UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-23469-CIV-WILLIAMS/MCALILEY

CYNTHIA UPCHURCH,

Plaintiff,

vs.

CARNIVAL CORPORATION,

Defendant.
_______________________________________/

REPORT AND RECOMMENDATION ON MOTION TO DISMISS

Defendant Carnival Corporation filed a Motion to Dismiss the Amended Complaint, which the Honorable Kathleen M. Williams referred to me for a report and recommendation. (ECF No. 22, 26). The Motion is fully briefed. (ECF Nos. 23, 24, 25). Having carefully reviewed the parties' memoranda, the pertinent portions of the record and the applicable law, for the reasons I explain below I recommend that the Court grant the Motion to Dismiss.

I. BACKGROUND

Plaintiff filed this action against Carnival seeking damages for personal injuries she sustained when she tripped over a threshold while disembarking the M/S VALOR onto a tender boat.[1] (ECF No. 20, *generally*). In her first complaint, Plaintiff alleged "there existed

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[1] As it must at this stage in this action, the Court assumes the truth of the factual allegations in the Amended Complaint.

a hazardous or dangerous condition on one of the VALOR's tender boats: a raised but not-conspicuous threshold in the floor." In that Complaint she clearly pled two causes of action: Count I for Negligent Maintenance and Count II for Negligent Failure to Warn, both based upon a theory of vicarious liability. (ECF No. 1 at ¶¶ 13, 15-38). Carnival moved to dismiss, arguing that Plaintiff did not sufficiently allege that Carnival had notice of the dangerous condition and "improperly attempt[ed] to plead direct liability under a vicarious liability theory to bypass the notice requirement." (ECF No. 9 at 5). In response, Plaintiff filed her Amended Complaint.

The Amended Complaint does not specifically identify the cause of action(s). (ECF No. 20, *generally*). Rather, all of Plaintiff's allegations regarding liability are stated under a section labeled "Liability and Damage Facts". Therein, Plaintiff alleges that Carnival is vicariously liable for a crewmember's negligence which was a direct and proximate cause of Plaintiff's injuries. (*Id*. at ¶ 21). Plaintiff attempts to support this conclusion with the following allegations:

- Carnival owed Plaintiff a duty of reasonable care for her safety (*id*. at ¶ 12);
- crewmembers on board the VALOR owed disembarking passengers a duty of reasonable care for their safety (*id*. at ¶ 13);
- an unidentified Carnival crewmember, who Plaintiff recognized as having also staffed the guest excursion desk (the "Crewmember"), directed Plaintiff to enter the tender boat (*id*. at ¶¶ 16, 17);
- the Crewmember failed to exercise reasonable care because he/she: (i) "directed too many passengers to board the tender boat at once" and "direct[ed] passengers to disembark the VALOR onto the tender boat too rapidly" which obscured passengers' view of the raised threshold over which Plaintiff tripped, (ii) failed to adequately warn

> passengers entering the tender boat of the raised threshold, and (iii) failed to adequately assist passengers entering the tender boat so that they did not trip over the raised threshold (*id*. at ¶ 19).

Notably, the Amended Complaint makes no mention that the Valor's tender boat had a hazardous "raised but not conspicuous threshold." As with the first Complaint, she does not allege that Carnival had notice of a hazard created by the raised threshold.

Carnival asks this Court to dismiss the Amended Complaint. It makes two arguments: (1) the Amended Complaint is a shotgun pleading because it does not clearly state Plaintiff's cause(s) of action, and (ii) the Plaintiff's allegations can proceed only upon a theory of direct liability, and this requires Plaintiff to plead that Carnival had notice of the allegedly dangerous condition, which the Amended Complaint does not do. (ECF No. 24, *generally*).

In her response, Plaintiff seeks to clarify her Amended Complaint, stating that she alleges one count of negligence, which she characterizes as "a core claim for vicarious liability".[2] (ECF No. 23 at 5). Plaintiff contends that her allegations can proceed upon a theory of vicarious liability because she has "identified a negligent crewmember, alleged the specific material negligent acts and omissions by that crewmember, and alleges that the crewmember at all material times was acting in furtherance of [Carnival's business]." (*Id*.). She points out, accurately, that a properly pled claim of negligence against a cruise line of vicariously liability, for the negligence of its crew member, does not require Plaintiff to

[2] Plaintiff does not explain what she means by a "core claim". This suggests she may have another claim that is not "core." Beyond this, Plaintiff does not address Defendant's argument that the Amended Complaint is an improper shotgun pleading.

plead and prove that the defendant shipowner had notice of that crewmember's negligence. (ECF No. 23 at 5-7). Because she wants to bring a vicarious liability claim of negligence against Carnival, Plaintiff argues that she need not plead notice. I address these arguments in turn.

II. ANALYSIS

A. Standard

Federal Rule of Civil Procedure Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To satisfy this standard, a plaintiff must plead facts that make out a claim that is plausible on its face and raises the right to relief beyond a speculative level. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 510 (2007). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court must accept all of the plaintiff's factual allegations as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). However, "conclusory 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). The court must also draw "all reasonable inferences" in favor of the plaintiff. *St. George v. Pinellas Cty*, 285 F.3d 1334, 1337 (11th Cir. 2002).

B. The Amended Complaint is a Shotgun Pleading

The first Complaint clearly set forth two causes of action. The Amended Complaint is not so clear. This is especially significant here, where Carnival's liability for tort is

governed by maritime law,[3] which allows two types of negligence claims that may be brought against Carnival: one based upon its direct negligence, and the other based upon Carnival's vicarious liability for an employee's negligence. *Yusko v. NCL (Bahamas) Ltd.*, 4 F.4th 1164, 1169 (11th Cir. 2021). These concepts of direct and vicarious liability are "very different" and cannot be conflated. *Id*. Most importantly, for Carnival to be directly liable for negligence, it must have had "actual or constructive notice of the risk-creating condition, at least where… the menace is one commonly encountered on land…." *Id.* at 1168 (quoting *Keefe v. Bahama Cruise Line, Inc.* 867 F.2d 1318, 1320 (11th Cir. 1989)). As a separate matter, Carnival may be vicariously liable for negligent acts committed by its employees, so-called "employee-caused torts"; this is so even if Carnival did not have prior notice of the employee-created risk. *Id.* at 1169. As the Eleventh Circuit has explained: "When the tortfeasor is an employee, the principle of vicarious liability allows an otherwise non-faulty employer to be held liable for the negligent acts of that employee actuating within the scope of employment." *Id.* (citation, modification and quotation marks omitted).

The Amended Complaint has features of both direct liability and vicarious liability claims, and this creates confusion about what exactly are Plaintiff's cause(s) of action. The Amended Complaint plainly states that Carnival is "vicariously liable for any negligence of the [C]rewmember" who directed Plaintiff onto the tender boat. (ECF No. 20 at ¶ 18). Yet it also alleges that Carnival owed Plaintiff a duty of care, (ECF No. 20 at ¶ 12), which

[3] "General maritime law governs tort claims…that arise on ships sailing in navigable waters." *Yusko v. NCL (Bahamas) Ltd.*, 4 F.4th 1164, 1167 (11th Cir. 2021) (citation omitted).

"has nothing to do with vicarious liability, which is not based on the shipowner's conduct." *Yusko*, 4 F.4th at 1169. The Amended Complaint also accuses the Crewmember of failing to warn Plaintiff of the "raised threshold, over which Plaintiff tripped". (ECF No. 20 at ¶ 19c). The duty to warn, however, squarely belongs to Carnival, not its crewmembers. *Yusko*, 4 F.4th at 1168 ("a cruise line owes its passengers a duty to warn of known dangers beyond the point of debarkation in places where passengers are invited or reasonably expected to visit.") (quoting *Chaparro v. Carnival Corp.* 693 F.3d 1333, 1336 (11th Cir. 2012). Carnival, of course, can only meet this duty through the actions of its employees and agents; this, however, does not relieve Carnival of that duty.

Plaintiff argues, correctly, that "[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." *Id*. at 1170. Yet this does not relieve Plaintiff of the obligation to properly plead her claim. The Amended Complaint is a shotgun pleading because it "commits the sin of not separating into a different count each cause of action or claim for relief" and, for the reasons explained above, it fails "to give [Carnival] adequate notice of the claims against [it] and the grounds upon which each claim rests." *Weiland v. Palm Beach Cnty. Sheriff's Office*, 792 F.3d 1313, 1323 (11th Cir. 2015) (citations omitted).

C. Plaintiff Fails to State a Claim for Negligence

The Amended Complaint must also be dismissed because Eleventh Circuit precedent makes clear that Plaintiff can proceed against Carnival, for damages caused by her trip and fall, only on a theory that it is directly liable for the hazard that caused Plaintiff to fall. The *Yusko* Court was clear that there are "occasions where passengers are *limited*

to a theory of *direct* liability", to include cases where "a passenger will seek to hold a shipowner liable for maintaining dangerous premises…[or] failing to warn of dangerous conditions off-ship…." *Yusko*, 4 F.4th at 1170 (emphasis added) (citing *Everett v. Carnival Cruise Lines*, 912 F.2d 1355 (11th Cir. 1990); *Chaparro*, 693 F.3d 1333.). That is the situation here.

Although Plaintiff would like to focus on the Crewmember's alleged failure to warn her of the raised threshold, or to "adequately … assist" her over the threshold (ECF No. 20 at ¶19c, d), she is clear that the "hazard [was] posed by the threshold." (*Id.* ¶ 20). The Eleventh Circuit and Courts in this District regularly hold that such negligent maintenance and failure to warn claims are limited to a theory of direct liability and, therefore, require allegations of notice. *See e.g., Yusko*, 4 F.4th at 1168 (citing *Everett*, 912 F.2d at 1358, where passenger tripped over a metal threshold for a fire door, as an example of a direct liability claim.); *Britt v. Carnival Corp.*, No. 1:21-cv-22726, 2021 WL 6138848, at *5 (S.D. Fla. Dec. 29, 2021) ("Plaintiff cannot maintain a vicarious liability claim arising from allegations that Defendant's employees negligently mopped, and therefore negligently maintained Defendant's premises and failed to warn" because "[u]nder *Yusko*, claims for negligent maintenance and failure to warn are 'limited to a theory of direct liability,' which requires notice.").

The *Yusko* Court provided the following examples of vicarious liability negligence claims that do not require the plaintiff to plead and prove notice: (i) medical negligence of an onboard nurse and doctor, (ii) crewmember assault on a passenger, or (iii) negligence of a crewmember dancer in dropping a passenger while dancing. *Yusko*, 4 F.4th at 1169-

70. In each of these instances, the crewmember created the dangerous condition. By contrast here, the Crewmember did not create the hazard of the raised threshold. The alleged acts of the Crewmember are similar to those of a cruise line employee who negligently mopped a spill or negligently repaired a door stopper, which are direct negligent maintenance claims that require notice on the part of the shipowner. *Britt*, 2021 WL 6138848 at *4-5 (citations omitted). Plaintiff's focus on the Crewmember does not obscure the fact that the danger she complains of is the raised threshold on a tender boat. "A routine direct, premises liability claim [cannot] simply be recast as a vicarious liability claim to avoid having to plead and prove notice." *Navarro v. Carnival Corp.*, No. 19-21072-CV, 2020 WL 7480861, at *2 (S.D. Fla. Dec. 18, 2020).

For the reasons set forth above, the allegations in the Amended Complaint can only be based upon a theory of direct liability. Plaintiff, however, does not allege that Defendant had notice of the dangerous condition as required. Plaintiff therefore fails to state a claim upon which relief can be granted.

III. CONCLUSION

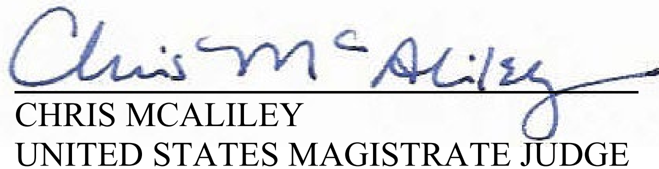
Based on the foregoing, I **RESPECTFULLY RECOMMEND** that the Court **GRANT** Defendant's Motion to Dismiss, (ECF No. 22). I note that Plaintiff does not request leave to file a second amended complaint in the event that the Court grants Defendant's Motion to Dismiss. Perhaps this is because Plaintiff recognizes that she cannot allege the necessary facts to state a claim for direct liability. In any event, if Plaintiff chooses to file objections to this Report and Recommendation, she shall state therein whether she seeks leave to amend her complaint again, and her justification for believing

she can properly plead her claim in a third complaint.

IV. OBJECTIONS

No later than fourteen days from the date of this Report and Recommendation the parties may file any written objections to this Report and Recommendation with the Honorable Kathleen M. Williams, who is obligated to make a *de novo* review of only those factual findings and legal conclusions that are the subject of objections. Only those objected-to factual findings and legal conclusions may be reviewed on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985), *Henley v.* Johnson, 885 F.2d 790, 794 (11th Cir. 1989), 28 U.S.C. § 636(b)(1), 11th Cir. R. 3-1 (2016).

RESPECTFULY RECOMMENDED in chambers at Miami, Florida, this 13th day of May 2022.



CHRIS MCALILEY
UNITED STATES MAGISTRATE JUDGE

cc: Honorable Kathleen M. Williams
Counsel of Record