

Utsey v Utsey
2026 NY Slip Op 31077(U)
March 18, 2026
Supreme Court, Kings County
Docket Number: Index No. 1876/2017
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18th day of March, 2026.

P R E S E N T :
HON. WAVNY TOUSSAINT,
Justice.

KEITH UTSEY,

Plaintiff,

- against -

TINA UTSEY,

Defendant.

Index No.: 1876/2017

DECISION AND ORDER

The following papers numbered 1 to read herein	NYSCEF Doc. No.
Notice of Motion/Order to Show Cause/ and Affidavits (Affirmations) Annexed	<u>179-185</u>
Cross Motion and Affidavits (Affirmation) Annexed	<u>190-195</u>
Answers/Opposing Affidavits (Affirmations)	<u>189</u>
Reply Affidavits (Affirmations)	<u>196; 197</u>
Affidavit (Affirmation)	_____
Other Papers	_____

Plaintiff moves (Seq. 10) for an order, pursuant to CPLR § 4403, confirming the report of the court-appointed referee, entering a judgment in accord therewith, and directing the court-appointed referee to disburse all funds currently held. Defendant opposes the motion and cross-moves (Seq. 11) for an order, pursuant to CPLR § 4403, rejecting the court-appointed referee’s report and for court intervention re-calculating same. Plaintiff opposes defendant’s motion.

Background

The Action and its Procedural Posture

This is a partition action initiated by Keith Utsey (“plaintiff”) against his half-sibling, Tina Utsey (“defendant”), regarding the 3-family property located at 238 Decatur Street, Brooklyn, New York (the “property”), held by them as tenants in common. Summary judgment as to partition was granted in plaintiff’s favor by order of the Court dated August 2, 2019 (NYSCEF Doc. No. 19). Among other things, William D. Bowman, Esq. was appointed referee (“Referee Bowman”) to take proof and report as to plaintiff’s and defendant’s title and interest in the property, which was to be sold at public auction. The parties thereafter engaged in protracted motion practice relative to their asserted rights. As a result, a partition judgment ordering the sale of the property, among other things, was not entered until March 9, 2022 (NYSCEF Doc. No. 84). After further motion practice and a bankruptcy filing by defendant, ultimately, by order dated July 2, 2024, a partition sale was ordered to proceed “forthwith” in accord with the partition judgment entered on March 9, 2022 (NYSCEF Doc. No. 124). The property was sold on November 22, 2024 for \$2,255,000 and equal disbursements were made to the parties of \$691,905.17 (NYSCEF Doc. No. 177 at p. 2). Prior to closing, the Court granted plaintiff’s motion (Seq. 08) to hold \$600,000 in escrow to permit Referee Bowman to calculate credits due to each party, post-closing (NYSCEF Doc. No. 142).

The Referee’s Report

Referee Bowman was appointed pursuant to the Court order dated August 2, 2019. He was tasked with detailing the allocation of the net proceeds between plaintiff and defendant upon the sale of the property.

Having taken into consideration the full scope of the litigation as prosecuted by the parties; the voluntary documentary submissions of the parties for review, including documentation of their respective expenses and disbursements relative to their claimed interests in the property prior and subsequent to the sale of the property; among other things, Referee Bowman issued the June 6, 2025 Supplemental Accounting Report (the "Referee Report"; NYSCEF Doc. No. 177) .

Among determining the various expenses, disbursements, carry costs, repairs, credits and offsets due to each party, Referee Bowman determined plaintiff is entitled to \$254,246.56 and defendant is entitled to \$321,778.44, payable from the remaining sales proceeds of \$600,000.00. Referee Bowman also determined plaintiff is entitled to \$3,500.00 as reimbursement for costs expended for roof repairs. Finally, Referee Bowman requests a legal fee of \$20,475, as itemized in the "Legal Fees" statement (NYSCEF Doc. No. 178) accompanying the Referee Report. Confirmation of this report is now at issue.

The Parties' Contentions

Motion Seq. 10

By Motion Sequence 10, plaintiff moves to confirm the Referee Report and for a judgment directing a distribution of the remaining \$600,000 sales proceeds held in escrow by Referee Bowman. Plaintiff argues the Court should fully adopt and confirm the Referee Report, as it reflects a fair administration of the interests of the parties as to the remaining sales proceeds.

Defendant opposes and contends Referee Bowman's calculation of credits due to each party is fatally flawed, in that the referee arbitrarily deducted credits due, from plaintiff to defendant, for mortgage, carrying charges and miscellaneous expenses.

Defendant contends she was entitled to recover 50% of such payments made for such costs and expenses to which plaintiff did not contribute. Defendant further states Referee Bowman should not have taken up the issue of whether plaintiff was entitled to attorney's fees, as doing so exceeded the scope of his duties as referee. Moreover, defendant contends the Court should deem the initial referee report controlling as "law of the case" with respect to credits to be applied to each party, particularly regarding the mortgage taken out by defendant. Defendant contends the Referee's recommendation that plaintiff be credited with 16 months of expenses during the period the matter was stayed on account of defendant's bankruptcy filing; along with a credit to plaintiff of \$65,370.00 in attorney's fees related thereto, among other things, should be summarily rejected.

In reply, plaintiff again reiterates the position stated in the moving papers and requests the Court to determine the motion and cross-motion on the papers already submitted.

Motion Seq. 11

On the motion (Seq. 11), defendant asks the Court to reject the Referee Report and instead intervene to re-calculate the parties' respective interests and distributions due to them. Defendant relies essentially on the same arguments offered in opposition to Motion Seq. 10 and accordingly, submits that the re-calculated disbursements should be adjusted by the Court to reflect a net payment to plaintiff of \$137,150.27 (vs. the \$254,246.56 proposed in the Referee Report) and a net to defendant of \$457,574.09 (vs. the \$321,778.44 proposed in the Referee Report). In arriving at the foregoing figures, defendant's distribution analysis first sets an equal split of the escrowed funds at \$300,000 each for plaintiff and defendant, before then applying a series of deductions and credits to arrive at

the above stated net payment amounts. In doing so, defendant argues the Referee Report should be rejected, as the referee purportedly made certain determinations for credits and deductions "without justification", among other reasons (See NYSCEF Doc. No. 191 at pars. 33-36). Defendant nonetheless defers to the Court with respect to Referee Bowman's legal fee request (See NYSCEF Doc. No. 191 at pars. 65-69).

Plaintiff's opposition relied essentially on the same arguments offered in support of Motion Seq. 10 and in reply to defendant's opposition thereto.

Discussion

Applicable Law of Partition

A joint tenant or tenant-in-common to real property may maintain an action to partition of the property. The interest may be "an estate of inheritance, or for life, or for years." (*Paquet v Murphy*, 242 AD3d 1214, 1215 [2d Dept 2025]). Importantly, in all circumstances, the right to partition is not absolute and the remedy is always subject to the equities between the parties (*Id.*; see also *Clarke v Clarke*, 227 AD3d 659, 661 [2d Dept 2024]).¹ As such, each party herein is entitled to receive a proper share of the property and its benefits (here proceeds from the sale) (*Cruz v Cruz*, 213 AD3d 805, 806 [2d Dept 2023]). As an action for partition is "equitable in nature", the court may adjust the rights of the parties where one party obtains more than his or her proper share of rents or profits

¹ The Court notes this matter is not governed by RPAPL § 993, known as "the Heirs Act", which was passed in 2019 to amend traditional partition proceedings. This new law was intended to protect individuals who hold real estate as tenants-in-common from predatory real estate speculators (Senate Mem in Support, New York Bill Jacket, 2019 S.B. 4865 Ch 596) (*See Laurelton Estates, LLC v Prince*, 244 NYS3d 120, 127-128 [2d Dept 2025]). The Heirs Act permits partition by sale only after all of the heirs have an opportunity to purchase the interests of the selling co-tenants. Only then may the court direct a commercially reasonable sale, which need not be by auction. Here, there was no other fractional interest holder seeking to force the sale of the property.

derived from the property (*Cruz*, 213 AD3d at 806; *see also Kiernan v Martin*, 48 AD3d 641, 642 [2d Dept2008]; *Wawrzusin v Wawrzusin*, 212 AD2d 779, 779 [2d Dept 1995]).

The Role of the Referee

The role of the referee is to determine the issues referred, as well as to resolve conflicting testimony and matters of credibility. Pursuant to CPLR § 4403, the court may confirm or reject in whole or in part any report by the referee. As a general rule, the court will not disturb the referee's findings, and the report should be confirmed, if the referee's findings are supported by the record and if the referee has already defined the issues and fairly resolved matters of credibility (*Wynkoop v 622A President Street Owners Corp.*, 169 AD3d 1103, 1105 [2d Dept 2019]; *Spodek v Feibusch*, 55 AD3d 903, 903 [2d Dept 2008]).

Motion Seqs. 10 and 11

The Court considers both motions together since resolution of each hinges on whether the Referee Report should be confirmed; or rejected and modified. It is evident to the Court Referee Bowman was rigorous in his assessment of the positions offered by both plaintiff and defendant, focusing on the equitable nature of this partition action. Having devoted fifty-eight (58) hours in the disposition of this matter (NYSCEF Doc. No. 178), Referee Bowman fairly considered the prolonged and delayed sale of the property caused by defendant's bankruptcy filing and the attendant consequences incurred by plaintiff flowing therefrom. He rejected plaintiff's claim for "lost" use of money and gave appropriate credit to defendant for her payment of the mortgage covering the period August 2020 through October 2024, among other things.

Referee Bowman also clearly set forth his analysis when addressing both plaintiff's and defendant's positions on matters relating to reimbursements and credits claimed for

appliances purchased, roof repairs, sale notice publication costs, discrepancies surrounding the failed listing attempts for a private sale of the property; and importantly, defendant's occupancy of the property over the course of the litigation up to the time of the sale. The Court finds Referee Bowman arrived at a well-reasoned determination of the parties' interest herein.

The Court finds defendant's arguments offered for rejecting (and re-calculating) the distribution amounts set by Referee Bowman unavailing. It appears to the Court that the Referee Report is well supported by the record and fairly resolves all matters presented by the parties. The Court therefore declines to re-calculate the apportioned disbursements as determined by Referee Bowman who, in great detail, sets forth both the factual and deliberative basis for the findings leading to the recommended payments to plaintiff and defendant. Defendant has insufficiently demonstrated a basis for any departure from the findings set forth in the Referee Report.

Applicability of the "Law of the Case" Doctrine

Defendant relies heavily on the doctrine of "law of the case" to argue that the "Referee in reviewing the papers before him has no basis to disprove the additional credits being sought by Defendant" (*See* NYSCEF Doc. No. 189 at par. 7) as "[t]he issue of responsibility for payments of the mortgage and carrying charges has already been determined in the [initial referee report] and confirmed by this Court's Judgment" (*See* NYSCEF Doc. No. 191 at par. 52).

The critical intervening event between the issuance of the initial referee report on January 5, 2021 and the supplemental report issued June 6, 2025, among other things, was the bankruptcy filing by defendant. This filing appears to have been strategically initiated

in an attempt to stop the first sale date; and perhaps cancel the sale all together. Under these circumstances, and in the context of the protracted litigation between the parties, Referee Bowman determined “it was not *equitable* for Mr. Utsey to contribute to the mortgage during the period that the [bankruptcy] stay was imposed” (NYSCEF Doc. No. 177 at p. 6; *emphasis supplied*). He therefore disapproved the additional mortgage credit for the period sought by defendant. While defendant deems this “equitable” consideration barred by “law of the case”, the Court finds this equitable consideration wholly appropriate under the circumstances; which certainly does not act as a barr to the supplemental adjustments made by Referee Bowman.

“The doctrine of the law of the case applies only to legal determinations that were necessarily resolved on the merits [a] prior decision [of the court], and to the same questions presented in the same case” (*Deutsche Bank Natl. Trust Co. v Gambino*, 181 AD3d 558, 559 [2020]). The doctrine articulates a sound policy that once an issue is “judicially determined, that should be the end of the matter as far as judges and courts of co-ordinate jurisdiction are concerned” (*Matter of Oyster Bay Assoc. Ltd. Partnership v Town Bd. of Town of Oyster Bay*, 21 AD3d 964, 966 [2005]).

However, “law of the case rests on a foundation that . . . distinguishes it from issue and claim preclusion. Whereas the latter concepts are rigid rules of limitation, law of the case is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power [citation omitted]. As such, law of the case is necessarily “amorphous” in that it “directs a court's discretion,” but does not restrict its authority” (*People v Evans*, 94 NY2d 499, 503 [2000]). Furthermore, and more directly applicable here, “[i]n cases involving references to report, the Supreme

Court is the ultimate arbiter of the dispute and has the power to reject the referee's report and make new findings" (*Bank of Am., N.A. v Barton*, 199AD3d 625, 627 [2d Dept 2021 citing *Countrywide Home Loans, Inc. v Hershkop*, 188 AD3d 1148, 1149 [2d Dept 2020]).

By the very interim nature of the initial referee report, the question of the final determination of the parties' interests herein, and the apportionment of same, was left open for further consideration. There was no final determination of those interests made back on January 5, 2021, as there could not have been since the property had not yet been sold. In any event, the Court retained ultimate authority to render a determination as to credits and adjustments between the parties and the referee did not exceed his authority in considering such issues. His determinations, in any event, were supported by the record (*Perez v Fiore*, 78 AD3d 1143, 1144 [2d Dept 2010]). Accordingly, defendant's argument that "law of the case" bars the referee from submitting a supplemental report, now confirmed by the Court, is *per se* meritless and is hereby rejected.

The Award of Referee's Fees

Referee Bowman shall be compensated for the considerable time and effort expended in resolving this partition matter. According to the "Legal Fees" statement submitted (NYSCEF Doc. No. 178) by Referee Bowman, 58 hours were expended herein, including the review of the case file; the conduct of hearings, conferences, and telephone calls; and the preparation of the reports dated January 5, 2021 and June 6, 2025. Referee Bowman spent considerable time reviewing the parties' submissions both before and after the partition sale, in an effort to appropriately determine the credits and adjustments due each party therefrom. The stated billing rate of \$350/hour thus yields a fee of \$20,300 (not the \$20,475 as listed in the statment, presumeably reflecting a mathamatical error). The

Court finds this amount to be reasonable and customary based upon the complexity and duration of this matter, and the exemplary services rendered.

Conclusion

Accordingly, it is now

ORDERED, that plaintiff's motion (Seq. 10) for an order, pursuant to CPLR § 4403, confirming the report of the court-appointed referee, entering a judgment in accord therewith, and directing the court-appointed referee to disburse all funds currently held, is granted to the extent set forth below; and it is further

ORDERED, that defendant's cross-motion (Seq. 11) for an order, pursuant to CPLR § 4403, rejecting the court-appointed referee's report and for court intervention re-calculating same is denied in every respect; and it is further

ORDERED, that Referee Bowman's request for legal fees is granted, but is adjusted to reflect the amount of \$20,300 (not \$20,475 as set forth in NYSCEF Doc. No. 178), with the excess \$175 to be split equally (i.e., \$87.50) between plaintiff and defendant; and it is further

ORDERED, that Referee Bowman, within twenty (20) days from the date this order is uploaded to e-file, shall make the following disbursements by escrow check as follows:

- 1) the sum of \$254,334.06 (\$254,246.56 + \$87.50) shall be made payable to "Keith Utsey";
- 2) the sum of \$321,865.94 (\$321,778.44 + \$87.50) shall be made payable to "Tina Utsey";
- 3) the sum of \$20,300 shall be made payable to "William D. Bowman, Esq."; and 4) the sum of \$3,500 shall be made payable to "Keith Utsey"; and it is further

ORDERED, that Referee Bowman shall upload a final report of accounting reflecting the disbursements as directed hereby; and it is further

ORDERED, that plaintiff's counsel shall serve a copy of this order, with Notice of Entry, upon defendant's counsel within ten (10) days from the date this order is uploaded to e-file.

Any other requested relief not specifically granted has been considered and is expressly denied.

The clerk shall enter judgment accordingly.

This constitutes the decision, order and judgment of the Court.

For Clerks use only

MG _____

MD _____

Motion Seq. 10 & 11

E N T E R



J.S.C.

**HON. WAVNY TOUSSAINT
J. S. C.**

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KINGS COUNTY CLERK
FILED