

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number: 24-21170-CIV-MARTINEZ

PATRICIA D. WURDINGER,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.

_____ /

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE came before the Court upon Defendant Carnival Corporation’s Motion to Dismiss Plaintiff’s First Amended Complaint (“Motion”), (ECF No. 13). Plaintiff filed a response in opposition, (ECF No. 14), and Defendant filed a reply, (ECF No. 15). After considering the relevant briefing, the record, and being otherwise fully advised in the premises, the Motion is **GRANTED**.

BACKGROUND

Plaintiff alleges that soon after boarding Carnival’s ship, *Horizon*, “[s]he slipped on ice cream on the floor near the ice cream machine” while on the Lido Deck. (Am. Compl. ECF No. 12 ¶ 4, 9.) Plaintiff alleges that Defendant’s negligence in maintaining its ice cream machine and the surrounding area caused Plaintiff to slip, fall, and sustain injuries. (*See* Am. Compl.) Defendant argues that “[t]he allegations asserted by Plaintiff in her Amended Complaint fail to establish how Carnival was on notice of any dangerous condition related to the presence of ice cream on the floor as they rest on generic conclusory statements which are insufficient to withstand a motion to dismiss.” (Mot. at 7.)

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), the Court will grant a motion to dismiss if the complaint fails to state a claim for which relief can be granted. At this stage of the case, “the question is whether the complaint ‘contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.’” *Worthy v. Phenix City*, 930 F.3d 1206, 1217 (11th Cir. 2019) (alteration adopted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “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.” *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

When ruling on a motion to dismiss, “the Court accepts the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff.” *Speaker v. U.S. Dep’t of Health and Human Servs. For Disease Control and Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010). Although a complaint need not include detailed factual allegations, a plaintiff must offer “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. “[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.” *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

DISCUSSION

Maritime law governs Plaintiff’s negligence claim because the alleged tort was committed aboard a ship sailing navigable waters. *See Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320 (11th Cir. 1989). At the motion to dismiss stage, a plaintiff must plead facts sufficient to plausibly establish 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." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012). Notably, plaintiffs in maritime negligence cases must also assert sufficient factual allegations to allow the court to draw the reasonable inference that the defendant vessel owner had notice of the risk-creating condition. *Keefe*, 867 F.2d at 1322.

Actual notice is established "when the defendant knows about the dangerous condition." *Newbauer v. Carnival Corp.*, 26 F.4th 931, 935 (11th Cir. 2022). Constructive notice is established when the defendant "ought to have known of the peril to its passengers" because the hazard was "present for a period of time so lengthy as to invite corrective measures." *Keefe*, 867 F.2d at 1322. A plaintiff must "demonstrate specific facts pertaining to how long the dangerous condition existed or that the dangerous condition existed for a sufficient period of time to create constructive notice." *Kendall v. Carnival Corp.*, No. 1:23-cv-22921, 2023 WL 8593669, at *3 (S.D. Fla. Dec. 7, 2023); *see also Newbauer*, 26 F.4th at 936 ("Newbauer's argument is unpersuasive because she failed to allege any facts suggesting the amount of time the hazard existed on the deck before she fell or that there were crewmembers monitoring the area."). Constructive notice may also be established if a plaintiff can "point to previous injuries or show that the defendant previously warned of the danger." *Malley v. Royal Caribbean Cruises Ltd.*, 713 F. App'x 905, 908 (11th Cir. 2017).

Plaintiff presents five theories to establish Defendant's notice of the alleged danger. The Court will address each in turn.

First, Plaintiff alleges that "Defendant always operated the subject ice cream vending machine and spills occurred that Defendant was keenly aware of occurring on a repetitive basis during all sailings." (Am. Compl. ¶ 13(a).) However, Plaintiff fails to cite to similar cases that show spills occurred on a repetitive basis during all sailings. *See Kendall*, 2023 WL 8593669, at *3 ("Indeed, a party may establish constructive notice with evidence of substantially similar

incidents in which conditions substantially similar to the occurrence in question must have caused the prior accident.”) Plaintiff fails to allege how these prior spills were substantially similar and thus put Carnival on notice of the hazard that caused Plaintiff’s injuries. Plaintiff does not allege which ships the spills occurred on, how repetitive the spills were, if the spills were ice cream, and if people consistently slipped on the spilled substance. (*See* Am. Compl.) Plaintiff fails to include factual allegations to support her conclusion that Defendant had actual knowledge.

Second, Plaintiff alleges that “Defendant absolutely knew that customers young and old would dispense the ice cream themselves and spill ice cream in the process of doing so and that spills occurred repetitively and usually without the presence of any employees/crew members.” (Am. Compl. ¶ 13(b).) Plaintiff’s assertion is a legal conclusion that the Court will not take as true. *See Twombly*, 550 U.S. at 555 (explaining that while a complaint “does not need detailed factual allegations,” it must provide “more than labels and conclusions”). Plaintiff does not allege any facts that show how often the spills happened, whether there were any crewmembers or employees present at the time of the spill at issue, or that a customer spilled the ice cream that caused the incident at issue. *See Patton v. Carnival Corp.*, 22-13806, 2024 WL 1886504, at *3 (11th Cir. Apr. 30, 2024) (reasoning that the plaintiff’s “complaint lacks any plausible ‘allegation as to how long’ the dangerous condition existed” and “hasn’t plausibly described the dangerous condition ‘in a way that would suggest’ it has been there ‘for a sufficient period of time.’”)

Third, Plaintiff alleges that “Defendant had actual notice of the spills occurring at and near the subject ice cream vending machine for a very long time prior to Plaintiff’s incident” because “Defendant had specific, time oriented, repetitive inspection policies to the subject ice cream machine . . . to inspect the machine’s operation, to clean up the catch tray, and to clean up spills occurring around and near the subject ice cream vending machines.” (Am. Compl. ¶ 13(c).)

Plaintiff's complaint is devoid of facts to support the conclusion that Defendant had notice for a "very long time." Plaintiff also fails to make any factual allegations that the inspection policies were violated thus causing the subject injury. *See Nichols v. Carnival Corp.*, 423 F. Supp. 3d 1316, 1323 (S.D. Fla. 2019) ("These allegations do not present sufficient facts to establish notice because they do not allege how, factually, Carnival's inspections would have revealed the various allegedly unsafe conditions and what the corresponding unsafe conditions were.").

Fourth, Plaintiff alleges that "Defendant more generally had constructive notice of spills since such spills occurred randomly and on a regular basis at and near the subject self-service ice cream vending machine for a very long time prior to Plaintiff's accident. (Am. Compl. ¶ 13(d).) Again, Plaintiff does not allege what substances were spilled randomly, if the same substance was spilled in this instance, how long the subject substance was spilled, or how long Defendant had notice of the substance at issue. *See Newbauer* 26 F. 4th at 936 (affirming the trial court's dismissal because the complaint "did not allege any facts supporting the conclusions that the substance had been on the floor for a sufficient period of time to create constructive notice, that this was a recurring issue, or that there may have been employees who observed the hazard and failed to take corrective action.").

Finally, Plaintiff alleges that the "rules and regulations applicable to the subject ice cream vending machine further evinces Defendant's actual knowledge of the ice cream vending machine regular spills hazard." (Am. Compl. ¶ 13(f).) It is unclear how the existence of rules and policies make Defendant aware of the actual spill at issue. Although rules and policies can indicate a general awareness of recurring issues, Plaintiff did not present any factual allegations that the rules and policies here made Defendant aware of the actual spill that caused Plaintiff's injury. General notice of a potential hazard is not enough to establish notice. *See Navarro v. Carnival Corp.*, 19-

21072-CIV, 2020 WL 1307185, at *3 (S.D. Fla. Mar. 19, 2020) (“As currently alleged, it appears that [plaintiff] mistakenly conflates foreseeability with actual or constructive notice.”).

Overall, Plaintiff fails to allege facts that plausibly allege Defendant’s notice of the spill that caused her injury. Plaintiff does not allege facts showing that the policies and procedures Defendant had in place were violated, how long the spill was there, that the spill at issue is similar to the alleged spills that occurred on a regular basis, or that there were crew members that saw the spill that actually caused Plaintiff’s injury.

Thus, the Court finds that Plaintiff failed to plead facts showing that Defendant had notice of the allegedly dangerous condition.

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. The Motion to Dismiss, (ECF No. 13), is **GRANTED**.
2. Plaintiff’s Amended Complaint, (ECF No. 12), is **DISMISSED without prejudice**.
3. Plaintiff may file a second amended complaint that cures the deficiencies identified in this Order on or before December 4, 2024. Failure to do so may be grounds for **final dismissal without further warning**.

DONE AND ORDERED in Chambers at Miami, Florida, this 6 day of November 2024.



JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Sanchez
All Counsel of Record