

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Hes v. Zirkin

Hes, 2026 NY Slip Op 00615 (Supreme Court of the State of New York Appellate Division First Department 2026) · No. Index No. 155457/22; Appeal No. 5780; Case No. 2024-06443 · Decided February 10, 2026

SUMMARY

The Appellate Division, First Department, unanimously affirmed an order dismissing Joey Hes's malicious prosecution claim against Samantha Zirkin. The court held that the law-of-the-case doctrine bound the plaintiff to the prior finding that the pleadings failed to sufficiently allege that the criminal proceedings terminated in her favor.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Kennedy, J.P.; Scarpulla, J.; Gesmer, J.; Mendez, J.; Hagler, J.
JURISDICTION	New York Supreme Court, Appellate Division, First Department
DECIDED	February 10, 2026
DOCKET	Index No. 155457/22; Appeal No. 5780; Case No. 2024-06443
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiff appealed from an order of Supreme Court, New York County, granting defendant Samantha Zirkin's motion to dismiss the malicious prosecution claim.
STANDARD OF REVIEW	The Appellate Division reviewed the pleading dismissal and application of the law-of-the-case doctrine; the opinion does not state a separately labeled standard of review.
PRECEDENTIAL VALUE	Published
PARTIES	Joey Hes v. Samantha Zirkin

TOPICS

motions to dismiss

pleadings

civil procedure

appellate procedure

torts

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the law-of-the-case doctrine bound plaintiff to the prior motion court's determination that the malicious prosecution claim failed to plead favorable termination of the criminal proceedings.
2. Whether dismissal of plaintiff's malicious prosecution claim against Samantha Zirkin should be affirmed.

HOLDINGS

1. The law-of-the-case doctrine applied because the prior order of the same court and justice necessarily and expressly decided that plaintiff had not adequately pleaded favorable termination of the criminal proceedings.
2. Dismissal of plaintiff's malicious prosecution claim against Samantha Zirkin was affirmed because plaintiff was bound by the prior determination that the claim inadequately pleaded favorable termination.

KEY QUOTATIONS

*“The doctrine of law of the case may be applied where an issue before the court was necessarily decided by a prior order of the same court and Justice” (*1)*

*“While plaintiff appealed the prior order, she never perfected the appeal and is thus bound by the motion court's finding that the malicious prosecution claim inadequately pled the required element that the criminal proceedings terminated favorably in her favor.” (*1)*

FACTUAL BACKGROUND

Plaintiff alleged that defendants instigated criminal proceedings against her and asserted a malicious prosecution claim among several tort claims. The prior motion court found that plaintiff had not sufficiently alleged that the criminal proceedings terminated in her favor and had also failed to establish actual malice. Plaintiff did not perfect her appeal from that prior order.

PROCEDURAL HISTORY

Plaintiff commenced the action in 2022 and later amended the complaint to assert claims for false arrest, intentional infliction of emotional distress, defamation, and malicious prosecution. Supreme Court previously dismissed defendant Adam Zirkin's motion in full, finding that the malicious prosecution claim failed to plead favorable termination of the criminal proceedings and actual malice. Plaintiff served a second amended complaint asserting the same causes of action, and Supreme Court dismissed Samantha Zirkin's malicious prosecution claim; the Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of Pettus v Board of Directors, 169 AD3d 524, 525 [1st Dept 2019], appeal dismissed, 33 NY3d 1047 [2019]
- Real World Holdings, LLC v 393 W. Broadway, 236 AD3d 447, 447 [1st Dept 2025]
- Smith-Hunter v Harvey, 95 NY2d 191, 195 [2000]

OPINION

PER CURIAM.

Hes v Zirkin (2026 NY Slip Op 00615) Hes v Zirkin 2026 NY Slip Op 00615 Decided on February 10, 2026 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: February 10, 2026 Before: Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ. Index No. 155457/22|Appeal No. 5780|Case No. 2024-06443| [*1]Joey Hes, Plaintiff-Appellant, v Adam Zirkin, Defendant, Samantha Zirkin, Defendant-Respondent.

The Engel Law Group, PLLC, New York (Adam E. Engel of counsel) for appellant. Leino Law, New York (Robert G. Leino of counsel), for respondent. Order, Supreme Court, New York County (Lori S. Sattler, J.), entered on or about September 12, 2024, which, to the extent appealed from as limited by the briefs, granted defendant Samantha Zirkin's motion to dismiss plaintiff's claim of malicious prosecution, unanimously affirmed, with costs.

Plaintiff commenced this action in 2022 which, as amended, alleged causes of action against defendant for: (i) false arrest, (ii) intentional infliction of emotional distress, (iii) defamation, and (iv) malicious prosecution. By order dated August 11, 2023, the motion court granted defendant Adam Zirkin's motion to dismiss the complaint in full.

As to the malicious prosecution claim, the court found that plaintiff did not allege with particularity the basis by which the criminal court dismissed the charges against her and therefore failed sufficiently to allege that the criminal proceedings were terminated in her favor.

The court also found that plaintiff's pleadings did not establish the element of actual malice. Plaintiff then served a second amended complaint pleading the same causes of action. The doctrine of law of the case may be applied where an issue before the court was necessarily decided by a prior order of the same court and Justice (see Matter of Pettus v Board of Directors, 169 AD3d 524, 525 [1st Dept 2019], appeal dismissed, 33 NY3d 1047 [2019]; see also Real World Holdings, LLC v 393 W. Broadway, 236 AD3d 447, 447 [1st Dept 2025]).

Here, in the prior order the motion court expressly found that plaintiff's allegations did not sufficiently state that the criminal prosecution against her, allegedly instigated by defendants, was terminated in her favor, which is a required element of a claim for malicious prosecution (see

Smith-Hunter v Harvey, 95 NY2d 191, 195 [2000]). While plaintiff appealed the prior order, she never perfected the appeal and is thus bound by the motion court's finding that the malicious prosecution claim inadequately pled the required element that the criminal proceedings terminated favorably in her favor.

In view of the foregoing, it is unnecessary for this Court to consider whether plaintiff satisfied the other pleading elements of her malicious prosecution claim. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: February 10, 2026