UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 19-cv-22754-MGC

JERALD KATZOFF,

Plaintiff,

vs.

NCL (BAHAMAS) LTD,
a Bermuda Company d/b/a
NORWEIGIAN CRUISE LINE,

Defendant.
_____/

ORDER ON MOTION FOR SUMMARY JUDGEMENT

THIS MATTER is before the Court on Defendant's Motion for Summary Judgement ("Motion") (ECF No. 77). Plaintiff filed an Opposition to Defendant's Motion (ECF No. 85) and Defendant filed a Reply to Plaintiff's Opposition (ECF No. 96). Thus, the Motion is fully briefed and ripe for review. The Court has carefully considered the Parties' motion papers, the record, and the relevant legal authorities. As discussed below, Defendant's Motion is **DENIED *in part* and GRANTED *in part***.

I. BACKGROUND

The following factual recitation is drawn from the Parties' respective statements of facts pursuant to Local Rule 56.1, as well as the Court's independent review of the record.

On August 16, 2018, while Plaintiff Jerald Katzoff ("Katzoff") was aboard one of Defendant Norwegian Cruise Line's ("NCL") cruise ships, he tripped and fell over a monitor that was placed on the dance floor in one of the ship's lounges. Def. & Pl. Rule 56.1 Stmts. ¶¶ 1, 2. Closed-circuit television ("CCTV") footage shows a handful of people, including Katzoff, on the dance floor at the time of the accident. ECF No. 77 at 5n.2. Although Katzoff did not think the dance floor was crowded at the time, he recalled that the lounge was "dark". Def. & Pl. Rule 56.1 Stmts. ¶ 14; Katzoff Dep. 126:10-14, ECF No. 92-1.

Contending that Plaintiff has failed to establish necessary elements of his claims, Defendant now moves this Court for summary judgement.

II. LEGAL STANDARD

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* In reviewing a motion for summary judgement, the Court is "required to view the evidence and all factual inferences therefrom in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in favor of the non-movant." *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1247 (11th Cir. 2013) (quoting *Skop v. City of Atlanta*, 485 F.3d 1130, 1143 (11th Cir. 2007)). Importantly, "at the summary judgment stage the judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter," but only "to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

III. DISCUSSION

A. There is a genuine issue of material fact as to whether the condition complained of was open or obvious.

"[U]nder federal maritime law, an operator of a cruise ship has a duty to warn of known dangers that are not open and obvious." *Frasca v. NCL (Bah.), Ltd.*, 654 F. App'x 949, 952 (11th Cir. 2016) (citing *Isbell v. Carnival Corp.*, 462 F. Supp. 2d 1232, 1237 (S.D. Fla. 2006). "An open and obvious condition is one that should be obvious by the ordinary use of one's senses." *Krug v. Celebrity Cruises, Inc.*, 745 Fed. App'x. 863, 866 (11th Cir. 2018). In deciding whether a dangerous condition is open and obvious, the Court must determine "whether a reasonable person would have observed the condition and appreciated the nature of the condition." *Aponte v. Royal Caribbean Cruise Lines, Ltd.*, 739 F. App'x 531, 537 (11th Cir. 2018).

CCTV footage of the incident shows that the monitor was in plain view of the room and had remained there for some time such that any potential danger posed by its placement should have obvious by the ordinary use of one's senses. *See* ECF No. 77 at 5n.2. Importantly, however, Plaintiff argues that the lighting in the submitted footage is not an accurate reflection of the lighting in the lounge at the time of the accident. According to Plaintiff, the CCTV recording flips between black and white and color to account for the

lighting in the room. Here, Plaintiff posits, the footage appears in black and white "because the lighting in the lounge at the time was too low to support color video recording." Def. & Pl. Rule 56.1 Stmts. ¶ 12. Relatedly, Katzoff testified that the lounge was dark at the time of the accident. Def. & Pl. Rule 56.1 Stmts. ¶ 14; Katzoff Dep. 126:10-14, ECF No. 92-1. Caridad Bergnes, a corporate representative, testified "that the modality [of the camera], depending on the lighting situation, flips the footage to black and white. So…in certain situations, it appears in color, but the camera, when it's a different lighting situation, it will flip it to black and white." Bergnes Dep. 262:13-18; 263:20-264:2, ECF No. 87-1.

Curiously, NCL fails to address why this change between black and white and color recording ought to be inconsequential to the Court's consideration of the CCTV footage. Instead, NCL counters that Bergnes was unsure about the reason for the change between black and white and color recording. Bergnes, however, seemed to be under the impression that lighting in the room was a factor.

Considering all relevant testimony, and necessarily drawing all factual inferences in Katzoff's favor, the Court is unable to conclude that a reasonable fact finder could not find that the potential danger posed by the placement of the monitor was unobvious under the circumstances. *See Frasca*, 654 F. App'x at 953. This is so because there is testimony that the room may have been darker than the CCTV footage suggests, and Defendant has not met its burden of establishing that it remains entitled to judgement as a matter of law even if the room had darker lighting. Summary judgement is consequently inappropriate.

B. **There is a genuine issue of material fact on the issue of notice.**

NCL also argues that it is entitled to summary judgement on the issue of notice. According to NCL, Plaintiff cannot succeed on his negligence claims because he has provided no proof that NCL had actual or constructive notice of the allegedly dangerous condition. However, NCL's designated deponent testified that there have been other instances of passengers tripping over speakers or some other equipment on lounge floors. *See, e.g.*, Berman Dep. 17:25-26:5; 36:25-38:13, ECF No. 88-1. NCL's main response to Plaintiff's identification of these other incidents is that these other incidents are not substantially similar to Katzoff's: particularly because some of them involved speakers (instead of monitors), and that in some instances, the speakers were placed in different locations on the vessel. *See* ECF No. 96 at 5. The Court is unpersuaded. The applicable

standard is substantial similarity, not identical circumstances, and NCL has not convincingly explained why the identified differences are substantially dissimilar such that notice cannot be reasonably inferred. Summary judgement on this issue is therefore inappropriate.

C. Defendant is entitled to summary judgement on Plaintiff's negligent design claim.

Although Plaintiff has withdrawn his claim of negligent design, *see* ECF No. 59 at 2, NCL seeks summary judgement, seemingly in the abundance of caution, on the claim. NCL contends that it is entitled to summary judgement on this claim because Plaintiff has failed to, and cannot, support its claim for negligent design. To the extent that this claim remains in this action, the Court agrees that Plaintiff has not provided evidence to support the factual assertions made in support of his negligent design claim. Summary judgement is therefore appropriate. *See* Fed. R. Civ. P. 56(c)(1)(B).

D. Plaintiff's damages do not appear to be limited to medical claims that require expert testimony.

NCL argues that Plaintiff's failure to establish causation, as it relates to alleged triceps and rotator cuff tears, through expert testimony is fatal to his negligence claims. It is true that, "unless the connection is a kind that would be obvious to laymen," "[e]xpert testimony is generally required to establish a causal connection between the accident and injury." *O'Brien v. NCL (Bahamas) Ltd.*, 288 F. Supp. 3d 1302, 1312 (S.D. Fla. 2017) (quoting *Schmaltz v. Norfolk & W. Ry. Co.*, 896 F. Supp. 180, 182 (N.D. Ill.1995)). *See also Kellner v. NCL (Bah.), Ltd.*, 2016 U.S. Dist. LEXIS 111777, at *3 (S.D. Fla. Aug. 22, 2016), *aff'd*, 753 F. App'x 662 (11th Cir. 2018) ("Expert testimony is required to establish medical causation for conditions not readily observable or susceptible to evaluation by lay persons."). Plaintiff has indeed proffered no expert testimony to establish causation for the triceps and rotator cuff injuries, which are not readily observable or susceptible to evaluation by lay persons. Summary judgement as to these specific claimed injuries is therefore appropriate.

Plaintiff does, however, indicate in his opposition that the record contains evidence that Plaintiff suffered injuries for which expert testimony might not be required. *See* ECF No. 85 at 9-10 (noting that the ship's medical records documented abrasions and swelling).[1] *See also Whitehead v. City of Bradenton*, 2015 U.S. Dist. LEXIS 51559, at *4 (M.D. Fla. Apr.

[1] The Court also notes that the Amended Complaint claims "Plaintiff was injured in and about his body and extremities…" ECF No. 35 at 4.

20, 2015) ("Plaintiff may offer testimony regarding her 'readily observable' physical injuries including the bruising, swelling, abrasions and the immediate pain she experienced as a result of the [incident]."). Consequently, only partial summary judgement is appropriate on this issue.

IV. CONCLUSION

For the reasons discussed above, Defendant's Motion for Summary Judgement (ECF No. 77) is **DENIED in part and GRANTED in part**. The Motion is granted as to the medical causation issue ***only*** to the extent noted above. The Motion is also granted as to Plaintiff's negligent design claim. The Motion is denied as to the issues of notice and the open and obvious nature of the placement of the monitor upon which Plaintiff fell. Further, because this Order resolves the Motion, the hearing scheduled for August 17, 2021 is **CANCELLED**.

DONE and ORDERED in chambers at Miami, Florida, this 11th day of August 2021.

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge

Copies furnished to:
Jonathan Goodman, U.S. Magistrate Judge
Counsel of record