UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-23958-CIV-ALTONAGA/Torres

BRENDA CONNELL,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court on Defendant, Carnival Corporation's Motion to Dismiss [ECF No. 9], filed on March 8, 2022. Plaintiff, Brenda Connell, filed a Response [ECF No. 14], and Defendant filed a Reply [ECF No. 16]. The Court has carefully considered the Complaint [ECF No. 1], the parties' written submissions, and applicable law. For the following reasons, the Motion is granted.

I. BACKGROUND

In 2019, while Plaintiff was aboard the Carnival *Horizon*, she "slipped on water or a wet, slippery substance on the deck surface and fell[.]" (Compl. ¶ 13 (alteration added); *see also id.* ¶¶ 17, 23, 29, 33). As a result, Plaintiff asserts four claims against Defendant: negligent maintenance (Count I), negligent failure to warn (Count II), vicarious liability for failure to correct dangerous condition (Count III), and vicarious liability for failure to warn (Count IV). (*See id.* ¶¶ 15–34). Defendant now moves to dismiss the Complaint for failing to state claims for relief, arguing (1) Counts I and II should be dismissed for failure to plausibly plead Defendant had notice of the dangerous condition (*see* Mot. 3–5), and (2) Counts III and IV should be stricken as duplicative of

Counts I and II or dismissed because notice is required under the facts as alleged (*see id.* 5–7).[1]

II. STANDARD

"To survive a motion to dismiss [under Federal Rule of Civil Procedure 12(b)(6)], 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) (alteration added; quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although this pleading standard "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (alteration added; quoting *Twombly*, 550 U.S. at 555). Pleadings must contain "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 (citation omitted). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (alteration added; citing *Twombly*, 550 U.S. at 556).

To meet this "plausibility standard," a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (alteration added; citing *Twombly*, 550 U.S. at 556). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009) (citation omitted), *abrogated on other grounds by Mohamad*

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[1] Defendant's argument section pertaining to Counts III and IV is titled: "Count[s] III and IV of Plaintiff's Complaint Should be Stricken as Duplicative." (Mot. 5 (alteration added)). But Defendant also contends these "claims must be dismissed as they fail to allege notice." (*Id.* 7). Further, the Motion is titled as a Motion to Dismiss, and the relief requested at the end is "an Order dismissing Plaintiff's Complaint[.]" (*Id.* (alteration added)).

In case there is any doubt about what relief Defendant is seeking, the Court construes the Motion as seeking dismissal of Counts III and IV. *See Campbell v. Williams*, No. 2:16-cv-680, 2017 WL 3387169, at *1 (M.D. Fla. Aug. 7, 2017) ("Because the Motion to Strike is presented more as a failure to state a claim, the Court will construe the Motion as a Motion to Dismiss."); *see also Boozer v. Towne Air Freight LLC*, No. 1:08-cv-00146, 2008 WL 11338672, at *2 (N.D. Fla. Nov. 17, 2008) ("Because the Defendant here wishes to strike an entire Count of the Complaint, this Court will construe the Defendant's Motion to Strike as a Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(6).").

v. Palestinian Auth., 566 U.S. 449 (2012). When considering a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (citing *SEC v. ESM Grp., Inc.*, 835 F.2d 270, 272 (11th Cir. 1988)).

III. DISCUSSION

Counts I & II. Defendant argues Counts I and II — Plaintiff's direct liability claims — should be dismissed because Plaintiff fails to plausibly allege Defendant had actual or constructive notice of a dangerous condition. (*See* Mot. 4). Plaintiff's only allegations regarding notice are identical paragraphs contained in Counts I and II that state: "At all material times [Defendant] knew or should in the exercise of reasonable care have known of the dangerous condition . . . due to the length of time it had been present, the occurrence of prior similar incidents, or otherwise." (Compl. ¶¶ 18, 24 (alterations added)). Contrary to Plaintiff's position (*see* Resp. 10–11), these conclusory allegations are insufficient to establish notice.

The elements of a maritime negligence claim are well settled: "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." *Newbauer v. Carnival Corp.*, 26 F. 4th 931, 935 (11th Cir. 2022) (quotation marks and citation omitted). To impose a duty in a maritime context, the shipowner must "have had actual or constructive notice of a risk-creating condition, at least where, as here, the menace is one commonly encountered on land and not clearly linked to nautical adventure." *Id.* (alteration adopted; quotation marks and citations omitted). Therefore, "[i]n order to survive Carnival's motion to dismiss, [Plaintiff] [must] plead sufficient facts to support each element of

her claim, including that Carnival had actual or constructive notice about the dangerous condition." *Id.* (alterations added; citation omitted).

Newbauer is analogous and warrants dismissal of Counts I and II. As here, Newbauer sued Carnival for negligent failure to maintain and negligent failure to warn. *See id.* at 933. Newbauer alleged she slipped on a "liquid or wet, slippery transitory substance" that "was located in an area of the ship that was a high traffic dining area" such that Carnival "knew or should have known of the presence of the substance." *Id.* (alteration adopted; quotation marks omitted). To establish notice, Newbauer "alleged that the substance 'had existed for a sufficient period of time before her fall' such that Carnival had actual or constructive knowledge of its presence and the opportunity to correct or warn about the hazard." *Id.* (alteration adopted). , Newbauer alternatively "alleged that Carnival had actual or constructive knowledge of the substance because of 'the regularly and frequently recurring nature of the hazard in that area.'" *Id.*

Newbauer's allegations were insufficient to establish notice. The district court granted Carnival's motion to dismiss, finding: (1) "Newbauer had not alleged any facts in support of her claim that there were prior slip and fall incidents where she fell"; (2) because "Newbauer mistakenly conflated foreseeability with actual or constructive notice[,] she had not sufficiently pled that the high trafficked area gave Carnival actual or constructive notice of the wet substance at issue"; and (3) "it was impossible to tell, based on Newbauer's sole conclusory statement [about the amount of time the hazard had been present], if the condition was present for seconds, minutes, or hours." *Id.* (alterations added). Thus, "while Newbauer's complaint made clear that it was '*possible*' Carnival was on notice, the complaint did not allege sufficient facts to state a claim that

w[as] '*plausible* on [its] face [and thus] sufficient to survive a motion to dismiss.'" *Id.* at 933–34 (emphases in original; alterations added).

The Eleventh Circuit affirmed. *See id.* at 936. The court found each of Newbauer's allegations regarding notice conclusory and unsupported by factual allegations. *See id.* at 935–36. More specifically, the court found Newbauer failed to "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 in the area who observed the hazard and failed to take corrective action." *Id.* at 936. Altogether, "Newbauer failed to include any factual allegations that were sufficient to satisfy the pleading standard set forth in *Iqbal* and *Twombly* such that it is facially plausible that Carnival had actual or constructive notice of the dangerous condition." *Id.* at 935.

Plaintiff's conclusory allegations about notice substantively are the same as Newbauer's and thus insufficient. She merely states Defendant had notice of the slippery substance "due to the length of time it had been present" or "the occurrence of prior similar incidents[.]" (Compl. ¶¶ 18, 24 (alteration added)). Like Newbauer, Plaintiff fails to allege any factual support for her conclusions, such as how long the substance had been there or how many prior similar incidents there had been. Like Newbauer, Plaintiff also fails to plausibly allege Defendant had notice of any dangerous condition. And like Newbauer, Plaintiff's negligent maintenance and failure to warn claims fail.

For these reasons, Counts I and II are dismissed for failure to plausibly allege notice.

There is an additional relevant holding in *Newbauer*. Newbauer's attorneys — who are currently representing Plaintiff — argued "that the district court erred by not granting her leave to amend *sua sponte* before dismissing the complaint." *Newbauer*, 26 F. 4th at 936. The Eleventh

Circuit rejected this argument, reiterating that "a district court is not required to grant a plaintiff leave to amend her complaint *sua sponte* when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Id.* (alterations adopted; quotation marks omitted; quoting *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc)).

Partially learning from their mistakes, Plaintiff's attorneys request leave to amend the Complaint if the Motion is granted. (*See* Resp. 11). They will be afforded that opportunity.

Counts III & IV. Defendant contends Counts III and IV should be dismissed because "Plaintiff is attempting to bypass the notice requirement of direct liability claims under maritime law by pleading under [theories] of vicarious liability." (Mot. 7 (alteration added)). The Court agrees.[2]

In *Yusko v. NCL (Bahamas), Ltd.*, 4. F. 4th 1164 (11th Cir. 2021), the Eleventh Circuit clarified the notice requirements for direct liability and vicarious liability negligence claims under maritime law. *Yusko* reiterated that a maritime plaintiff pursuing a direct liability theory must establish the shipowner had actual or constructive notice of a risk-creating condition and affirmed such notice is not required under vicarious liability theories. *See id.* at 1167–1170. Plaintiff cites *Yusko* for the proposition that she may plead her negligent maintenance and failure to warn claims under alternative vicarious liability theories. (*See, e.g.*, Resp. 4 (citing *Yusko*, 4 F. 4th at 1170)). The Court, and several other courts in this District, "do[] not read *Yusko* so broadly as to permit negligent maintenance and failure to warn claims brought under [] vicarious liability theor[ies]." *Britt v. Carnival Corp.*, No. 1:21-cv-22726, 2021 WL 6138848, at *4 (S.D. Fla. Dec. 29, 2021) (alterations added; footnote call number omitted); *see Atkinson v. Carnival Corp.*, No. 20-20317-

[2] Defendant also maintains Counts III and IV should be stricken as duplicative of Counts I and II. (*See* Mot. 5). The Court does not reach this issue because Counts III and IV are due to be dismissed.

Civ, 2022 WL 405366, at *2 (S.D. Fla. Feb. 10, 2022) (agreeing with *Britt*); *Worley v. Carnival Corp.*, No. 21-23501-Civ, 2022 WL 845467, at *2 (S.D. Fla. Mar. 22, 2022) (same).

True, *Yusko* reaffirmed there are situations where asserting a vicarious liability theory against a shipowner makes sense — such as when there is a readily identifiable tortfeasor employee. *Yusko* was such a case: the plaintiff sued the shipowner over injuries she sustained when the shipowners' professional dancer dropped her during a dance movement. *See* 4 F. 4th at 1166; *see also id.* at 1170–71 (reversing the district court's grant of summary judgment against the plaintiff). *Yusko* provides two additional examples: medical negligence cases (*Franza*) and intentional sexual assault cases involving crew members (*Doe*). *See id.* at 1169–70 (citing *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1228 (11th Cir. 2014); *Doe v. Celebrity Cruises*, 394 F.3d 891, 913 (11th Cir. 2004)).

Yusko then distinguishes vicarious liability cases by providing four examples of situations "where passengers are limited to a theory of direct liability[,]" two of which are relevant here. *Id.* at 1170 (alteration added; citing *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989); *Everett v. Carnival Cruise Lines*, 912 F.2d 1355 (11th Cir. 1990)).[3] The first is *Keefe*, where "a passenger on a cruise ship slipped and fell on a wet surface while dancing and sued the shipowner for negligently maintaining its floor." *Id.* at 1168 (citing *Keefe*, 867 F.2d at 1320). The second is *Everett*, where "a passenger on a cruise ship tripped and fell over a metal threshold for a fire door and sued the shipowner for negligence." *Id.* (citing *Everett*, 912 F.2d at 1357). "In both

[3] The other two examples involved a passenger suing a shipowner for its negligent failure to warn of known dangers on the island where the ship had stopped, *see Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1335–36 (11th Cir. 2012), and a passenger suing a shipowner for negligently failing to monitor its premises and prevent her sexual assault by other passengers, *see K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041, 1046 (11th Cir. 2019). *See Yusko*, 4 F. 4th at 1169–70. In both cases, "the notice requirement governed because the passengers alleged wrongdoing by the shipowner itself." *Id.* at 1169.

Keefe and *Everett*, the passengers sued the shipowners for negligent acts committed by the shipowners themselves — the negligent creation or maintenance of their premises." *Id.* at 1169.

This slip-and-fall case is like *Keefe* and *Everett*. Certainly, Plaintiff's negligent maintenance and failure-to-warn claims are the types of claims *Yusko* contemplates require notice for the shipowner to be found liable. "To hold otherwise would effectively eradicate the notice requirement in negligence cases under federal maritime law against Carnival or any corporate entity that almost exclusively acts through agents." *Atkinson*, 2022 WL 405366, at *2 (citation omitted). In other words, it would allow plaintiffs to "bypass the notice requirement simply by identifying an employee involved in Carnival's mere creation or maintenance of a defect." *Id.* (citation omitted).

Accordingly, Counts III and IV are dismissed as improper attempts to circumvent the notice requirement.[4]

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss **[ECF No. 9]** is **GRANTED**. The Complaint is **DISMISSED without prejudice**. Plaintiff has until **April 22, 2022** to file an amended complaint, including allegations plausibly suggesting actual or constructive notice.

[4] As noted, in interpreting *Yusko*, several other district courts have dismissed or granted summary judgment on similar vicarious liability claims. *See Britt*, 2021 WL 6138848, at *5 (dismissing a "negligent mopping" claim brought under a vicarious liability theory); *Atkinson*, 2022 WL 405366, at *2 (granting Carnival summary judgment on a negligent maintenance claim brought under a vicarious liability theory); *Worley*, 2022 WL 845467, at *1–2 (dismissing negligent maintenance and failure to warn claims brought under vicarious liability theories).

DONE AND ORDERED in Miami, Florida, this 30th day of March, 2022.

CECILIA M. ALTONAGA
CHIEF UNITED STATES DISTRICT JUDGE

cc: counsel of record