

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 24-21617-CIV-COHN/VALLE

VENITA MICHEL,

Plaintiff,

vs.

CARNIVAL CORPORATION d/b/a
CARNIVAL CRUISE LINES, INC.,

Defendant.

ORDER GRANTING IN PART MOTION TO DISMISS COMPLAINT

THIS CAUSE is before the Court upon Defendant's Motion to Dismiss [DE 5] ("Motion"). The Court has considered the Motion, Plaintiff's Response [DE 8], Defendant's Reply [DE 13], and is otherwise fully advised in the premises.

I. Background

In this maritime personal injury action, Plaintiff Venita Michel alleges that she was injured aboard the Carnival Conquest on April 29, 2023. See DE 1. She claims that while she was descending the ladder attached to the top bunk in her cabin, "[s]uddenly and without warning, the ladder shifted violently to one side causing [her] to fall off the ladder." Id. ¶ 12. Her Complaint contains three claims. Count I asserts a vicarious liability claim based on the active negligence of Defendant's crewmember in "improperly and insufficiently securing the bunkbeds [sic] ladder to the bunk bed." Id. ¶ 26. Counts II and III, respectively, assert direct claims of negligent failure to warn and failure to maintain. Id. ¶¶ 30-50. Defendant seeks dismissal of all claims pursuant to Fed. R. Civ. P. 12(b)(6). See DE 5.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a court shall grant a motion to dismiss where, based upon a dispositive issue of law, the factual allegations of the complaint cannot support the asserted cause of action. Glover v. Liggett Grp., Inc., 459 F.3d 1304, 1308 (11th Cir. 2006). Indeed, “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Thus, a complaint must contain “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570).

Nonetheless, a complaint must be liberally construed, assuming the facts alleged therein as true and drawing all reasonable inferences from those facts in the plaintiff’s favor. Twombly, 550 U.S. at 555. A complaint should not be dismissed simply because the court is doubtful that the plaintiff will be able to prove all of the necessary factual allegations. Id. Accordingly, a well-pleaded complaint will survive a motion to dismiss “even if it appears that a recovery is very remote and unlikely.” Id. at 556.

III. Analysis

A. Plaintiff Adequately States a Vicarious Liability Claim

In maritime negligence actions, “a plaintiff must allege that (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.” Franza v. Royal Caribbean Cruises, Ltd., 772 F.3d 1225, 1253 (11th Cir. 2014) (citation and quotation marks omitted). The duty of care owed by a cruise operator to its passengers is ordinary reasonable care under the circumstances, “which requires, as a prerequisite to imposing liability, that the carrier

have actual or constructive notice of the risk-creating condition.” Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1322 (11th Cir. 1989). A defendant can be deemed to be on actual notice where the “defendant knows of the risk creating condition” and on constructive notice “when a dangerous condition has existed for such a period of time that the shipowner must have known the condition was present and thus would have been invited to correct it.” Bujarski v. NCL (Bahamas) Ltd., 209 F. Supp. 3d 1248, 1250-51 (S.D. Fla. 2016). This notice requirement, however, does not apply to maritime negligence claims proceeding under a theory of vicarious liability. See Yusko v. NCL (Bahamas), Ltd., 4 F.4th 1164, 1170 (11th Cir. 2021) (“a passenger need not establish that a shipowner had actual or constructive notice of a risk-creating condition to hold a shipowner liable for the negligent acts of its employees.”).

Defendant argues that Count I “is a direct negligence claim disguised under a theory of vicarious liability,” that Plaintiff therefore must plead sufficient facts for the Court to find that Defendant had actual or constructive notice of the hazardous condition which caused the Plaintiff to fall, and that Plaintiff has failed to do so. DE 13 at 3-6. The Court disagrees. As the Eleventh Circuit has explained, “[a] plaintiff is the master of his or her complaint and may choose to proceed under a theory of direct liability, vicarious liability, or both.” Yusko, 4 F.4th at 1170. Here, Plaintiff has done just that and has asserted both direct and vicarious liability claims against Defendant. Plaintiff is not required to plead Defendant’s notice of the hazard with respect to its vicarious liability claim. See, e.g., Hunter v. Carnival Corp., 609 F. Supp. 3d 1305, 1311 (S.D. Fla. 2022) (permitting plaintiff to pursue a vicarious liability claim against Carnival based on a Carnival employee's failure to properly secure bunk bed without establishing

notice). Defendant's request to dismiss Count I based on failure to adequately plead notice is therefore denied.

B. Plaintiff Fails to Adequately State a Direct Claim of Negligence

Turning to Counts II and III, Defendant also argues that Plaintiff's direct negligence claims should be dismissed because they do not plausibly allege Defendant's notice of the allegedly dangerous condition in Plaintiff's cabin. In response, Plaintiff argues that she sufficiently alleged notice because her Complaint states that:

At all times material hereto, Defendant knew of the foregoing dangerous conditions causing the Plaintiff's incident and failed to correct and/or warn the Plaintiff about them, or the foregoing dangerous conditions existed for a sufficient length of time so that Defendant, in the exercise of reasonable care under the circumstances, should have learned of them and corrected and/or warned the Plaintiff about them. Insofar as it relates to conditions that Defendant did not create, Defendant's knowledge was or should have been acquired through prior incident(s) and/or through its maintenance and/or inspections of the subject area.

DE 8 at 5-6 (quoting DE 1 ¶ 36). Plaintiff, relying upon Fadruga v. Carnival Corp., 23-23503-CIV, 2024 WL 1908980 (S.D. Fla. Apr. 30, 2024), also appears to argue that she has adequately alleged notice because she has "alleged that Carnival—through its cabin steward employee—'had direct contact and involvement with an arguably palpable hazard.'" Id. at 6 (quoting Fadruga, 2024 WL 1908980 at *4).

The Court agrees with Defendant that Plaintiff's Complaint fails to include factual allegations that plausibly suggest that Defendant had actual or constructive notice of the allegedly dangerous condition. Clearly, the above-quoted portions of her Complaint that Plaintiff points to as satisfying the notice requirement contain only conclusory allegations of notice and lack any specific supporting facts whatsoever. For instance, while Plaintiff vaguely alludes to one or more prior incidents, as in Holland v. Carnival

Corp., 50 F.4th 1088 (11th Cir. 2022), she “has not alleged any facts concerning a substantially similar incident to the one at issue.” And although Plaintiff suggests that her allegations regarding notice are “nearly identical,” DE 8 at 1, to those found sufficient in Hunter v. Carnival Corp., 609 F. Supp. 3d 1305 (S.D. Fla. 2022), the Court finds Hunter easily distinguishable.

At first glance, Hunter does seem to involve generally similar allegations to this case—both involve bunk bed ladders on a Carnival vessel. But as to the specific allegations regarding the defendant’s notice of the risk of harm posed by the ladder, the cases diverge significantly. The Hunter court noted that the plaintiff had alleged “several specific facts” regarding notice, including “that Defendant approved [adding a fifth bed to the cabin] despite knowing the size of its cruise cabins, and thus knew that adding an additional bed to a cabin would require moving the bunk bed ladder to a place where it would not be secured” and “that Defendant’s crewmembers inspected the cabin at least 12 hours in advance of the cruise and, thus, Defendant knew (or should have known) of the ladder’s placement well in advance of the accident.” 609 F. Supp. 3d at 1314. Similarly specific factual allegations are notably absent from Plaintiff’s Complaint.

Plaintiff also seems to take the position that she has satisfied the notice requirement because of the nature of the hazard at issue here and because of Defendant’s “contact and involvement”—through its employee—with the hazard. This position lacks legal support. First, the Eleventh Circuit has definitively rejected the argument “that a cruise ship operator can be liable for negligence without notice if it created the dangerous condition that injured the plaintiff.” Pizzino v. NCL (Bahamas)

Ltd., 709 Fed. Appx. 563, 565-66 (11th Cir. 2017). Nevertheless, Plaintiff attempts to draw a comparison to Fadruga, where the court found the notice requirement satisfied because of the defendant's direct contact with the dangerous condition which, in that case, was "allegedly unreasonably hot soup." 2024 WL 1908980, at *4 (S.D. Fla. Apr. 30, 2024). Critical to the Fadruga court's analysis, however, was the fact that the "risk-creating condition—the high temperature of the soup—was presumably readily observable by whoever prepared or served it." Id. at *3. The court even specifically differentiated between Fadruga's allegations and those in "cases where a danger is hidden, not readily unobservable, or fleeting, **such as with a defective piece of equipment** or a transient substance (of unknown origins) on a floor. Id. (emphasis added). Here, Plaintiff's allegations of an improperly secured ladder are clearly more akin to a defective piece of equipment than soup that was so observably hot that someone "placed 'a second bowl ... underneath' the bowl the soup was in" so that it could be carried to the plaintiff's table. Id. Defendant's request to dismiss Counts II and III based on failure to adequately plead notice is therefore granted. The Court will, however, grant Plaintiff's request for leave to amend as Defendant has failed to show that amendment would be futile.

C. Plaintiff Alleges Sufficient Facts to Support an Inference that the Danger was not Open and Obvious

Defendant also argues that Plaintiff's failure to warn claim (Count II) should be dismissed because "Plaintiff fails to allege that the risk creating condition was not open and obvious, nor does Plaintiff allege sufficient facts to infer that the dangerous condition was not open and obvious." DE 5 at 8. Although the Court has already dismissed Count II for failure to plead notice, should Plaintiff attempt to replead this

claim, the Court will, in the interest of efficiency, address Defendant's open and obvious argument as well.

A cruise ship has no duty to warn of dangers which are open and obvious. Malley v. Royal Caribbean Cruises Ltd., 713 F. App'x 905, 907 (11th Cir. 2017). "To determine whether a condition is open and obvious, this Court asks whether a reasonable person would have observed the condition and appreciated the nature of the condition." Id. at 908. Here, while Plaintiff concedes that her Complaint does not use the words "open and obvious," she argues that her factual allegations permit the reasonable inference that the ladder's dangerousness was not obvious. The Court agrees. Construing the factual allegations in the light most favorable to Plaintiff, the Court finds that she has, although just barely, adequately alleged that the ladder's dangerousness was not obvious. In her Complaint, she explains how the bunk bed has "grommets and/or slots where the hooks of the ladder are designed and intended to be attached and secured." DE 1 ¶ 15. The Court can infer that a reasonable person would have been unable to readily appreciate how the ladder's hooks were meant to be secured and the risk associated with them not being properly secured.

D. Plaintiff's Complaint is a Shotgun Pleading and Commingles Direct Negligence and Vicarious Liability Claims

Finally, Defendant argues that Plaintiff's Complaint should be dismissed because it is a shotgun pleading and because it improperly commingles two theories of negligence in each count. DE 5 at 9-13. Plaintiff concedes that her Complaint does bear some characteristics of a shotgun pleading and that her vicarious liability claim does contains allegations that are only relevant to her direct liability claims. DE 8 at 9-11. She denies that dismissal on these grounds is appropriate but argues that, if the

Court finds otherwise, she should be given leave to amend to address these issues. The Court agrees and will dismiss Plaintiff's Complaint without prejudice to her filing an Amended Complaint that does not contain multiple counts where each counts adopts the allegations of all preceding counts or commingle theories of liability by alleging Defendant's duty in a claim for vicarious liability.

IV. Conclusion

In light of the foregoing, it is **ORDERED and ADJUDGED** as follows:

1. Defendant's Motion to Dismiss [DE 8] is **GRANTED in part and DENIED in part** as set forth above.
2. Plaintiff shall file an Amended Complaint that comports with this Order by **July 1, 2024**. Defendant's response shall be due 14 days after the filing of an Amended Complaint.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 17th day of June, 2024.



JAMES I. COHN
United States District Judge

Copies provided to counsel of record via CM/ECF