

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 17th day of September, two thousand and four.

PRESENT:

HON. JOSEPH M. McLAUGHLIN,
HON. GUIDO CALABRESI,
HON. PETER W. HALL,
Circuit Judges.

JAMES D'AMATO,

Plaintiff-Appellant,

v.

No. 03-7538

CHARLES RATTOBALLI,

Defendant-Appellee.

For Plaintiff-Appellant:

JAMES J. D'AMATO, *pro se*, Inverness, Florida.

For Defendant-Appellee:

MATTHEW K. FLANAGAN, L'Abbate, Balkan, Colavita
& Contini, L.L.P., Garden City, NY

Appeal from the United States District Court for the Eastern District of New York
(Seybert, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and it hereby is AFFIRMED.

Plaintiff-Appellant James D'Amato appeals the dismissal of his claims against Charles Rattoballi, the attorney representing D'Amato during a criminal investigation and, subsequently, a trial that ended with D'Amato's conviction for health care fraud in violation of 18 U.S.C. § 1347. In his complaint, D'Amato alleged, *inter alia*, violations of the Fifth, Sixth, and Fourteenth Amendments, and contraventions of various criminal statutes, *see* 18 U.S.C. §§ 371, 1506, 1623, 2071. He also sought to recover for legal malpractice under New York law. Construing D'Amato's constitutional arguments under 42 U.S.C. § 1983, the district court twice dismissed the complaint, without prejudice and with leave to amend, for failure to state a claim and for want of subject matter jurisdiction.

With respect to D'Amato's claims under various criminal statutes – none of which provide for a civil remedy – we affirm dismissal for substantially the reasons expressed by the district court. We also affirm with respect to D'Amato's state law malpractice claims, for these cannot succeed under New York law. *See, e.g., Carmel v. Lunney*, 70 N.Y.2d 169, 173 (1987).

With respect to the claims under § 1983, D'Amato does not allege that Rattoballi acted under color of state law, and his § 1983 claim is therefore unavailing. *See Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998).

We have considered all of D'Amato's arguments and find them to be without merit. The judgment of the district court is therefore AFFIRMED.

For the Court,

ROSEANN B. MACKECHNIE,

Clerk of Court

by: _____