UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 21-cv-23701-COOKE/DAMIAN

KIMBERLY HOSTERT,

Plaintiff,

v.

CARNIVAL CORPORATION,
a Panamanian Corporation d/b/a
CARNIVAL CRUISE LINES,

Defendant.
_____/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

THIS MATTER is before the Court on Defendant Carnival Corporation's Motion to Dismiss (the "Motion"). ECF No. 8. Plaintiff Kimberly Hostert ("Plaintiff") filed a response in opposition to the Motion. ECF No. 10. Defendant Carnival Corporation ("Defendant") filed a reply in support of the Motion. ECF No. 12. Thus, the Motion is ripe for adjudication.

The Court having reviewed the Motion, the briefing related thereto, the relevant legal authorities, for the reasons discussed below, finds that the Motion should be granted in part and denied in part.

BACKGROUND

Plaintiff alleges that she was a fare-paying passenger on board Defendant's M/S "HORIZON". ECF No. 1, Compl. at ¶ 10. Plaintiff allegedly slipped on a wet, foreign, or transitory substance on the exterior portion of Deck 11, on her way to a "Dive-In" movie night aboard the vessel. *See id.* at ¶ 11. Plaintiff allegedly sustained serious injuries, including a left patella fracture, as a result of the slip and fall. *See id.* Plaintiff's Complaint asserts three claims: negligent maintenance (Count I); negligent failure to warn (Count II); and a claim for vicarious liability (Count III). Defendant's Motion seeks dismissal of all three claims.

LEGAL STANDARD

A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss, a plaintiff

must plead sufficient facts to state a claim that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In evaluating a motion to dismiss, the Court's consideration is limited to the allegations in the complaint. *GSW, Inc. v. Long Cty.*, 999 F.2d 1508, 1510 (11th Cir. 1993). Thus, "[a]ll factual allegations are accepted as true and all reasonable inferences are drawn in the plaintiff's favor." *Simione v. Libman*, 18-63037-CIV, 2019 WL 6324284, at *2 (S.D. Fla. Nov. 25, 2019), appeal dismissed, 19-14940-AA, 2020 WL 7384952 (11th Cir. July 20, 2020) (citing *Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. For Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010)). While a complaint "does not need detailed factual allegations," it must provide "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. *See also Iqbal*, 556 U.S. at 678 (explaining that Rule 8(a)(2)'s pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"). Nor can a complaint rest on "'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557) (alteration in original).

ANALYSIS

With respect to Counts I and II of Plaintiff's Complaint, Defendant argues that they should be dismissed because Plaintiff fails to sufficiently allege that Defendant had notice of the alleged dangerous condition (i.e. the slippery deck). The Court agrees.

"Federal maritime law applies to actions arising from alleged torts 'committed aboard a ship sailing in navigable waters.'" *McFee v. Carnival Corp.*, No. 19-22917-CIV, 2019 WL 13189061, at *3 (S.D. Fla. Sept. 16, 2019) (quoting *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1315 (S.D. Fla. 2011)). "To plead negligence in a maritime case, '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.'" *Id.* (quoting *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1253 (11th Cir. 2014)). "With respect to the duty element in a maritime context, 'a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew.'" *Newbauer v. Carnival Corp.*, 26 F.4th 931, 935 (11th Cir. 2022) (quoting *Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 720 (11th Cir. 2019)). "This standard 'requires, as a prerequisite to imposing

liability, that the carrier 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.* (quoting *Guevara*, 920 F.3d at 720) (alteration in original)).

A. Counts I and II Must Be Dismissed Because Plaintiff Fails to Allege the Defendant had Actual or Construct Notice of the Alleged Dangerous Condition.

Counts II and II of the Complaint must be dismissed because Plaintiff fails to plausibly allege that Defendant had actual or constructive knowledge of the purported dangerous condition. The Eleventh Circuit's recent decision in *Newbaur v. Carnival Corporation*, 26 F.4th 931 (11th Cir. 2022), is instructive. There, the Eleventh Circuit found that that the plaintiff's "complaint contain[ed] only conclusory allegations as to actual or constructive notice." *Id.* at 935 (alteration added). The Eleventh Circuit noted that while, the plaintiff alleged "that Carnival had constructive notice of the wet substance on the deck because it was in a 'high traffic dining area,' . . . [the plaintiff] failed to provide any factual allegations supporting the notion that high traffic in the area gave Carnival notice of the condition." *Id.* (alterations added) (citation omitted in original). Likewise, the Court found that "while [the plaintiff] alleged in her complaint that the substance 'had existed for a sufficient period of time before [her] fall' such that Carnival had constructive notice of its presence, she failed to allege any facts in support of this conclusory allegation." *Id.* at 936 (alterations added) (citation omitted in original). Aditionally, the *Newbaur* Court found that the plaintiff "failed to allege a sufficient factual basis to support her conclusory allegation that Carnival had actual or constructive knowledge of the hazard based on the 'regularly and frequently recurring nature of the hazard in that area.'" *Id.* (citation omitted in original).

Based upon the Eleventh Circuit's analysis in *Newbaur* this Court finds that Plaintiff's allegations here are conclusory and lacking. Here, Count I, in relevant part, alleges:

> [T]he exterior surface of the area of Deck 11 where the Plaintiff fell was in a high traffic area due to the production of a "Dive-In" movie night being put on by Defendant and attended by passengers and was in a condition dangerous to passengers traversing the area, including the Plaintiff, due to its being wet and therefore slippery. . . . Defendant either knew or should have known of the dangerous wet condition in the area where the Plaintiff slipped and fell due to the length of time the water or wet, slippery area had been present before the Plaintiff encountered it, the recurring nature of the condition, or both, and Defendant accordingly owed a duty to Plaintiff to exercise reasonable care timely and adequately

> to remedy the dangerous condition. . . . Notwithstanding Defendant's actual or constructive knowledge of the dangerous condition described above, the Defendant failed before the time of the Plaintiff's fall to take reasonable measures to maintain the area in a reasonably safe manner or to correct its condition, through drying or cordoning off the area or otherwise. The Defendant thereby failed to exercise reasonable care for the safety of its passengers including the Plaintiff and was thereby negligent.

ECF No. 1, Compl. at ¶¶ 14-16 (alteration added). Similarly, in relevant part, Count II alleges:

> [T]he exterior surface of the area of Deck 11 where the Plaintiff fell was in a high traffic area due to the production of a "Dive-In" movie night being put on by Defendant and attended by passengers and was in a condition dangerous to passengers traversing the area, including the Plaintiff, due to its being wet and therefore slippery. . . . Defendant either knew or should have known of the dangerous condition in the area where the Plaintiff slipped and fell due to the length of time the water or wet, slippery area had been present before the Plaintiff encountered it, the recurring nature of the condition, or both, and Defendant accordingly owed a duty to Plaintiff to exercise reasonable care timely and adequately to warn passengers of the condition. . . . Notwithstanding Defendant's actual or constructive knowledge of the dangerous condition described above, the Defendant failed before the time of the Plaintiff's fall to take reasonable measures to adequately to warn the Plaintiff through placement of appropriate signage or markings, orally delivered or written warnings, cordoning off the dangerous area, or otherwise. The Defendant thereby failed to exercise reasonable care for the safety of its passengers including the Plaintiff and was thereby negligent.

Id. at ¶¶ 21-23 (alteration added). Plaintiff's allegations fail to plausibly allege that Defendant had actual or constructive knowledge of the purported dangerous condition. Like in *Newbaur*, Plaintiff here fails to provide any facts to support her conclusory allegation regarding the length of time that the purported substance was on the deck or the recurring nature of the alleged condition. Nor does Plaintiff provide any facts to support her conclusory assertion that the deck area where Plaintiff allegedly fell was a high traffic area. In short, Plaintiff's allegations regarding Defendant's actual and/or constructive notice of the alleged dangerous condition are far too conclusory to make them plausible. These allegations, therefore, fail to comply with *Twombly*, *Iqbal*, and their progeny. Accordingly, Counts I and II of the Complaint must be dismissed.

B. Count III of the Complaint Plausibly States a Claim for Negligence Based Upon Vicarious Liability.

Next, Defendant argues that Plaintiff's claim for vicarious liability should also be dismissed because "Plaintiff's attempt to transform a garden-variety slip-and-fall direct liability claim into one for vicarious liability with Count III contravenes the Eleventh Circuit's recent opinion in *Yusko v. NCL (Bahamas) Ltd.*, 4 F.4th 1164 (11th Cir. 2021) and must be dismissed with prejudice." ECF No. 8, Mot. to Dismiss at p. 7. In response, Plaintiff suggests that her claim for vicarious liability is pled in the alternative to her claims for negligent maintenance and negligent failure to warn and argues "[w]hen a passenger asserts a claim that a cruise line is vicariously liable for the negligent acts or omissions of crewmembers, the passenger need not plead or prove that the cruiseline had actual or constructive notice of any dangerous condition." ECF No. 10, Resp. to Mot. to Dismiss at p. 5. The Court agrees with Plaintiff.

In *Yusko*, the plaintiff participated in a dance competition aboard a cruise ship. *See Yusko*, 4 F.4th at 1166. As part of the competition, the plaintiff was paired with a crewmember who allegedly "performed multiple dance movements in which he spun [the plaintiff] while holding her arms. [The plaintiff] danced for less than a minute before falling backward and hitting her head during one of those movements." *Id.* The plaintiff then brought negligence claims against NCL for its failure to exercise reasonable care and its crewmember's failure to act in a reasonable manner that would keep her safe. *Id.* The district court held that "a shipowner is not liable to a passenger under maritime negligence law unless it has actual or constructive notice of the risk-creating condition that caused the passenger's injury." *Id.* "Because the plaintiff had not shown that NCL had notice of the risk-creating condition that led to her injury –i.e., [the crewmember's] allegedly negligent dancing – the district court granted NCL's motion for summary judgment" *Id.* On appeal, the Eleventh Circuit reversed the district court. In doing so, the Eleventh Circuit held "a passenger need not establish that a shipowner had actual or constructive notice of a risk-creating condition to hold a shipowner liable for the negligent acts of its employees." *Id.* at 1170. In reaching this holding, the Eleventh Circuit reasoned:

> As an initial matter, NCL's argument erroneously conflates the very different concepts of direct and vicarious liability. Our caselaw's notice requirement defines the scope of a shipowner's duty to exercise ordinary

> reasonable care to passengers. If a shipowner breaches that duty in a way that injures a passenger, then it may be directly liable to that passenger under maritime law. . . . But the scope of a shipowner's duty has nothing to do with vicarious liability, which is not based on the shipowner's conduct. 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 acting within the scope of employment." . . . Accordingly, it makes very little sense to rely on caselaw about the scope of a shipowner's duty where, as here, the shipowner's duty is irrelevant.

Id. at 1169 (alterations added) (quoting *Langfitt v. Fed. Marine Terminals, Inc.*, 647 F.3d 1116, 1121 (11th Cir. 2011)). Thus, in accordance with *Yusko*, a passenger need not plead actual or constructive notice of a risk-creating condition when bringing a maritime negligence claim based upon vicarious liability i.e. based on the actions or omissions of a cruise ship's employees.

Here, in pertinent part, Count III of Plaintiff's Complaint alleges:

> At all material times, the Defendant was vicariously liable for failure by its crewmembers, acting in furtherance of the business of its vessel, to exercise reasonable care for the safety of Defendant's passengers, including the Plaintiff.
>
> At all material times including the time referenced in the preceding paragraph, the exterior surface of the area of Deck 11 where the Plaintiff fell was in a high traffic area due to the production of a "Dive-In" movie night being put on by Defendant and attended by passengers and was in a condition dangerous to passengers traversing the area, including the Plaintiff, due to its being wet and therefore slippery.
>
> At all material times the wet, slippery condition of the area of Deck 11 where Plaintiff slipped and fell was created by a crewmember or crewmembers inadequately or improperly cleaning and drying the area, thereby leaving the area wet. The crewmembers' failure adequately to clean and dry the area constituted a failure to exercise reasonable care for the safety of passengers in the area, including the Plaintiff, and was thereby negligent. The crewmembers' specific acts of negligence included:
>
> a. Failure adequately to clean the area where Plaintiff fell;
>
> b. Failure adequately to dry the area where Plaintiff fell after cleaning it;

> c. Applying excessive water or liquid to the area where Plaintiff fell in the course of cleaning it;
>
> d. Failing to inspect the area adequately for dangerous wetness;
>
> e. Failure to warn passengers including the Plaintiff of the wet or slippery area through placement of adequate signs or markings, cordoning off the dangerous area, delivery of oral or written warnings, or otherwise.
>
> At all material times the Defendant was vicariously liable for the negligent acts and omissions of the crewmembers referenced above, since those crewmembers were acting in furtherance of the business of the vessel, specifically cleaning and drying Deck 11.

ECF No. 1, Compl. at ¶¶ 27-31. These allegations plainly assert a claim for negligence against Defendant based upon vicarious liability for the alleged actions of Defendant's employees. Nonetheless, Defendant argues that its "crewmembers alleged negligence in cleaning and drying the subject areas is in fact a claim for negligent maintenance of Carnival's premises and negligent failure to warn." ECF No. 8, Mot. to Dismiss at p. 8. Defendant is essentially arguing that despite the plain language of Count III's allegations, the Court should find that Count III necessarily amounts to a premises liability claim. The Court, however, will not re-write Plaintiff's Complaint in such a fashion. Plaintiff alleges that Defendant's employees created an unreasonably dangerous condition that caused her to slip and fall; therefore, Count III is not a premises liability claim. Moreover, as the Court noted in *Yusko*, "[a] plaintiff is the master of his or her own complaint and may choose to proceed under a theory of direct liability, vicarious liability, or both." *Yusko*, 4 F.4th at 1170 (alteration added). *Yusko* does not give this Court "license to recast passengers' vicarious liability claims as negligent maintenance claims. To the contrary, it requires taking a plaintiff's claims as they are while also recognizing that a plaintiff will not always be able to plead a vicarious liability claim plausibly and in good faith." *Hunter v. Carnival Corporation*, --- F. Supp. 3d ---, No. 22-20236-CIV, 2022 WL 2498757, at *4 (S.D. Fla. July 1, 2022). As such, the Court finds that because Count III asserts a claim for vicarious liability, Plaintiff is not required to plead actual or constructive notice. The Court, therefore, declines Defendant's request to dismiss Count III for failure to plead notice.

Accordingly, for the reasons discussed above, it is **ORDERED and ADJUDGED** that Defendant Carnival Corporation's Motion to Dismiss (ECF No. 8) is **GRANTED IN PART and DENIED IN PART**. Counts I and II of Plaintiff's Complaint (ECF No. 1) are hereby **DISMISSED WITHOUT PREJUDICE**.

DONE and ORDERED in Chambers in Miami, Florida this 16th day of August 2022.

DONALD L. GRAHAM
UNITED STATES DISTRICT COURT JUDGE
For Marcia G. Cooke, U.S. District Judge

Copies furnished to:
Melissa Damian, U.S. Magistrate Judge
Counsel of record