

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 SUMMARY ORDER

4 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL
5 REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY
6 TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE
7 ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT
8 STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR
9 PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

10 At a stated term of the United States Court of
11 Appeals for the Second Circuit, held at the Thurgood
12 Marshall United States Courthouse, Foley Square, in the
13 City of New York, on the 10th day of September, two
14 thousand four.

15 PRESENT: HON. ELLSWORTH VAN GRAAFEILAND,
16 HON. DENNIS JACOBS,
17 HON. ROSEMARY S. POOLER,
18 Circuit Judges.

19 - - - - -X
20 DAVID MCCULLOUGH,

21 Plaintiff-Appellant,

22 -v.-

03-6193

23 UNITED STATES OF AMERICA

24 Defendant-Appellee,

25 - - - - -X

26 ON SUBMISSION FOR APPELLANT: DAVID MCCULLOUGH, pro se,
27 Sonyea, NY

28
29 ON SUBMISSION FOR APPELLEE: GLENN T. SUDDABY, United
30 States Attorney for the
31 Northern District of New
32 York

1 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,**
2 **ADJUDGED AND DECREED** that the judgment of the district
3 court be **AFFIRMED.**

4 Appeal from the United States District Court for the
5 Northern District of New York (Mordue, J.).

6 Plaintiff-Appellant David McCullough appeals from a
7 judgment of the District Court dismissing, for lack of
8 jurisdiction, his tort claims against the Clerk's Office
9 of the United States District Court for the Northern
10 District of New York (the "Clerk's Office"). Familiarity
11 by the parties is assumed as to the facts, procedural
12 context, and the specification of appellate issues. We
13 affirm.

14 McCullough seeks damages pursuant to the Federal Tort
15 Claims Act, 28 U.S.C. § 1346(b), arising from the
16 misdelivery of his mail by the Clerk's Office. The
17 gravamen of McCullough's complaint is that the
18 misdelivery resulted in an invasion of his privacy by
19 whomever received and (presumably) opened his mail. To
20 state a cause of action under the FTCA, McCullough was
21 required "to establish that, under New York law, a
22 private actor could be found liable in tort for the
23 unauthorized opening of another's mail." Hurwitz v.
24 United States, 884 F.2d 684, 686 (2d Cir. 1989). New
25 York does not recognize a cause of action for such a
26 tort, thus the district court correctly dismissed the
27 claim for lack of jurisdiction. And even if New York
28 courts recognized a privacy tort arising from the
29 misdelivery or unauthorized opening of mail, the FTCA
30 exempts from its waiver of sovereign immunity "any claim
31 arising out of the loss, miscarriage, or negligent
32 transmission of letters or postal matter," 28 U.S.C.
33 § 2680(b), a classification broad enough to encompass the
34 claims raised here, see, e.g., Marine Ins. Co. v. United
35 States, 378 F.2d 812, 813-15 (2d Cir. 1967).

