UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:22-cv-21499-GAYLES/TORRES

THOMAS BODKIN,

Plaintiff,

v.

MSC CRUISES, S.A.,

Defendant.
_____/

ORDER

THIS CAUSE comes before the Court upon Defendant MSC Cruises, S.A.'s Motion to Dismiss Plaintiff's Second Amended Complaint (the "Motion") [ECF No. 36]. The Court has reviewed the Motion and the record and is otherwise fully advised. For the reasons that follow, the Motion is **GRANTED**.

BACKGROUND[1]

I. Factual Background

This action arises from injuries that Plaintiff Thomas Bodkin sustained while aboard the MSC *Seashore* owned and operated by Defendant MSC Cruises, S.A. ("Defendant"). [ECF No. 32]. On April 6, 2022, Plaintiff was descending the spiral staircase in the lobby of the yacht club between Deck 18 and Deck 16 and slipped and fell. [ECF No. 32 ¶ 13].

Plaintiff alleges a list of "risk creating conditions" that caused him to fall, including unreasonably shiny stairsteps; unreasonably curvy stairsteps; uneven stairsteps; inadequate visual

[1] As the Court proceeds on a motion to dismiss, it accepts the allegations in Plaintiff's Complaint as true. *See Brooks v. Blue Cross & Blue Shield of Fla. Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (per curiam).

cues to help passengers see each step; unreasonably dark lighting; the inadequate dimensions of the handrail; and other dangerous conditions that purportedly would be revealed during discovery (the "Risk Creating Conditions"). *Id.* ¶ 18. Plaintiff also alleges, without detail, that Defendant had actual or constructive notice of the Risk Creating Conditions because it knew or should have known (a) that there was a sign on the subject stairs; (b) that crewmembers use the subject stairs; (c) about prior incidents involving falls; (d) about design defects in the subject stairs; (e) of unnamed safety standards; (f) that it failed to adequately inspect the subject stairs and the vicinity prior to the incident; and (g) about other reasons that would be disclosed during discovery. *Id.* ¶ 20.

II. Procedural History

On May 16, 2022, Plaintiff filed this action against Defendant. [ECF No. 1]. On June 10, 2022, Plaintiff filed the First Amended Complaint, alleging negligent failure to inspect (Count I), negligent failure to maintain (Count II), negligent failure to remedy (Count III), negligent failure to warn (Count IV), and negligent design, installation, and approval of the subject stairs and the vicinity (Count V). [ECF No. 11]. Defendant moved to dismiss the First Amended Complaint. On December 5, 2022, the Court entered an Order, [ECF No. 30], granting Defendant's motion and dismissing Plaintiff's First Amended Complaint without prejudice, [ECF No. 15], for failing to adequately allege actual or constructive notice. On December 16, 2022, Plaintiff filed his Second Amended Complaint asserting the same claims. [ECF No. 32]. Defendant now moves to dismiss for failure to state a claim. [ECF No. 36]. In particular, Defendant argues that Plaintiff fails to adequately allege actual or constructive notice and is a shotgun pleading. *Id.*

LEGAL STANDARD

To survive a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6), a claim "must contain sufficient factual matter, accepted as true, to 'state a claim to relief

that is plausible on its face,'" meaning that it must contain "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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While a court must accept well-pleaded factual allegations as true, "conclusory allegations . . . are not entitled to an assumption of truth—legal conclusions must be supported by factual allegations." *Randall v. Scott*, 610 F.3d 701, 709–10 (11th Cir. 2010). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Therefore, a complaint that merely presents "labels and conclusions or a formulaic recitation of the elements of a cause of action" will not survive dismissal. *Id.* (internal quotation omitted).

ANALYSIS

I. Plaintiff Fails to Adequately Allege Claims for Negligence

To bring a maritime negligence claim, "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." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) (citation omitted). "This standard requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of a risk creating condition . . . ." *Holland v. Carnival Corp.*, 50 F.4th 1088, 1094 (11th Cir. 2022) (internal quotation omitted). Therefore, "a shipowner's actual or constructive knowledge of the hazardous condition arises as part of the duty element in a claim seeking to hold the shipowner directly liable for its own negligence." *Id.* "Actual notice exists when the defendant knows of the risk creating condition" *Bujarski v. NCL*, 209 F. Supp. 3d 1248, 1250 (S.D. Fla. 2016). "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.* (internal quotation omitted). "Alternatively, a plaintiff can establish constructive notice with evidence of substantially similar incidents in which conditions substantially similar to the occurrence in question must have caused the prior accident." *Newbauer v. Carnival Corp.*, 26 F.4th 931, 935 (11th Cir. 2022).

Here, Plaintiff fails to allege with sufficient particularity that Defendant had actual or constructive notice of the Risk Creating Conditions that caused his injury. Indeed, most of Plaintiff's allegations regarding notice are conclusory and lack any detail about how Defendant knew or should have known that the Risk Creating Conditions existed. For example, Plaintiff generally alleges that Defendant knew or should have known about the danger of the stairs because there was a sign present. However, Plaintiff provides no specifics about what the sign said. [ECF No. 32 ¶ 20a]. Similarly, Plaintiff fails to provide any factual allegations supporting the notion that crewmembers using the stairs and being in the vicinity gave Defendant notice of the Risk Creating Conditions. *Id.* ¶ 20b. Moreover, Plaintiff lists two cases purportedly involving falls, *Id.* ¶ 20c, but fails to provide details about the facts in those cases or explain how those cases are "substantially similar incident[s] to the one at issue." *Holland*, 50 F.4th at 1096. Plaintiff also alleges Defendant knew or should have known about "safety standards/recommendations/other guidelines regarding the safety of the subject stairs" without naming the standards. [ECF No. 32 ¶ 20e]. This is not enough to plausibly allege actual or constructive notice as to Counts I–IV.

II. Count V: Negligent Design, Installation, and Approval

Defendant argues that Count V should be dismissed because it fails to allege facts showing that Defendant participated in the design of the subject area. "Liability based on negligent design would require that [MSC] 'actually created, participated in, or approved the alleged negligent design[.]'" *Johnson v. Carnival Corp.*, No. 19-23167-CIV, 2021 WL 1341526, at *9 (S.D. Fla.

Apr. 9, 2021) (quoting *Groves v. Royal Caribbean Cruises, Ltd.*, 463 F. App'x 837, 837 (11th Cir. 2012)). In addition, a defendant can only be liable for negligent design "if it had actual or constructive notice of such hazardous condition." *Groves*, 463 F. App'x at 837 (citation omitted). Where a plaintiff "alleges that a cruise line defendant 'specifi[ed], approv[ed] and/or accept[ed]' and was 'intimately involved with and ultimately approved . . . the design' of the area that caused injury to a plaintiff, the plaintiff has stated allegations that are generally sufficient to survive a motion to dismiss." *Donaldson v. Carnival Corp.*, No. 20-23258-CIV, 2020 WL 6801883, at *4 (S.D. Fla. Nov. 19, 2020) (quoting *Castillo v. NCL Bahamas Ltd.*, No. 17-23545-CIV, 2018 WL 1796260, at *4 (S.D. Fla. Jan. 5, 2018)) (alterations in original).

Here, Plaintiff alleges that "MSC participated in the design process of the subject vessel by generating design specifications," [ECF No. 32 ¶ 84]; MSC "approved of the subject vessel's design, including the design of the subject stairs and the vicinity," *Id.*; MSC "designed, installed, and approved of the subject stairs and the vicinity," *Id.* ¶ 86; and "MSC maintains the contractual right to participate, review, modify, and reject the design plans and drawings" of the *Seashore*, *Id.* ¶ 88. These allegations are sufficient to state a claim for negligent design. Therefore, Defendant's request to dismiss Count V of the Complaint is denied.

CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant MSC Cruises, S.A.'s Motion to Dismiss Plaintiff's Second Amended Complaint, [ECF No. 36], is **GRANTED in part and DENIED in part** as follows:

1. Defendant MSC Cruises, S.A.'s Motion to Dismiss Plaintiff's First Amended Complaint, [ECF No. 15], is **GRANTED** as to Counts I–IV, and **DENIED** as to Count V.

2. Counts I–IV shall be **DISMISSED without prejudice**.

DONE AND ORDERED in Chambers at Miami, Florida, this 9th day of August, 2023.

DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE