UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:19-24871-UU

AIDA RIOS,

Plaintiff,

v.

MSC CRUISES S.A.,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant's Motion for Summary Judgment, D.E. 43 ("Motion"), Plaintiff's Response in Opposition, D.E. 53 ("Opposition"), and Defendant's Reply, D.E. 61 ("Reply").

THE COURT has considered the Motion and is otherwise fully advised in the premises. For the reasons discussed below, the Motion is GRANTED.

BACKGROUND

Plaintiff Aida Rios ("Rios") alleges that on December 1, 2018 while a passenger on Defendant's ("MSC") vessel, the *MSC Seaside*, she tripped and fell over a staircase[1] near a music/dance lounge onboard: the "Haven Lounge." D.E. 1 at ¶¶ 11–12 ("Complaint"). Rios alleges that she fell because the staircase "was not properly lit," and that she was inadequately warned. *Id.* at ¶ 13. Rios asserts that MSC knew or should have known that "an unreasonably dangerous condition existed in the area of the staircase due to the extremely poor lighting in the

[1] Though the Complaint uses the term "staircase," Rios and the record clarify that the site of the accident is more properly described as a "step up onto an apron stage." *See* Opp. at 1.

lounge" and that MSC negligently failed to warn Rios of the aforementioned condition. *Id.* at ¶ 21. Rios alleges no other theory supporting breach or causation in her single-count failure-to-warn negligence action seeking damages stemming from her onboard fall. *See generally* Compl.

After discovery concluded on September 1, 2020, MSC moved for summary judgment on September 15, 2020. MSC argues that it is entitled to summary judgment as a matter of law because (1) it did not have notice of the allegedly dangerous condition; (2) it did not create the allegedly dangerous conditions; and (3) the allegedly dangerous conditions were open and obvious. In addition to opposing MSC's Motion, Rios seeks partial summary judgment on several of the affirmative defenses raised by MSC in its Answer to Rios' Complaint, though not on the issue of notice. *See* D.E. 46. Two of the defenses on which Rios seeks partial summary judgment, however, include MSC's arguments that it did not create the dangerous conditions and that the dangerous conditions were open and obvious.

LEGAL STANDARD

Summary judgment is authorized only when the moving party meets its burden of demonstrating that "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. When determining whether the moving party has met this burden, the Court must view the evidence and all factual inferences in the light most favorable to the non-moving party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rojas v. Florida*, 285 F.3d 1339, 1341–42 (11th Cir. 2002).

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; after the moving party has met its burden of proving that no genuine issue of material fact exists, the non-moving party must make a showing sufficient to establish the existence of an

essential element of that party's case and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrell*, 477 U.S. 317 (1986); *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997); *Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989).

If the record presents factual issues, the Court must not decide them; it must deny the motion and proceed to trial. *Envntl. Def. Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Cont'l Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969). If reasonable minds might differ on the inferences arising from undisputed facts, then the Court should deny summary judgment. *Impossible Elec. Techs., Inc. v. Wackenhut Protective Sys., Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[T]he dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

Moreover, the party opposing a motion for summary judgment need not respond to it with evidence unless and until the movant has properly supported the motion with sufficient evidence. *Adickes*, 398 U.S. at 160. The moving party must demonstrate that the facts underlying the relevant legal questions raised by the pleadings are not otherwise in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611–12 (5th Cir. 1967). The Court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. *Liberty Lobby, Inc.*, 477 U.S. at 255.

DISCUSSION

MSC argues that it is entitled to summary judgment for three independent reasons: (1) it did not have notice of a dangerous condition; (2) it did not create the allegedly dangerous conditions; and (3) the allegedly dangerous conditions were open and obvious. Rios disagrees with all three arguments, asserting that MSC was on notice of the condition, created it, and that it was not open and obvious.

Drawing all factual inferences in the light most favorable to non-movant Rios, the Court finds that MSC is entitled to summary judgment. Rios has failed to produce any evidence that MSC breached its duty of care. She has not put forth evidentiary support that MSC had actual or constructive notice of the allegedly dangerous condition. Absent such evidence, MSC cannot be held liable for Rios' injuries as a matter of law.

A. Applicable Law

General maritime law governs this tort action. *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320 (11th Cir. 1989). Under the Eleventh Circuit's maritime law jurisprudence, a cruise ship operator "is not liable to passengers as an insurer, but only for its negligence." *Id.* at 1322; *see also Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 724 (11th Cir. 2019) (Pryor, J., concurring). To succeed on a maritime negligence claim, the plaintiff must show: "(1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm." *Taiariol v. MSC Crociere S.A.*, 677 F. App'x 599, 600 (11th Cir. 2017) (quoting *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012)).

Furthermore, "notice is a perquisite to imposing liability" in a maritime negligence action. *Id.* at 602 (citing *Keefe*, 867 F.2d at 1322). Notice of the risk-creating condition may be

actual or constructive to satisfy this prerequisite. *Id.* at 601. MSC's "liability thus hinges on whether it knew or should have known about the [risk-creating condition]." *Amy v. Carnival Corp.*, 961 F.3d 1303, 1308 (11th Cir. 2020) (quoting *Keefe*, 867 F.2d at 1322) (alterations in original).

B. Actual or Constructive Notice

In arguing that MSC had notice of the risk-creating condition, Rios raises (1) the affidavit of former MSC passenger Joseph DiJoseph, Opp., Ex. D ("Affidavit") describing a previous incident that Plaintiff characterizes as "similar", and (2) the existence of "Watch Your Step" warning signs as evidence. Neither is sufficient to defeat summary judgment here.

1. The DiJoseph Affidavit

As an initial matter, the Affidavit cannot be considered by the Court in ruling on the Motion because it is an out of court statement offered to prove the truth of the matter asserted, and "[t]he general rule is that inadmissible hearsay cannot be considered on a motion for summary judgment." *Lewis v. Residential Mortg. Sols.*, 800 F. App'x 830, 834 (11th Cir. 2020) (quoting *Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999)); *see also* Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.").

The rule against considering hearsay may be overcome where the statement might be reduced to admissible evidence at trial. *Lewis*, 800 F. App'x at 834. While typically this can be done by calling the affiant at trial, *see id.*, that would be insufficient here. The Affidavit relays statements made by a third party, Kathleen DiJoseph, to the affiant, Joseph DiJoseph. Even if Mr. DiJoseph were called at trial and made the same statements made in the Affidavit, it would

be hearsay. Plaintiff does not attempt to establish any hearsay exception, although the Court reads a general statement that Kathleen DiJoseph is "not competent to complete an affidavit," Aff. at 2, as perhaps an incomplete attempt to establish unavailability under Fed. R. Evid. 804. The Court cannot determine that any hearsay exception applies such that the Affidavit would "be reduced to admissible evidence at trial," *id.* (internal quotation marks and citation omitted), and thus cannot consider it.

Regardless, the Affidavit does not do what Rios seems to think it does. It does not establish that MSC had notice of any risk-creating condition, and certainly not notice of a condition relating to the stairs being "[im]properly lit," Compl. at ¶ 13. The Affidavit does not say anything about any party, including the DiJosephs, reporting or otherwise giving notice about Mrs. DiJoseph's alleged fall to MSC at all. No triable issue of fact concerning constructive notice is raised by the Affidavit or general record of Ms. DiJoseph's fall because "[t]he inquiry is not whether the defendant had notice of an object or its physical specifications, but instead, whether the defendant had notice of a risk-creating condition." *Taiariol*, 677 F. App'x at 602; *see also Lipkin v. Norwegian Cruise Line Ltd.*, 93 F. Supp. 3d 1311, 1323 (S.D. Fla. 2015) ("mere implication of actual or constructive notice is insufficient to survive summary judgment"). Even if this Court were to consider the Affidavit in ruling on the Motion, drawing all factual inferences in favor of Rios, it does not evidence notice of the risk-creating condition identified in the Complaint.

2. "Watch Your Step" Signage

MSC does not dispute signage at the site of Rios' fall that read "Watch Your Step." *See* Reply at 2. But such signage is not evidence of actual or constructive notice of the dangerous condition—improper lighting—asserted in the Complaint. Warning signs sometimes evidence

notice of a dangerous condition, but "[n]ot all warning signs will be evidence of notice; there must also be a connection between the warning and the danger. *Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 721 (11th Cir. 2019).

Here, Rios alleges that "an unreasonably dangerous condition existed in the area of the staircase due to the extremely poor lighting in the lounge," Compl. at ¶ 21, and offers no other dangerous condition of which she did not receive an adequate warning. Thus, a warning will be evidence of notice only if it is connected to the complained-of danger—poor lighting. *See Taiariol*, 677 F. App'x at 602.

The Eleventh Circuit has repeatedly upheld the principle that warnings are evidence of notice only when they are connected to the alleged dangerous condition. *See e.g.*, *Taiariol v. MSC Crociere S.A.*, 677 F. App'x at 602 (11th Cir. 2017) ("'watch your step' sticker on the step does not raise an issue of fact as to whether the defendant had notice of the nosing's slippery condition"); *see also Bunch v. Carnival Corp.*, 825 F. App'x 713, 715 (11th Cir. 2020) (signs reading "Watch Your Step, High Threshold" connected to failure to warn of "excessively high" threshold); *Amy v. Carnival Corp.*, 961 F.3d 1303, 1309 (11th Cir. 2020) (warnings not to "'climb up rails,' 'try to sit on them' . . . because 'accidents can happen'" connected to failure to warn of danger posed by falling over or through rails). Even viewing the evidence of "Watch Your Step" signage in the light most favorable to Rios, it is not evidence that a "'sufficient connection' exists between the warning and the danger." *Amy*, 961 F.3d at 1309. In her Complaint, Rios does not allege that the failure to warn of the mere existence of a step in the Haven Lounge caused her injuries, as was the case in *Guevara*. 920 F.3d at 715 (plaintiff "alleged that NCL negligently failed to (1) warn passengers of the step down"). Rather, she alleges that a dangerous condition existed "due to the extremely poor lighting in the lounge,"

and the Court can only consider the claims alleged in the operative Complaint.

The Court's "task here is merely to decide whether the record contains evidence from which a reasonable jury could conclude that [MSC] knew or should have known that," as alleged in the Complaint, due to improper lighting, a passenger could trip and fall on the stairs at issue in the Haven Lounge. *Amy*, 961 F.3d at 1310. The Court does not endeavor to weigh competing evidence. But given Rios's failure to put forth any evidence of constructive or actual notice of the alleged lighting deficiency onboard its vessel, MSC is entitled to summary judgment as a matter of law. *Taiariol*, 677 F. App'x at 602 (11th Cir. 2017).

CONCLUSION

Because the record contains no evidence that MSC had notice of the allegedly dangerous condition onboard the *MSC Seaside*, the Court need not reach MSC's other asserted grounds for summary judgment. Relatedly, Rios' Motion for Partial Summary Judgment, D.E. 46, which contests several of MSC's affirmative defenses—none of which underpin the decision in this Order—is denied as moot. Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion, D.E. 43, is GRANTED. It is further

ORDERED AND ADJUDGED that Plaintiff's Complaint is DISMISSED WITH PREJUDICE. The Court will separately enter judgment in favor of MSC pursuant to Federal Rule of Civil Procedure 58. It is further

ORDERED AND ADJUDGED that the case is CLOSED. All hearings are CANCELED and all pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers in Miami, Florida, this 30th day of November 2020.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record via CM/ECF