

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn**

Civil Case No. 11-cv-00967-REB-KMT

TIMOTHY JOHN KENNEDY,

Plaintiff,

v.

MARK A. FINLEY,
ERNEST ROGER PEELE,
SHERIFF JOHN WESLEY ANDERSON, and
EL PASO COUNTY SHERIFF'S OFFICE,

Defendants.

Civil Case No. 11-cv-03270-REB-KLM

TIMOTHY JOHN KENNEDY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendants.

**ORDER ADOPTING RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE**

Blackburn, J.

This matter is before me on the **Recommendation of United States Magistrate Judge** [#18]¹ filed April 19, 2012, in Civil Action No. 11-cv-03270. None of the parties

¹ “[#56]” is an example of the convention I use to identify the docket number assigned to a specific paper by the court’s case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

filed an objection to the recommendation. Thus, I review the recommendation only for plain error. **See *Morales-Fernandez v. Immigration & Naturalization Service***, 418 F.3d 1116, 1122 (10th Cir. 2005). Finding no error, much less plain error, in the disposition recommended by the magistrate judge, I find and conclude that the recommendation should be approved and adopted as an order of this court.

The complaint in Civil Action No. 11-cv-03270 concerns the plaintiff's claim against the United States of America under the Federal Tort Claims Act (FTCA). The plaintiff's claim is based on the alleged actions of a now retired agent of the Federal Bureau of Investigation, Ernest Peele. Agent Peele performed an analysis of certain bullets as part of an investigation by the El Paso County Sheriff's Office. Based on the investigation of the El Paso County Sheriff's Office, which included Agent Peele's analysis, the plaintiff, Timothy Kennedy, was charged with two counts of first degree murder. Mr. Kennedy was convicted on both counts. Many years later, Mr. Kennedy was granted a new trial on the murder charges. In his complaint, Mr. Kennedy alleges that Agent Peele's analysis of bullets involved in the investigation was inaccurate, and that Agent Peele knowingly presented inaccurate information to the El Paso County Sheriff's Office and to the state court in which the murder charges were prosecuted.

In Civil Action No. 11-cv-00967 (***Kennedy v. Finley***), Mr. Kennedy filed a complaint alleging wrongful actions by certain law enforcement officials in the investigation of Mr. Kennedy concerning the murders. In this earlier case, Mr. Kennedy sued certain officials of the El Paso County Sheriff's Office as well as Agent Peele and the United States of America. On July 2, 2012, I entered an order [#78] in ***Kennedy v. Finley*** granting the motion to dismiss filed by the United States. I dismissed Mr. Kennedy's FTCA claim against the United States because Mr. Kennedy had not

exhausted his administrative remedies as to that claim, as required by 28 U.S.C. § 2675(a). In Civil Action No.11-cv-03270, Mr. Kennedy re-asserts his FTCA claim against the United States based on the alleged wrongful actions of Agent Peele. The claims in Civil Action No. 11-cv-03270 are closely intertwined with the claims pending in 11-cv-00967, ***Kennedy v. Finley***.

As noted by the magistrate judge, the determination whether to consolidate cases is governed by Rule 42(a) of the Federal Rules of Civil Procedure, which provides, pertinently:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

FED. R. CIV. P. 42(a).²

Common questions of law and fact predominate almost totally in Civil Action Nos. 11-cv-00967 and 11-cv-03270. Therefore, these two cases are consolidated.

THEREFORE, IT IS ORDERED as follows:

1. That the **Recommendation of United States Magistrate Judge** [#18] filed April 19, 2012, is **APPROVED** and **ADOPTED** as an order of this court;

2. That under Fed. R. Civ. P. 42(a)(2) and D.C.COLO.LCivR 42.1, ***Kennedy v. United States of America***, Civil Action No. 11-cv-3270-REB-KLM is **CONSOLIDATED** with ***Kennedy v. Finley, et al.***, Civil Action No. 11-cv-00967; and

3. That under D.C.COLO.LCivR 42.1, Civil Action No. 11-cv-3270-REB-KLM is

² As the district judge to whom the oldest numbered case involved in the proposed consolidation is assigned for trial, the question whether to consolidate these matters falls to me for determination. See D.C.COLO.LCivR 42.1.

REASSIGNED to United States Magistrate Judge Kathleen M. Tafoya; and

4. That all future filings in these consolidated actions shall be captioned as shown below:

Civil Case No. 11-cv-00967-REB-KMT
(Consolidated with Civil Action No. 11-cv-03270-REB-KMT)

TIMOTHY JOHN KENNEDY,

Plaintiff,


v.

MARK A. FINLEY,
ERNEST ROGER PEELE,
SHERIFF JOHN WESLEY ANDERSON, and
EL PASO COUNTY SHERIFF'S OFFICE,

Defendants.

Dated March 18, 2013, at Denver, Colorado.

BY THE COURT:


Robert E. Blackburn
United States District Judge