

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

CASE NO. 18-25372-CIV-ALTONAGA/Goodman

SUSAN OWEN,

Plaintiff,

v.

CARNIVAL CORPORATION, et al.,

Defendants.

ORDER

THIS CAUSE came before the Court on Defendant, Carnival Corporation’s Motion for Summary Judgment [ECF No. 92], filed on August 23, 2022. Plaintiff, Susan Owen, filed a Response [ECF No. 95]; to which Defendant filed a Reply [ECF No. 99]. The Court has considered the record, the parties’ written submissions,¹ and applicable law. For the following reasons, the Motion is granted.

I. BACKGROUND

This is a maritime personal injury action arising from Plaintiff’s trip aboard Defendant’s vessel, the *Breeze*, in December 2017. (*See* SOF ¶ 1). Plaintiff purchased a ticket for the trip in August 2017, and in doing so, received the terms and conditions of the Ticket Contract. (*See id.* ¶¶ 3–4). On December 24, 2017, she set sail on the seven-day excursion, along with her family. (*See id.* ¶¶ 3, 7).

¹ The parties’ factual submissions include Defendant’s Statement of Material Facts [ECF No. 93] (“SOF”); Plaintiff’s Statement of Contested Facts [ECF No. 96] (“Resp. SOF”); and Defendant’s Reply Statement of Material Facts [ECF No. 100] (“Reply SOF”).

Before departing, Plaintiff's daughter-in-law checked into the cruise on behalf of herself and her family members, including Plaintiff. (*See id.* ¶ 7). Part of the check-in process included agreeing to the terms and conditions of the Ticket Contract. (*See id.* ¶¶ 7–8). Among other provisions, the Ticket Contract contained a pre-suit notice clause requiring any guest intending to file a personal injury suit against Defendant to submit “full particulars in writing . . . to [Defendant] within 185 days after the date of the injury, event, illness or death giving rise to the claim.” (*Id.* ¶ 12 (alterations added)).

During the trip, Plaintiff developed an eye condition that prompted her to visit the *Breeze*'s medical facilities. (*See* SOF ¶ 13). The ship's doctor, Dr. Dayan Fanery Campino Castillo, treated Plaintiff and prescribed her medication to help with the condition. (*See id.* ¶ 15). Notwithstanding this treatment, Plaintiff's condition worsened, although she never returned to the ship's medical facilities. (*See id.* ¶¶ 18–20).

On January 2, 2018, just three days after disembarking from the cruise, Plaintiff visited her own doctor, who informed her of potential complications arising from the medicine she was prescribed while onboard the *Breeze*. (*See* SOF, Ex. 2, Owens Dep. Tr. [ECF No. 93-2] 137:5–143:5).² By January 31, 2018, Plaintiff had visited a corneal specialist, who had the same concerns regarding the prescribed medication and subsequently scheduled Plaintiff for corneal transplant surgery.³ (*See id.* 148:4–149:20).

On December 21, 2018, Plaintiff filed her initial Complaint [ECF No. 1]. This was well over 185 days after multiple doctors shared their concerns about the medications Dr. Campino had

² The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings. Citations to deposition testimony rely on the pagination and line numbering in the original document.

³ This corneal specialist, Dr. Reddy, is listed on Plaintiff's expert disclosures. (*See* Resp. SOF, Ex. 3, Pl.'s Expert Disclosures [ECF No. 96-3] 1–2).

prescribed Plaintiff during her December 28, 2017 appointment. (*See Owens Dep. Tr.* 137:5–143:5; 148:4–149:20).

Four months after filing her Complaint, Plaintiff submitted an Amended Complaint [ECF No. 30]. The Amended Complaint alleges five claims against Carnival: (I) Negligence, (II) Vicarious Liability for the Negligence of the Ship’s Medical Staff; (III) Apparent Agency Against Defendant for the Acts of the Ship’s Medical Staff; (IV) Assumption of Duty for Negligence of the Ship’s Medical Staff; and (V) Joint Venture Between Carnival and Campino. (*See id.* ¶¶ 13–78). The gravamen of Plaintiff’s Amended Complaint, and the injury central to all five claims, is the “negligent[] misdiagnos[is] and [] negligently prescribed medication which was not the proper course of treatment . . . and did not conform to the standard of care.” (*Id.* ¶ 12 (alterations added)).

On March 23, 2022, Defendant filed its Answer and Affirmative Defenses [ECF No. 82]. While Defendant asserted 26 affirmative defenses, the only one relevant here states that “[t]his action is governed by and subject to the terms, limitations, and conditions contained within Plaintiff’s Passenger Ticket Contract(s), which are incorporated here by reference.” (*Id.* 7 (alteration added)).

The parties dispute whether Plaintiff, before filing her Complaint, provided “full particulars in writing” to Defendant within 185 days of her injury — the negligent treatment she received onboard the *Breeze* — in accordance with the Ticket Contract. (*Compare* SOF ¶ 23 with Resp. SOF ¶ 23). Plaintiff maintains that her medical records constituted “full particulars in writing” (Resp. SOF ¶ 23 (quotation marks omitted)); whereas Defendant insists that “Plaintiff never provided the contractually required, pre-suit, written notice of claim” (SOF ¶ 26 (alteration added; citation omitted); *see also id.* ¶ 23). Defendant further claims that the lack of notice prevented it from initiating a “formal investigation” into the incident. (Reply 8). Plaintiff counters that the

lack of a pre-suit formal investigation did not impact Defendant's ability to develop its case. (*See* Resp. 10–13).

Defendant now seeks summary judgment. (*See generally* Mot.). Instead of contesting Plaintiff's underlying claims, Defendant argues that summary judgment is appropriate because Plaintiff filed her Complaint without first submitting the contractually required pre-suit notice. (*See* Mot. 3). According to Defendant, because she failed to abide by the pre-suit notice condition, Plaintiff cannot recover on her underlying claims. (*See id.*).

In response, Plaintiff argues that Defendant did not adequately plead, and thus waived, its pre-suit notice defense. (*See* Resp. 2). If the defense can be asserted, however, Plaintiff argues that triable questions of fact remain as to whether Plaintiff's lack of compliance is otherwise excused under 46 U.S.C. section 30508(c)(1). (*See id.* 8–9).

II. LEGAL STANDARD

Summary judgment may be rendered if the pleadings, discovery and disclosure materials on file, and any affidavits show there is no genuine dispute of any material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a), (c). An issue of fact is “material” if it might affect the outcome of the case under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is “genuine” if the evidence could lead a reasonable jury to find for the non-moving party. *See id.*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court draws all reasonable inferences in favor of the party opposing summary judgment. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000).

If the non-moving party bears the burden of proof at trial, the moving party may obtain summary judgment simply by: (1) establishing the nonexistence of a genuine issue of material fact

as to any essential element of a non-moving party's claim and (2) showing the Court there is insufficient evidence to support the non-moving party's case. *See Blackhawk Yachting, LLC v. Tognum Am., Inc.*, No. 12-Civ-14209, 2015 WL 11176299, at *2 (S.D. Fla. June 30, 2015). "Once the moving party discharges its initial burden, a non-moving party who bears the burden of proof must cite to . . . materials in the record or show that the materials cited do not establish the absence or presence of a genuine dispute." *Id.* (alteration added; quotation marks omitted; citing Fed. R. Civ. P. 56(c)(1)).

III. DISCUSSION

Defendant argues that summary judgment should be entered because Plaintiff failed to comply with the Ticket Contract's pre-suit notice provision. (*See generally* Mot.). Pre-suit notice requirements, and the waiver of claims for lack of compliance with such requirements, are permissible under 46 U.S.C. section 30508. *See Cigainero v. Carnival Corp.*, 426 F. Supp. 3d 1299, 1305 (S.D. Fla. 2019) (citing 46 U.S.C. § 30508). Plaintiff raises three arguments to defeat summary judgment: (1) Defendant failed to adequately plead its pre-suit notice defense as an affirmative defense (*see* Resp. 2); (2) if the defense is nevertheless permitted, questions of fact remain as to whether Defendant received pre-suit written notice (*see id.* 8); and (3) even if Defendant did not receive such notice, questions of fact remain as to whether the lack of notice is excused by Defendant otherwise having knowledge of the injury and not being prejudiced by the lack of notice (*see id.*). These arguments are addressed in turn.

A. Affirmative Defense

First, the Court must determine whether Defendant can rely on its defense that Plaintiff failed to submit written pre-suit notice as was required under the Ticket Contract. Both parties agree that a lack of compliance with a ticket contract's notice requirement constitutes a permissible

affirmative defense to Plaintiff's claims. (See Resp. 2; Reply 1); *see also McLendon v. Carnival Corp.*, No. 20-cv-24939, 2021 WL 848945, at *2 (S.D. Fla. Mar. 5, 2021); *Lebron v. Royal Caribbean Cruises, Ltd.*, No. 16-Civ-24687, 2017 WL 7792720, at *5 (S.D. Fla. Aug. 18, 2017), *report and recommendation adopted*, No. 16-Civ-24687, 2017 WL 7803805 (S.D. Fla. Sept. 27, 2017). The specific defense of Plaintiff's lack of compliance, however, is not raised in Defendant's Answer. Plaintiff asserts that this omission constitutes a waiver, which now bars Defendant from raising the defense in a motion for summary judgment. (See Resp. 2–8).

The Court disagrees. “If a plaintiff receives notice of an affirmative defense by some means other than pleadings, ‘the defendant’s failure to comply with [Federal Rule of Civil Procedure] Rule 8(c) does not cause the plaintiff any prejudice.’” *Grant v. Preferred Research, Inc.*, 885 F.2d 795, 797 (11th Cir. 1989) (alterations added; quoting *Hassan v. U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir.1988)). In other words, Defendant may still rely on an affirmative defense first raised in a summary judgement motion unless Plaintiff demonstrates that the belated defense prejudiced her in some way. *See Pensacola Motor Sales Inc. v. E. Shore Toyota, LLC*, 684 F.3d 1211, 1222 (11th Cir. 2012). Plaintiff does not demonstrate such prejudice here.

To establish the requisite prejudice, Plaintiff must demonstrate more than the mere prospect that she “might lose the case if the defense is asserted.” *Pinares v. United Techs. Corp.*, 10-cv-80883, 2018 WL 10502427, at *3 n.6 (S.D. Fla. Dec. 6, 2018). Rather, “prejudice” here requires Plaintiff to demonstrate that Defendant’s belated, “surprise” assertion prevented her from discovering different evidence or developing a different theory of the case over the course of the litigation. *Id.* (quoting *Jones v. Miles*, 656 F.2d 103, 107 n.7 (5th Cir. 1981)); *see also Cooper v. Marten Transp., Ltd.*, No. 1:10-cv-3044, 2014 WL 11517830, at *5 (N.D. Ga. May 23, 2014) (allowing affirmative defense when plaintiff “did not explain what different or supplemental line

of questions he would have pursued had he known of [d]efendants’ effort to proceed with [the affirmative] defense[.]” (alterations added)). Moreover, a plaintiff’s “surprise” can be mitigated, and prejudice avoided, if the affirmative defense raised in the summary judgment motion is itself a more specific version of a generic affirmative defense raised in the initial pleading. *See, e.g., Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1258–59 (11th Cir. 2014) (finding no prejudice because a defendant’s pleading of a generic “failure to mitigate” defense put the plaintiff on sufficient notice of the more specific version of the defense raised at summary judgment and trial). Finally, any “unfair[.] surprise[.] or prejudice[.]” might also be avoided if Plaintiff requested and took additional discovery concerning the belated affirmative defense. *Fla. Beauty Flora Inc. v. Pro Intermodal L.L.C.*, No. 20-Civ-20966, 2021 WL 1945821, at *8 (S.D. Fla. May 14, 2021).

Plaintiff does not identify different depositions she might have taken, questions she might have but did not ask during the depositions she did take, or otherwise describe different discovery avenues she may have pursued (*see generally* Resp.); these omissions severely weaken her argument. *See Cooper*, 2014 WL 11517830, at *5. Further, she does not request that the Court allow her to take additional discovery on the matter or suggest that additional discovery would be necessary in order to rebut the defense. (*See generally* Resp.); *see also Fla. Beauty Flora Inc.*, 2021 WL 1945821, at *8. Rather, Plaintiff merely summarizes the discovery that has already occurred in this case, with a conclusory assertion that she “has been prejudiced by participating in these proceedings without properly being advised of the defense[.]” (Resp. 7 (alteration added)).

Nowhere in Plaintiff’s recitation of the costs and resources expended in depositions, experts, and mediation does she actually identify or elaborate on how she might “have taken different discovery[,] . . . change[d] litigation strategy[,]” or otherwise “taken a different approach in discovery[.]” had she been earlier informed as to — or herself inquired about in discovery —

the particulars of the affirmative defense. *Pinares*, 2018 WL 10502427, at *3 (alterations added). While Defendant’s affirmative defense of the “terms, limitations, and conditions contained within [the Ticket Contract]” (Answer 7 (alteration added)), may have been insufficient to satisfy pleading standards, it put Plaintiff on sufficient notice, allowing her to inquire regarding the more specific Ticket Contract terms Defendant now invokes. *See Adams*, 754 F.3d at 1258–59. In any event, the deadline for giving pre-suit notice expired long before Plaintiff first filed this suit; there would have been no way to correct the failure to comply with the Ticket Contract’s terms.

Both parties cite to *Pinares*, 2018 WL 10502427, at *2–3, in support of their respective positions. (*Compare* Resp. 6 with Reply 5–6). Defendant has the better reading. The “prejudice” Plaintiff asserts here is merely the prospect that she may lose the case, or perhaps not even have expended the resources to pursue it in the first place. (*See* Resp. 7–8). That does not suffice. *See Pinares*, WL 10502427, at *3 n.6. So, while the assertion of the defense may “prejudice” Plaintiff’s case in a literal sense (*see* Reply 4–6), the Court cannot say it will cause any “unfair[] surprise[] or prejudice[.]”. *Fla. Beauty Flora Inc.*, 2021 WL 1945821, at *8 (alterations and emphasis added).

B. Non-Compliance with Notice

Because Plaintiff does not identify any unfair prejudice, Defendant may rely on the Ticket Contract’s pre-suit notice requirement. And there is no genuine dispute of fact as to whether Plaintiff complied with the Ticket Contract’s requirements — she did not. The Ticket Contract required that Plaintiff provide “full particulars in writing” of any alleged claims “within 185 days” of the “injury, event, [or] illness giving rise to [it].” (SOF ¶¶ 17–21 (alterations added)).

While Plaintiff argues that the medical records generated by her visit to Dr. Campino themselves constituted “full particulars in writing[.]” she does not dispute that those records are

the only written notice she “provided.” (Resp. SOF ¶ 23 (alteration added; quotation marks omitted)). Indeed, Plaintiff does not identify any documents that *she* prepared or presented to Defendant, prior to filing her Complaint, that would have given Defendant notice of her claims. Further, Plaintiff does not dispute that she “never contacted or returned to the medical center following her initial visit[,]” or that she “disembarked the vessel at the end of her cruise without any follow-up with the shipboard medical staff.” (SOF ¶ 19–20 (alterations added); *see also* Resp. SOF 3 (“The Plaintiff does not contest [SOF ¶¶] 1 through 21.” (alteration added))).

Medical records and forms from a shipboard medical visit are not the written notice of a legal claim envisioned by the Ticket Contract’s pre-suit notice requirement. *See Rutledge v. NCL (Bahamas) Ltd.*, No. 08-cv-21412, 2010 WL 4116473, at *4 (S.D. Fla. Oct. 18, 2010) (stating that a plaintiff’s “medical form did not constitute written notice of a claim”). Those routine medical records provide no notice of the specific claims of negligent treatment that Plaintiff alleges in this suit. (*See generally* Am. Compl.); *see also Rutledge*, 2010 WL 4116473 at *4; *Carter v. BPCL Mgmt., L.L.C.*, No. 19-Civ-60887, 2021 WL 7502560, at *7–8 (S.D. Fla. Sept. 28, 2021).

Regardless, the Ticket Contract plainly required *Plaintiff to provide Defendant* with written notice of any claims arising from the negligent treatment she now alleges. (*See* SOF ¶ 12). Plaintiff does not advance any evidence tending to show that the medical records prepared by Defendant’s independent contractor, Dr. Campino, somehow satisfy the contractual obligation she herself assumed. Accordingly, there is no genuine dispute that the Plaintiff did not comply with the pre-suit notice requirement of the Ticket Contract.

C. Knowledge & Prejudice

Notwithstanding Plaintiff’s failure to comply with the Ticket Contract’s pre-suit notice requirement, section 30508(c) excuses noncompliance if Defendant “had knowledge of the

injury . . . and . . . has not been prejudiced by [Plaintiff's] failure" to submit the pre-suit notice. 46 U.S.C. § 30508(c)(1) (alterations added); *see also Rutledge*, 2010 WL 4116473, at *4 ("The fact that Plaintiff failed to give notice does not end the Court's inquiry, however, because this case is governed by maritime law."). Plaintiff claims that the shipboard medical records provided Defendant with sufficient knowledge of her "injury," while Defendant asserts that the records provide only the knowledge of an underlying eye infection, not of any subsequent claims of negligent treatment by the shipboard doctor regarding the eye infection. (*Compare* Resp. 10 with Reply 6–7). And, while Defendant claims that the lack of pre-suit notice or knowledge prejudiced it by preventing the initiation of its formal investigation process, Plaintiff asserts that Defendant's own evidence and conduct in this case indicate that the lack of notice did not prevent it from otherwise developing its defense. (*Compare* Reply 8 with Resp. 10–13).

Plaintiff bears the burden of proof in establishing Defendant's knowledge and lack of prejudice. *See Gentry v. Carnival Corp.*, No. 19-cv-25200, 2021 WL 4973508, at *4 (S.D. Fla. Aug. 18, 2021); *Cigainero*, 426 F. Supp. 3d at 1306 (citing *Davis v. Valsamis, Inc.*, 752 F. App'x 688, 695–96 (11th Cir. 2018)). So, to invoke section 30508(c)(1)'s savings clause and defeat summary judgment, Plaintiff must demonstrate triable issues of fact that Defendant had "knowledge of [her] injury," and it has "not been prejudiced by the failure [to give the requisite notice.]" 46 U.S.C. § 30508(c)(1) (alterations added).

In defining the bounds of "knowledge" under section 30508(c)(1), *Rutledge*, 2010 WL 4116473, and *Cigainero*, 426 F. Supp. 3d 1299, are instructive. In *Rutledge*, the plaintiff sued because of injuries suffered from a fall while onboard the defendant's ship. *See generally* 2010 WL 4116473. As here, the plaintiff failed to provide the contractually required pre-suit notice, and the defendant moved for summary judgment based on this non-compliance. *See id.* The court

denied summary judgment. *See id.*

Immediately after her fall, the plaintiff reported to the ship's medical staff, described the nature of the injury and how it occurred, and was diagnosed and treated. *See id.* at *1. The injuries for which the plaintiff sought redress were the same injuries which had been reported, treated, and investigated while she was still on board the ship. *See generally id.* Because the defendant was able to perform an immediate investigation into the matter, including treating the plaintiff's injury and examining the area where it had occurred, the court found "that the [defendant] had knowledge of the injury[.]" *Id.* at *4 (alterations added).

Contrast that situation with *Cigainero*, where the plaintiff raised (among other claims) a false imprisonment claim, alleging that the defendant's employees detained her upon disembarkation to ensure she settled unpaid medical bills incurred while onboard. 426 F. Supp. 3d at 1303. The plaintiff there failed to comply with the contractual pre-suit notice requirement, but she nonetheless "argue[d] that because she was detained . . . and (according to her) held by security for four hours, [d]efendant knew about her false imprisonment claim." *Id.* at 1306 (alterations added). The court disagreed and granted summary judgment, reasoning that "even if those facts were true, they would not give the [d]efendant knowledge of the [p]laintiff's claim, only of facts that might support such a claim." *Id.* (alterations added).

To demonstrate Defendant's knowledge of her injury here, Plaintiff emphasizes the shipboard medical records that Dr. Campino prepared and attempts to draw comparisons to the use of the medical records in *Rutledge*. (*See* Resp. 8–10; Resp. SOF ¶ 23). The analogy does not hold up. In *Rutledge*, the medical records provided direct notice and knowledge of the actual injury the plaintiff sustained; that injury was the same injury for which she then sued the defendant. *See* 2010 WL 4116473 at *1, 4. Here, the medical records only indicate that Plaintiff visited Dr.

Campino with an eye infection and was treated. (*See* SOF, Attach. 1, Borcegue Aff., Exs. D., E. [ECF No. 93-1] 40–49 (“Medical Records”)).

Plaintiff does not identify any other evidence that would allow the Court, let alone any reasonable juror, to conclude that the records were sufficient to give Defendant knowledge of the negligent treatment claims by the medical staff — the actual “injury” — Plaintiff now alleges in this case. (*See generally* Resp.). That makes this case more analogous to *Cigainero* than *Rutledge*. All the medical records indicate is Defendant’s potential knowledge of Plaintiff’s underlying medical condition — an eye infection; not the claims that the shipboard doctor misdiagnosed or mis-prescribed medication, resulting in the later injury to the eye Plaintiff suffered after she disembarked. *See* 426 F. Supp. 3d at 1306; *see also* *Carter*, 2012 WL 7502560, at *7 (“Even assuming” that Plaintiff “informed [a member] of the ship’s staff that [s]he was not feeling well[,]” that “would not give Defendant knowledge of Plaintiff’s claim, only of facts that might support such a claim.” (alterations added)).

Ultimately, to the extent that the medical records provided Defendant with any relevant “knowledge,” it is only the knowledge that Plaintiff visited the *Breeze*’s medical facility and was treated by Dr. Campino. (*See generally* Medical Records). Neither they nor anything else in the records indicates that Defendant had prior knowledge of Plaintiff’s subsequent issues with that treatment. Because the records do not provide advance knowledge of the actual injury alleged in this case — the negligent treatment claims arising from that medical facility visit — they are insufficient, and hence do not create triable issues of fact to establish “knowledge” under section 30508(c)(1). Plaintiff has not demonstrated how, simply by maintaining routine medical records, Defendant has “knowledge” of potential future negligent treatment claims a passenger might later bring.

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Plaintiff bears “the burden of proving that Defendant knew about [her] injury[.]” *Cigainero*, 426 F. Supp. 3d at 1306 (alterations added; citing *Davis*, 752 F. App’x at 695–96). She does not meet this burden or create a genuine dispute of material fact as to whether Defendant had that knowledge.⁴

IV. CONCLUSION

In sum, Defendant is permitted to assert its defense of Plaintiff’s lack of compliance with the Ticket Contract’s pre-suit notice requirement. Plaintiff does not create a genuine dispute of fact concerning her non-compliance with the requirement. And Plaintiff does not create a genuine dispute of fact over Defendant’s lack of prior knowledge regarding her claimed injury of negligent treatment by the shipboard medical staff.

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that Defendant, Carnival Corporation’s Motion for Summary Judgment [ECF No. 92] is **GRANTED**. Summary judgment will issue by separate order. All pending motions are denied as moot.

DONE AND ORDERED in Miami, Florida, this 21st day of November, 2022.



CECILIA M. ALTONAGA
CHIEF UNITED STATES DISTRICT JUDGE

cc: counsel of record

⁴ Because Plaintiff does not satisfy section 30508(c)(1)’s “knowledge” requirement, the Court need not address the issue of whether Defendant was “prejudiced” by the lack of notice.