UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 19-23140-CIV-MORENO

LESLIE RAMIREZ,

Plaintiff,

vs.

NCL (BAHAMAS) LTD.,

Defendant.

_____/

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Plaintiff, Leslie Ramirez, brings a one-count negligence action against Defendant NCL (Bahamas) Ltd. to recover damages from a trip and fall over a protruding metal pipe on a walkway on Defendant's ship. Defendant moved to dismiss the complaint arguing that the Plaintiff fails to properly plead notice or constructive notice and proximate cause. Defendant also moves to dismiss Plaintiff's claim for damages under Florida law. After reviewing Plaintiff's complaint, the Court grants the motion to dismiss as to the failure to plead actual or constructive notice. The Court denies the motion to dismiss for failure to plead proximate cause and as to damages under Florida law.

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss **(D.E. 12)**.

THE COURT has considered the motion, the response, the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is GRANTED in part and DENIED in part. Plaintiff shall file an Amended Complaint by no later than April 22, 2020. Failure to do so will be grounds for dismissing the case without prejudice.

I. Background

Plaintiff filed a one-count negligence action against Defendant NCL (Bahamas), Ltd. Plaintiff alleges that after boarding, she was walking along one of the ship's outdoor walkways on a narrow passageway located on the starboard side of deck 12. She alleges the unmarked metal pipe extended into the subject walkway, and there were no warnings posted or barriers placed around this hidden defect.

As Plaintiff made a right turn, the subject walkway was congested with fellow passengers and she was not able to see the protruding metal pipe, which caused her to fall and suffer injury to her right thigh, left ankle, left thigh, left shoulder, and left elbow.

In her negligence count, Plaintiff asserts that Defendant "created and maintained a dangerous and defective walkway by unreasonably placing or installing a protruding metal pipe directly in the path of passengers." She adds that "NCL possessed actual or constructive knowledge of the protruding pipe and the dangerous walkway." Defendant moves to dismiss the complaint arguing that the allegations insufficiently plead notice and proximate cause. Defendant also argues that Plaintiff's claim for damages under Florida law should be dismissed.

II. Legal Standard

"To survive a motion to dismiss, plaintiffs must do more than merely state legal conclusions," instead plaintiffs must "allege some specific factual basis for those conclusions or face dismissal of their claims." *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1263 (11th Cir. 2004). When ruling on a motion to dismiss, a court must view the complaint in the light most favorable to the plaintiff and accept the plaintiff's well-pleaded facts as true. *See St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 953 (11th Cir. 1986). This tenet, however, does not apply to legal conclusions. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Moreover, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual

allegations." *Id.* at 1950. Those "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). In short, the complaint must not merely allege a misconduct, but must demonstrate that the pleader is entitled to relief. *See Iqbal,* 129 S. Ct. at 1950.

III. Legal Analysis

A. Negligence

To state a negligence claim, Plaintiff must allege that: (1) NCL had a duty to protect her from a particular injury; (2) NCL breached that duty; (3) NCL's breach actually and proximately caused her injury; and (4) she suffered actual harm. *Pizzino v. NCL (Bahamas) Ltd.*, 709 F. App'x 563, 565 (11th Cir. 2017) (citing *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1280 (11th Cir. 2015)). Under federal maritime law, NCL owes all passengers a duty of exercising reasonable care under the circumstances. *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1321 (11th Cir. 1989) (citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630–32 (1959)). NCL is not, however, liable to its passengers "as an insurer"; "but only for its negligence." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1334 (11th Cir. 1984) (quoting *Kermarec*, 358 U.S. at 632)). As such, NCL's duty of care extends only to "those dangers which are not apparent and obvious to the passenger." *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1322–23 (S.D. Fla. 2011) (quoting *Isbell v. Carnival Corp.*, 462 F. Supp. 2d 1232, 1237 (S.D. Fla. 2006)).

1. Open and Obvious

To start, the Plaintiff's complaint sufficiently states that the dangerous condition was not "open and obvious." The complaint states that "an unmarked metal pipe extended into the subject walkway causing an edge to protrude an unsafe distance above the walkway floor, which

concealed, created a perilous, unsafe and dangerous walkway." Her allegations that the pipe was unmarked and concealed are sufficient to state that the condition was not open and obvious.

2. Actual or Constructive Notice

It is important to remember that "negligence should not be inferred from the 'mere happening of an accident alone.'" *Wish v. MSC Crociere S.A.*, Case No. 07-60980, 2008 WL 5137149, at *2 (S.D. Fla. Nov. 24, 2008) (citing *Belden v. Lynch*, 126 So. 2d 578, 581 (Fla. 2d DCA 1961)). So, where "the menace is one commonly encountered on land and not clearly linked to nautical adventure"—as is the case here—Plaintiff must allege factual matter demonstrating that NCL had "actual or constructive notice of the risk-creating condition." *Pizzino*, 709 F. App'x at 565 (quoting *Keefe*, 867 F.2d at 1322). *Pizzino* followed the rule announced in *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990) that where a cruise operator was responsible for the installation of the dangerous condition, the plaintiff nevertheless needs to show that the cruise operator had actual or constructive notice of the condition before it could be held liable. *Id.* at 565-66. Put simply, creation of the defect is insufficient to obviate the notice requirement. *Id.*

Actual notice exists when "the defendant knows of the risk creating condition." *Bujarski v. NCL (Bahamas) Ltd.*, 209 F. Supp. 3d 1248, 1250 (S.D. Fla. 2016) (citing *Keefe*, 867 F.2d at 1322). And 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." *Id.* at 1250–51 (quoting *Bencomo v. Costa Crociere S.P.A. Co.*, Case No. 10-62437, 2011 WL 13175217, at *2 (S.D. Fla. Nov. 10, 2011), *aff'd*, 476 F. App'x 232 (11th Cir. 2012)).

The complaint states that NCL "created and maintained a dangerous and defective walkway by unreasonably placing or installing a protruding metal pipe directly in the path of

passengers." Here, the Plaintiff's only allegation as to notice is that if NCL created the risk-creating condition, it necessarily had notice that it posed a danger. The problem is that – aside from the conclusory allegation that NCL knew about it because it created and maintained the condition – there are no factual allegations supporting the conclusion that NCL *knew* of this risk or that it existed for such a period of time that NCL must have known the condition was present and should have corrected it.

As currently pled, the Plaintiff conflates the creation of the condition, *i.e.* the installation of the pipe, with NCL's knowledge that it was dangerous. Plaintiff's conclusory allegation is insufficient under *Everett* and *Pizzino.* Plaintiff's complaint must set forth factual allegations of notice or constructive notice, separate and apart from NCL's installation and maintenance of the the pipe. *See, e.g. Navarro v. Carnival Cruise Lines, Ltd.*, Case No. 19-21072, (March 19, 2020) (finding Plaintiff failed to show cruise operator had actual or constructive notice of a dangerous condition); *Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1394 (S.D. Fla. 2014) (granting motion to dismiss negligence claim where there were no "allegations of prior injuries . . . or of any safety concerns or management problems that would have put Celebrity on notice of a dangerous condition triggering a duty to warn passengers of the risk."); *Gibson v. NCL (Bahamas) Ltd.*, Case No. 11-24343, 2012 WL 1952667, at *5 (S.D. Fla. May 30, 2012) (granting motion to dismiss negligence claim where there were "no allegations as to any prior practices or behavior of the Excursion Entities that would have put NCL on notice of dangers.").

Accordingly, the Court grants the motion to dismiss and grants Plaintiff leave to amend the complaint.

3. Proximate Cause

Regarding proximate cause, Defendant argues that Plaintiff's complaint does not contain any facts as to how any of the alleged acts or failures by NCL proximately caused her injury. With regards to proximate cause, federal courts sitting in admiralty may draw from "state law applying proximate causation requirements." *Diczok v. Celebrity Cruises, Inc.*, 263 F. Supp. 3d 1261, 1265–66 (S.D. Fla. 2017) (citing *Exxon Co. U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 839 (1996)). Proximate cause under Florida law requires evidence, which provides a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. *In re Royal Caribbean Cruises, Ltd.*, 991 F. Supp. 2d 1171, 1183 (S.D. Fla. 2013) (quoting *Gooding v. University Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984)).

Plaintiff alleges that NCL breached its duty of care in various ways, which proximately caused her injuries. The complaint alleges that NCL failed to safely construct and maintain the walkway, which had a protruding pipe. NCL also breached its duty of care by failing to warn the Plaintiff of the condition. NCL failed to place barriers around the protruding pipe. NCL failed to remove the pipe or modify it to eliminate the hazardous condition. NCL failed to properly train and instruct employees on how to maintain the subject premises in a reasonably safe condition. Plaintiff asserts that these failures directly and proximately caused her injuries. The crux of the complaint is that had NCL not installed a protruding pipe, had fixed it so it would not protrude, or had warned passengers about its existence in a congested narrow walkway, then Plaintiff would not have fallen. These allegations suffice to say that there is "a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result." Therefore, the Court finds Plaintiffs' allegations are sufficient to establish proximate cause.

B. Florida Claim for Damages

Defendant moved to dismiss Plaintiff's request for damages under Florida law because Plaintiff's complaint does not contain any counts under Florida law. Plaintiff agrees her claim is a maritime tort, but argues that federal courts rely on "state law to supplement maritime law so long as it does not alter or overrule maritime law." *Millan v. Celebration Cruise Operator, Inc.*, 212 F. Supp. 3d 1301, 1303 (S.D. Fla. 2015).

The dispute is whether the law precludes this Court from supplementing federal maritime law with state law, where consistent. To support its position that the claim for damages under Florida law must be dismissed, Defendant cites to *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 201 (1996) for the proposition that where federal maritime law governs a claim, federal maritime law may <u>not</u> be supplemented with state law. Defendant's blanket statement seems at odds with the holding of *Yamaha*, where the Supreme Court ultimately decided that state statutes supplement federal maritime law for deaths within territorial waters. *See Goodloe v. Royal Caribbean Cruises, Ltd.*, 418 F. Supp. 3d 1112, 1127 (S.D. Fla. 2019) (stating the holding of *Yamaha Motor* and finding Florida law supplements federal maritime law in deciding a damages issue). The holding of *Yamaha* does not seem to support Defendant's position. That being said, the Eleventh Circuit has cautioned that "it would be wrong to assume . . . that the holding in *Yamaha* embodies an unspoken rule that state interests must always trump competing admiralty principles when the two collide in state territorial waters. . ." *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept. 22, 1993*, 121 F.3d 1421, 1425 (11th Cir. 1997) (abrogated on other grounds). The Eleventh Circuit in *Amtrak Sunset* described the function as a balancing act of allowing "state law remedies while being careful not to trample the general maritime law." *Id.*

On a motion to dismiss, the Court need not decide the balancing act of what state remedies should be allowed, and which trample general maritime law. Therefore, the Court declines to

dismiss Plaintiff's request for damages under Florida law. This holding is consistent with other decisions in this district, which recognize that "[w]hile maritime law controls, state law may supplement maritime law as long as there is no conflict with maritime law." *See Faddish v. Buffalo Pumps*, 881 F.Supp.2d 1361, 1368 (S.D. Fla. 2012); *Morhardt v. Carnival Corp.*, 304 F. Supp. 3d 1290, 1294 (S.D. Fla. 2017); *Goodloe*, 418 F. Supp. 3d at 1130; *Millan*, 212 F. Supp. 3d at 303.

DONE AND ORDERED in Chambers at Miami, Florida, this 1st of April 2020.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record