

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 20-cv-20166-UU

IN THE MATTER OF THE:
COMPLAINT OF BOATRIDES
INTERNATIONAL INC., as Owner of M/V
BAYSIDE BLASTER, Official Number
1033547,

Petitioner.

ZORAH SHAREH,

Plaintiff,

v.

BOATRIDES INTERNATIONAL, INC.,

Defendant.

ORDER

THIS CAUSE comes before the Court upon Petitioner's Motion to Dismiss. D.E. 12.

THE COURT has considered the motion and the pertinent portions of the record and is otherwise fully advised in the premises.

I. Background

Unless otherwise indicated, the following facts are taken from the Claim of Complaint Against Petitioner [D.E. 7], brought by Plaintiff Zohrah Shareh ("Plaintiff") against Defendant Boatrides International, Inc. ("Defendant").

Plaintiff is a resident of New Jersey. D.E. 7 ¶ 1. Defendant is a Florida corporation that owned and operated a passenger cruise ship known as the M/V *Bayside Blaster*. *Id.* ¶¶ 2, 8. On August 10, 2018, Plaintiff embarked on what was scheduled to be a 90-minute sightseeing tour as

a passenger aboard the M/V *Bayside Blaster*. *Id.* ¶¶ 7, 11-12. At all material times, the M/V *Bayside Blaster* was on navigable waters, remaining exclusively within “inland and bay waters.” *Id.* ¶¶ 9-10.

Approximately 30 minutes into the tour, “dark clouds began to form with frequent lightning strikes and thunder,” and “the waves became much stronger as the seas began to rise.” *Id.* ¶¶ 14-15. At approximately the same time, the tour guide announced that “due to weather, the tour would end early and the boat would be returning to the dock.” *Id.* ¶ 16. The M/V *Bayside Blaster* immediately executed a “sharp turn” to return to the dock. *Id.*

When the “thunderstorm and heavy waves began,” Plaintiff “started crying, shaking violently and screaming.” *Id.* ¶ 38. Plaintiff “believed the boat was going to sink,” and she “developed severe whole-body tremulousness and was unable to stand or catch her breath.” *Id.* Upon returning to the dock, medical personnel evaluated Plaintiff and determined that she had suffered a panic attack. *Id.* Plaintiff sought subsequent medical treatment for episodes of “shaking and reflexive jerking of all extremities,” which resulted in several diagnoses, to include “conversion disorder,” “functional neurological disorder,” and “stress disorder post traumatic stress.” *Id.* Plaintiff continues to experience uncontrollable shaking, headaches, weight gain, and occasional paralysis. *Id.* ¶ 39.

Plaintiff’s complaint consists of a single count, labeled as “Negligence Against [Defendant].” *Id.* at p. 8. Defendant moved to dismiss the complaint, arguing that Plaintiff fails to state a claim for negligent infliction of emotional distress under federal maritime law. D.E. 12. For the following reasons, the Court grants Defendant’s motion to dismiss.

II. Legal Standard

To state a claim, Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” While a court, at this stage of the litigation, must consider the allegations contained in a plaintiff’s complaint as true, this rule “is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition, a complaint’s allegations must include “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Thus, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (citing *Twombly*, 550 U.S. at 555).

In practice, to survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The plausibility standard requires more than a sheer possibility that a defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Id.* Determining whether a complaint states a plausible claim for relief is a context-specific undertaking that requires the court to draw on its judicial experience and common sense. *Id.* at 679.

III. Analysis

As an initial matter, “[f]ederal maritime law applies to actions arising from alleged torts ‘committed aboard a ship sailing in navigable waters.’” *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1315 (S.D. Fla. 2011) (quoting *Keefe v. Bahama Cruise Line, Inc.*, 867

F.2d 1318, 1321 (11th Cir. 1989)). Although Plaintiff alleges both diversity of citizenship and admiralty jurisdiction as the bases for the Court's subject-matter jurisdiction, D.E. 7 ¶¶ 3-4, Plaintiff alleges that "[a]t all times material hereto, the M/V *Bayside Blaster* was on navigable waters." *Id.* ¶ 10. Accordingly, federal maritime law governs the substantive issues in this case. *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990) ("Even when the parties allege diversity of citizenship as the basis of the federal court's jurisdiction . . . , if the injury occurred on navigable waters, federal maritime law governs the substantive issues in the case.").

Plaintiff labels Count I as a cause of action for negligence against Defendant. D.E. 7, p. 8. Defendant argues that Plaintiff's claim "sounds entirely through a cause of action premised on negligent infliction of emotional distress." D.E. 12, p. 3. Plaintiff maintains in her opposition that her "complaint is a claim for Negligence." D.E. 20, p. 4. In contrast to a claim for negligence, a claim for negligent infliction of emotional distress requires "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but may manifest itself in physical symptoms." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337-38 (11th Cir. 2012) (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994)).

Plaintiff's complaint does not allege that she sustained any physical injury as a direct result of Defendant's alleged negligence.¹ Instead, Plaintiff alleges that Defendant's actions caused her to "suffer[] a panic attack," and that "as a direct consequence of [Defendant's] actions, . . . [Plaintiff] continues to shake uncontrollably, at times has headaches, weight gain, and occasional [] paralysis." D.E. 7 ¶¶ 38-39. Accordingly, based on Plaintiff's allegations, the Court construes

¹ Plaintiff's threadbare allegation that she "suffered bodily injuries," D.E. 7 ¶ 41, is insufficient and need not be accepted as true because the complaint is devoid of any factual allegations in support of this conclusory statement. *See Heinen v. Royal Caribbean Cruises LTD*, No. 19-13750, 2020 WL 1510290, at *2 (11th Cir. Mar. 30, 2020).

Count I as a claim for negligent infliction of emotional distress. *See Negron v. Celebrity Cruises, Inc.*, 360 F. Supp. 3d 1358, 1361 (S.D. Fla. 2018) (“The Plaintiffs do not specify any physical harm for which they seek recovery under this claim. Rather, the Plaintiffs ask for ‘severe emotional distress’ and ‘mental anguish’ damages allegedly resulting from the negligent conduct of the Defendant. That is a claim for negligent infliction of emotional distress.” (internal citation omitted)); *see also N.J.H. v. 2Infinity Fla. LLC*, No. 18-CV-2093, 2020 WL 474660, at *3 (M.D. Fla. Jan. 29, 2020) (“Although Plaintiffs refer to these claims only as ‘negligence’ and ‘vicarious liability,’ based on the factual allegations and nature of the relief sought, the Court construes these as negligent infliction of emotional distress claims.”).

A claim for negligent infliction of emotional distress under federal maritime law must survive the “zone of danger” test. *Chaparro*, 693 F.3d at 1338; *Negron*, 360 F. Supp. 3d at 1361; *Tassinari v. Key West Water Tours, L.C.*, 480 F. Supp. 2d 1318, 1320 (S.D. Fla. 2007). “The zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant’s negligent conduct, or who are placed in immediate risk of physical harm by that conduct.” *Martins v. Royal Caribbean Cruises Ltd.*, 174 F. Supp. 3d 1345, 1355 (S.D. Fla. 2016). To withstand a motion to dismiss, therefore, a plaintiff asserting a claim for negligent infliction of emotional distress must sufficiently allege that she either (1) sustained a physical impact or (2) was placed in an immediate risk of physical harm. *Negron*, 360 F. Supp. 3d at 1362. Further, a plaintiff “must allege more than merely being a witness to a traumatic event to sufficiently plead NIED; the plaintiff must be, at least, threatened with imminent physical impact.” *Martins*, 174 F. Supp. at 1355 (citing *Chaparro*, 693 F.3d at 1337-38); *Elbaz v. Royal Caribbean Cruises, Ltd.*, No. 16-24568-CIV, 2017 WL 3773721, at *5 (S.D. Fla. Jan. 12, 2017) (dismissing negligent infliction of emotional distress claim because the plaintiff failed to allege

sufficient facts to satisfy the zone of danger test); *Ghandi v. Carnival Corp.*, No. 13-24509-CIV, 2014 WL 1028940, at *3 (S.D. Fla. Mar. 14, 2014) (same).

Defendant argues that Plaintiff's complaint fails to allege sufficient facts necessary to pass the zone of danger test. Specifically, Defendant asserts that Plaintiff fails to allege that "her person, or the vessel itself sustained a 'physical impact,'" or that "she was at an objective risk of immediate harm." D.E. 12, p. 6-7. In response, Plaintiff argues that she satisfies the first prong of the zone of danger test because the Complaint alleges that "Plaintiff suffered immediate physical impact, . . . exhibited by whole body tremors, seizure type shaking, and the inability to stand." D.E. 20, p. 6. Plaintiff, however, conflates physical impact with the physical manifestation of an emotional injury. Based on Plaintiff's allegations, the fact that Plaintiff "developed severe whole-body tremulousness and was unable to stand or catch her breath," D.E. 7 ¶ 38, was not the result of a physical impact. Instead, those symptoms, as alleged, were the physical manifestations of a panic attack. *Id.* Although there is no dispute that Plaintiff sufficiently alleges the physical manifestations of her emotional injury, the complaint is devoid of any plausible allegations to suggest that Plaintiff sustained a physical impact as a result of Defendant's allegedly negligent conduct. Plaintiff's complaint thus fails to meet the first prong of the zone of danger test.

Alternatively, Plaintiff argues that the alleged severe weather conditions that developed while she was aboard the *M/V Bayside Blaster* placed her "in an immediate risk of physical harm," sufficient to satisfy the second prong of the zone of danger test. D.E. 20, p. 6. In the complaint, Plaintiff alleges that "the subject excursion was unreasonably dangerous due to forecasted weather conditions," D.E. 7 ¶ 34, that "Defendant's actions presented a known, foreseeable, and unreasonable risk of harm," *id.* ¶ 37, and that Plaintiff "believed the boat was going to sink," *id.* ¶ 38, but nowhere does Plaintiff allege any facts to support that she was, in fact, threatened with

imminent physical impact. To the contrary, Plaintiff alleges that at approximately the same time she noticed the development of the severe weather conditions, the tour guide announced that the tour would end early, and the M/V *Bayside Blaster* departed from its scheduled course to return to the dock.² *Id.* ¶¶ 13-16.

Accepting the allegations in the light most favorable to the Plaintiff, it is evident that Plaintiff's sightseeing tour aboard the M/V *Bayside Blaster* developed into a traumatic event for Plaintiff. But the fact that Plaintiff witnessed severe weather conditions while aboard the M/V *Bayside Blaster*, without additional factual allegations to support that she was threatened with imminent physical harm, is insufficient to withstand a motion to dismiss. *See Martins*, 174 F. Supp. at 1355; *Elbaz*, 2017 WL 3773721, at *5; *Ghandi*, 2014 WL 1028940, at *3.

The complaint, as pled, fails to allege that Plaintiff either sustained a physical impact or was placed in an immediate risk of physical harm. As a result, Plaintiff's complaint fails to satisfy the zone of danger test, and Plaintiff, therefore, fails to state a claim for negligent infliction of emotional distress.

IV. Conclusion

Because Plaintiff fails to sufficiently state a cause of action upon which relief may be granted, the Court will dismiss the complaint. The Court will give Plaintiff one opportunity to amend the complaint to correct the pleading deficiencies described in this Order. The Court advises Plaintiff that she must amend the complaint to sufficiently allege and set forth facts demonstrating entitlement to relief. Accordingly, it is hereby

² Almost as an afterthought, Plaintiff alleges that, in executing a "sharp turn" to return to the dock, the M/V *Bayside Blaster* "almost hit[] another vessel." D.E. 7 ¶ 16. But Plaintiff does not premise her alleged panic attack on this alleged near collision, nor does Plaintiff offer any additional factual allegations in support of this occurrence.

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss [D.E. 12] is GRANTED. Plaintiff's Claim of Complaint [D.E. 7] is DISMISSED WITHOUT PREJUDICE. Plaintiff SHALL file an amended complaint no later than **Friday, May 8, 2020**. Failure to file an amended complaint will result in the immediate dismissal of Plaintiff's action without further notice.

DONE AND ORDERED in Chambers in Miami, Florida this 27th day of April, 2020.



URSULA UNGARO
UNITED STATES DISTRICT JUDGE

Copies furnished:
All counsel of record