated’ and ‘pillaged’ money from JAL-TX – not Lis” (Lancaster memorandum [NYSCEF Doc No. 581], at 10).

“Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding” (*Nestor v Britt*, 270 AD2d 192, 193 [1st Dept 2000] [citation omitted]; *accord New Hampshire Ins. Co. v MF Global Fin. USA Inc.*, 204 AD3d 141, 155 [1st Dept 2022]; *Herman v 36 Gramercy Park Realty Assoc., LLC*, 165 AD3d 405, 406 [1st Dept 2018]). Accordingly, this court finds that Lancaster is precluded from adopting a position contrary to that which he has always asserted in this litigation, and his motion for summary judgment is denied.

Accordingly, it is

**ORDERED** that plaintiff’s motion for summary judgment (Motion Sequence No. 015) is denied; and it is further

**ORDERED** that defendants’ motion for summary judgment (Motion Sequence No. 016) is denied; and it is further

**ORDERED** that the parties are to attend a pre-trial conference on July 8, 2024, at 10:00am, in person, in the courtroom, Room 248, 60 Centre Street.

5/13/2024  
DATE

  
MELISSA A. CRANE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	