UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 18-CV-21953-MARTINEZ/AOR

CARELYN FYLLING,

Plaintiff,

v.

ROYAL CARIBBEAN CRUISES, LTD.,
a Liberian corporation,

Defendant.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Defendant Royal Caribbean Cruises, Ltd.'s ("Royal Caribbean" or "Defendant") Motion for Summary Judgment [D.E. 48]. This matter was referred to the undersigned by the Honorable Jose E. Martinez, United States District Judge, pursuant to Title 28, United States Code, Section 636 [D.E. 129]. The undersigned held a hearing on this matter on November 20, 2019 [D.E. 133]. For the reasons stated below, the undersigned respectfully recommends that Defendant's Motion for Summary Judgment be GRANTED IN PART and DENIED IN PART.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff Carelyn Fylling ("Fylling" or "Plaintiff") brings a negligence claim against Defendant, alleging that she sustained personal injuries on March 4, 2017 during a cruise aboard the *Harmony of the Seas* (hereafter, "*Harmony*") while it was at its berth at Port Everglades, Florida. See Compl. [D.E. 1]. Plaintiff alleges that, while boarding the *Harmony* through its entranceway on Deck 5, she tripped and/or stumbled through the entranceway due to conditions and hazards related to the ramp area, causing her to fall forward and strike her head on the hard

deck inside the door. Id. at 8. Plaintiff alleges that her trip and/or stumble was caused by one or more of the following conditions related to the entranceway (which "has a short ramp that is sloped up to the door sill"): the slope and camouflaging of the ramp by a large Royal Caribbean logo; the presence of a faux wood scupper cover along the length of the door sill that was insufficiently secured; the lack of conspicuity of the scupper cover; the presence of a "lip" where the scupper cover meets the doorsill; and the lack of conspicuity of the "lip." Id. at 6-8. Plaintiff alleges that, as a result of her trip and/or stumble, she sustained severe and permanent injuries, including a traumatic brain injury. Id. at 9.

As the bases of her negligence claim, Plaintiff alleges that Defendant:

> A. Negligently designed and/or specified and/or created and/or approved and/or maintained and/or controlled the hazardous conditions in question; and/or,
>
> B. Negligently failed to conduct a reasonable inspection to discover the hazardous conditions in question; and/or,
>
> C. Negligently failed to correct or mitigate the hazardous conditions in question; and/or,
>
> D. Negligently failed to warn passengers of the hazardous conditions in question; and/or,
>
> E. Negligently failed to assist the plaintiff to safely board the vessel; and/or,
>
> F. Otherwise negligently failed to exercise reasonable care.

Id. at 9. Defendant seeks summary judgment on the grounds that Plaintiff has failed to meet her burden of proof as to two issues: actual or constructive notice of an alleged dangerous condition; and negligent design of the alleged dangerous condition.[1]

[1] Defendant also seeks judgment as a matter of law that Plaintiff's shipboard accident did not cause an AV Fistula in her brain for which she underwent surgery. In her response, Plaintiff conceded that Defendant is entitled to summary judgment on this issue.

APPLICABLE LAW

I. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56, "[t]he 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." Fed. R. Civ. P. 56(a). When determining whether a genuine issue of material fact exists, courts "view all evidence and draw all reasonable inferences in favor of the non-moving party." Smith v. Royal Caribbean Cruises, Ltd., 620 F. App'x 727, 729 (11th Cir. 2015). "Yet, the existence of some factual disputes between litigants will not defeat an otherwise properly grounded summary judgment motion; 'the requirement is that there be no *genuine* issue of *material* fact.'" Weiner v. Carnival Cruise Lines, No. 11-CV-22516, 2012 WL 5199604, at *2 (S.D. Fla. Oct. 22, 2012) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Indeed,

> [T]he plain language of [Rule 56] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Cohen v. Carnival Corp., 945 F. Supp. 2d 1351, 1354 (S.D. Fla. 2013) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). Hence, the mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient; there must be evidence upon which a jury could reasonably find for the non-movant. Anderson, 477 U.S. at 251.

II. Negligence Action

"A carrier by sea does not serve as an insurer to its passengers; it is liable only for its negligence." Weiner, 2012 WL 5199604, at *2. To prove a claim for negligence, the plaintiff must establish: "(1) that defendant owed plaintiff a duty; (2) that defendant breached that duty;

(3) that this breach was the proximate cause of plaintiff's injury; and (4) that plaintiff suffered damages." Isbell v. Carnival Corp., 462 F. Supp. 2d 1232, 1236 (S.D. Fla. 2006). Because the incident upon which this action is based "occurred aboard a cruise ship, these elements must be evaluated by reference to federal maritime law." Weiner, 2012 WL 5199604, at *2.

"It is a settled principle of maritime law that a shipowner owes passengers the duty of exercising reasonable care under the circumstances." Isbell, 462 F. Supp. 2d at 1237 (citing Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959)). This standard of care "requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition." Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1322 (11th Cir. 1989).

Actual notice exists when the defendant knows of the risk creating condition. See Adams v. Carnival Corp., No. 08-22465-CIV, 2009 WL 4907547, at *4 (S.D. Fla. Sept. 29, 2009) ("To be sure, the record contains no evidence to show that Carnival actually knew of a defect in the chair."). "Constructive notice arises 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." Bencomo v. Costa Crociere S.P.A. Co., No. 10-62437-CIV-DIMITROULEAS/SNOW, 2011 U.S. Dist. LEXIS 157138, at *7 (S.D. Fla. Nov. 10, 2011), aff'd, 476 F. App'x 232 (11th Cir. 2012).

"A cruise line is not liable for any alleged improper design if the plaintiff does not establish that the ship-owner or operator was responsible for the alleged improper design." Mendel v. Royal Caribbean Cruises, Ltd., No. 10-23398-CIV, 2012 WL 2367853, at *2 (S.D. Fla. June 21, 2012) (citing Groves v. Royal Caribbean Cruises, Ltd., 463 F. App'x 837 (11th Cir. 2012)). In Groves, the Eleventh Circuit affirmed the district court's granting of summary

judgment to the defendant on the basis that the plaintiff had adduced no evidence that the defendant had "actually created, participated in, or approved the alleged negligent design" of the dining room where the plaintiff was injured. Groves, 463 F. App'x at 837.

DISCUSSION

As noted above, Defendant seeks a judgment of non-liability on the grounds that Plaintiff has not met her burden of proof as to the issues of notice and negligent design. The undersigned discusses each of these issues in turn.

1. *Actual or constructive notice*

To obtain summary judgment on this issue, Defendant relies on the lack of evidence of prior incidents where a passenger fell at the entranceway of the *Harmony* or the entranceways of its sister ships, the *Oasis of the Seas* and the *Allure of the Seas*. Plaintiff counters that Defendant knew that the inclination in the entranceway ramp presented a potential fall risk that could cause someone to fall, based on the deposition testimony of Defendant's corporate representative Amanda Campos ("Campos"). See Deposition of Amanda Campos ("Campos Depo.") [D.E. 73-1]. Campos testified that:

- The company knew that a change in inclination can cause a person – or elevation -- anyone, not just this one, can cause somebody to fall. Campos Depo. at 124.
- There's two signs on either side of the doorway saying "caution, watch your step." Id. at 128.
- Those cones don't say specifically there is a ramp or incline just before you get to the doorway; they say "caution, watch your step." Id.
- I mean the company believes that people who are watching where they're going can see that there's an inclination, but just in case someone is not watching where they're going, they have then alerted them as an added precaution that hey, there's an elevation, watch your step. Id. at 123.

- The security staff that manned the position just outside the doorway would certainly be aware of those cones and the reason why they were there. Id. at 128.

Plaintiff argues that this constitutes evidence of actual knowledge on the part of Defendant of the existence of a risk creating condition at the entranceway of the *Harmony*, relying on Guevara v. NCL (Bahamas) Ltd., 920 F.3d 710 (11th Cir. 2019). In Guevara, there was a warning sign in the area where the plaintiff slipped and fell, which read: "ATTENTION! FOR YOUR OWN SAFETY PLEASE USE THE HANDRAIL. WATCH YOUR STEP." Guevara, 920 F.3d at 715. The Eleventh Circuit noted that: "Not all warning signs will be evidence of notice; there must also be a connection between the warning and the danger." Id. at 721. However, an issue of fact precluded summary judgment in the case, given that "NCL's corporate representative testified that the warning sign was intended to draw passengers' attention to the step down in the area at issue." Id. at 722. The Eleventh Circuit explained its holding as follows: "[A] cruise ship operator has notice of a condition—and thus a duty to warn—if a sign is posted on a ship warning about the condition." Id.

As in Guevara, there is evidence in this case that precludes summary judgment on the issue of notice, given Defendant's placement of the cones stating "caution, watch your step" in the entranceway of the *Harmony*, and Campos' testimony that: Defendant knew that a change in inclination could cause a person to fall; that the cones had been placed at the entranceway to alert passengers that there was an elevation in that area; and that security staff that manned the area would certainly be aware of those cones and the reason why they were there.

2. *Negligent design*

Defendant argues that the testimony in the record establishes that third parties were responsible for the primary design function for the *Harmony*'s entranceway; hence, it is entitled to summary judgment on the issue of negligent design. Plaintiff counters with testimony from

Defendant's corporate representatives, Ronald Pettit, Jr. ("Pettit") and Kelly Gonzalez ("Gonzalez"). See Deposition of Ronald Pettit, Jr. ("Pettit Depo.") [D.E. 73-2]; Deposition of Kelly Gonzalez ("Gonzalez Depo.") [D.E. 73-3]. These corporate representatives testified as follows:

- The incline at the entranceway of the *Harmony* was part of Royal Caribbean's vessel design, part of its general arrangement drawings for this space. Pettit Depo. at 28.
- The objective of making a Royal Caribbean ship user friendly and safe for people who have disabilities is a factor that has to go into how Royal Caribbean sets up and designs the type of entranceway found on the *Harmony*. Id. at 39.
- Royal Caribbean made the call to have an incline at the entranceway of the *Harmony* for safety considerations. Gonzalez Depo. at 30.
- Royal Caribbean made the call to put its logo, consisting of a white crown and anchor logo on a blue background, at the entranceway of the *Harmony*. Id. at 22.

The undersigned finds that this testimony is sufficient to create an issue of fact as to whether Defendant actually "created, participated in or approved" the design of the *Harmony's* entranceway, which Plaintiff contends was negligent due to the ramp slope and the camouflaging effect of the Royal Caribbean logo. See Groves, 463 F. App'x at 837; Mendel, 2012 WL 2367853, at *2. See also Whelan v. Royal Caribbean Cruises Ltd, 2013 WL 5583970, at *4 (S.D. Fla. Aug 14, 2013) (denying motion for summary judgment due to the existence of an issue of fact as to whether the defendant actually created, participated in, or approved the design of a step from which the plaintiff fell while exiting a club on board the defendant's ship).

CONCLUSION

Based on the foregoing considerations, the undersigned RESPECTFULLY RECOMMENDS that Defendant's Motion for Summary Judgment be GRANTED IN PART, only to the extent of establishing as a matter of law that Plaintiff's shipboard accident did not

cause an AV Fistula in her brain for which she underwent surgery; and that the Motion for Summary Judgment be otherwise DENIED.

Pursuant to Local Magistrate Judge Rule 4(b), the parties have **fourteen days** from the date of this Report and Recommendation to file written objections, if any, with the Honorable Jose E. Martinez, United States District Judge. Failure to file timely objections may bar the parties from attacking the factual findings contained herein on appeal. See Resolution Tr. Corp. v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993). Further, "failure to object in accordance with the provisions of [28 U.S.C.] § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." See 11th Cir. R. 3-1 (I.O.P. - 3).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida, this 10th day of December, 2019.

ALICIA M. OTAZO-REYES
UNITED STATES MAGISTRATE JUDGE

cc: United States District Judge Jose E. Martinez
Counsel of Record