UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-cv-24109-WILLIAMS/REID

ILYASHA DAVIS,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

This matter is before the Court on Defendant Carnival Corporation's ("Carnival") Motion to Dismiss the Amended Complaint. [ECF No. 14]. The Honorable Kathleen M. Williams referred the motion to me for a report and recommendation pursuant to 28 U.S.C. § 636. [ECF No. 15]. Plaintiff Ilyasha Davis brings six negligence claims against Carnival. [ECF No. 11]. Carnival argues Counts 1-5 should be dismissed because they fail to sufficiently allege that Carnival had notice of the risk-creating condition. Regarding Count 6, vicarious liability for the negligent acts of Carnival's employees, Carnival argues a vicarious liability theory is an improper attempt to circumvent the notice requirement and Plaintiff has failed to present sufficient facts establishing the employee's negligent acts. [ECF No. 14].

I. Background

Davis was a passenger aboard Carnival's M/S Freedom in October 2022. [ECF No. 11 at 4]. According to the Amended Complaint, Davis was walking on Deck 5 of the Freedom when she slipped and fell on a foreign transitory liquid substance, causing her to sustain injuries. [*Id.*]. She

alleges she did not see the transitory substance due to the flooring's appearance and color. [*Id.* at 5]. The Amended Complaint provides that Davis observed approximately three crewmembers near the area at the time of the incident, "such that Davis reasonably infers that these crewmembers regularly used, observed, and tended to the subject area, and therefore were or should have been aware of the dangerous and/or risk creating conditions . . . and should have warned of and/or removed these conditions." [*Id.* at 5–6]. She alleges she took the following photograph after the incident, and that the photograph depicts the subject area, the foreign transitory liquid substance, and one of the crewmembers that regularly tended to the area:

[*Id.* at 3]. Davis alleges "the crewmembers knew or should have known of the dangerous condition because they saw the condition before [her] incident, but did not clean up the spill until after [her] incident." [*Id.* at 6]. Further, the Amended Complaint provides that Carnival participated in the installation and/or design of the subject surface, or alternatively, Carnival accepted the surface with its design defects present. [*Id.*]. Some of the risk-creating conditions, Davis alleges, are

Carnival's failure to use slip-resistant flooring, the appearance of the flooring, and the lack of safety measures, such as reasonable places to grab onto in the event of a fall. [*Id.* at 4–5]. Davis asserts six counts in the Amended Complaint: (1) negligent failure to inspect; (2) negligent failure to maintain; (3) negligent failure to remedy; (4) negligent failure to warn of a dangerous condition; (5) negligent design, installation, and/or approval of the subject surface; and (6) negligence for the acts of Carnival's employees based on vicarious liability. [*Id.* 9–21].

Count 6 of the Amended Complaint, titled "Negligence for the Acts of Carnival's Crew, Staff, Employees, and/or Agents, based on Vicarious Liability," specifically states:

> 18. The crewmembers who were in the immediate vicinity of the subject surface owed a duty to exercise reasonable care under the circumstances for the safety of its passengers.
>
> 19. The crewmembers who were in the immediate vicinity of the subject surface should have warned and/or assisted Davis in avoiding walking over the subject transitory foreign transitory foreign transitory liquid substance were agents of Carnival for the following reasons:
>
> a. They were the staff and/or employees of Carnival, or were Carnival's agents, apparent agents, and/or servants; and/or
> b. These staff, employees, and/or agents were subject to the right of control by Carnival; and/or
> c. These staff, employees, and/or agents were acting within the scope of their employment or agency; and/or
> d. Carnival acknowledged that this staff, employees, and/or agents would act on Carnival's behalf, and they accepted the undertaking.
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> 20. Carnival is vicariously liable for the negligent acts of these staff, employees and/or agents in failing to warn Davis of the dangerous conditions discussed in [the Amended Complaint's] paragraph 16(a–e) and/or failing to adequately assist her in avoiding walking over the subject transitory foreign transitory liquid substance. One of these crewmembers is depicted in a photograph attached to this complaint.
>
> 21. The breach of the crewmembers who were in the immediate vicinity of the subject surface was the cause in-fact of Davis's great bodily harm in that, but for their breach Davis's injuries would not have occurred.

22. The breach of the crewmembers who were in the immediate vicinity of the subject surface proximately caused Davis great bodily harm in that the incident that occurred was a foreseeable result of their breach.

23. As a result of the negligence of the crewmembers who were in the immediate vicinity of the subject surface, Davis has suffered severe bodily injuries resulting in pain and suffering . . . . .

[ECF No. 11 at 21–22].

II. Legal Standard

Carnival has moved to dismiss the complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); [ECF No. 14 at 1]. To survive a 12(b)(6) motion, a complaint must allege sufficient factual matter that, taken as true, states a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The factual allegations are accepted as true and construed in a light most favorable to the plaintiff; conclusory assertions and unwarranted deductions of fact are not." *Worley v. Carnival Corp.*, 21-23501-CIV, 2022 WL 845467, at *1 (S.D. Fla. Mar. 22, 2022) (citing *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)).

III. Analysis

There are two main issues relevant to the motion to dismiss: (1) whether Count 6 pleads a proper vicarious liability claim; and (2) with respect to all counts, whether Davis has sufficiently pled that Carnival was on notice of the alleged dangerous condition. [ECF No. 14 at 3, 7].

A. Vicarious Liability

Maritime law governs actions arising from alleged torts committed aboard a ship sailing in navigable waters." *Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 720 (11th Cir. 2019); *see Yusko v. NCL (Bahamas), Ltd.*, 4 F.4th 1164, 1167 (11th Cir. 2021). Decisions in maritime tort cases "rely on general principles of negligence law." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) (quoting *Daige v. Point Landing, Inc.*, 616 F.2d 825, 827 (5th Cir. 1980)). The

elements of a negligence claim based on a shipowner's direct liability for its own negligence 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." *Holland*, 50 F.4th at 1094.

In contrast, "a shipowner's duty to a plaintiff is not relevant to a claim based on vicarious liability." *Id.* "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.'" *Id.* (quoting *Langfitt v. F. Marine Terminals, Inc.*, 647 F.3d 1116, 1121 (11th Cir. 2011)). Because "the scope of a shipowner's duty has nothing to do with vicarious liability," *Yusko*, 4 F.4th at 1169, plaintiffs asserting vicarious liability against a shipowner do not need to establish that the shipowner had actual or constructive notice of the risk-creating condition. *Id.* at 1170; *see Holland*, 50 F.4th at 1094.

Carnival contends Davis's vicarious liability claim is simply an attempt to circumvent notice requirements for direct liability claims. [ECF No. 14 at 3]. Carnival argues that *Yusko*'s holding—allowing maritime plaintiffs to plead both direct and vicarious liability claims—does not extend to negligent maintenance or negligent failure to warn claims, and therefore Davis must allege Carnival's notice. [*Id.*; ECF No. 18 at 2]; *See Britt v. Carnival Corp.*, 580 F. Supp. 3d 1211, 1216 (S.D. Fla. 2021) ("*Yusko* contemplates, and this Court agrees, that claims stemming from the negligent maintenance of a ship's premises or failure to warn will be made out under a direct liability theory, which requires notice."); *Yusko*, 4 F.4th at 1170 (noting that plaintiffs would be limited to direct liability as a matter of "common sense" for maintenance of dangerous premises). Carnival also argues that Davis has not identified a specific employee whose negligent actions caused her injury. [ECF No. 14 at 7].

Carnival relies on *Holland*, 50 F.4th 1088, *Britt v. Carnival Corp.*, 580 F. Supp. 3d 1211 (S.D. Fla. 2021), and *Worley v. Carnival Corp.*, 21-23501-CIV, 2022 WL 845467 (S.D. Fla. Mar. 22, 2022), and other similar cases. In each case, the plaintiff's vicarious liability claims were dismissed pursuant to Rule 12(b)(6). In *Holland*, for instance, the plaintiff asserted two claims against the shipowner for negligent maintenance and negligent failure to warn after slipping on a wet substance, and both claims were alleged under a vicarious liability theory. *Id.* at 1091–92. The Eleventh Circuit affirmed the district court's dismissal, explaining that the plaintiff clearly sought to hold the shipowner directly liable because (1) he could not identify a specific employee whose negligence caused the injury; and (2) he focused his claims and oral arguments on the shipowner's notice and duty to the plaintiff. *Id.* at 1094–95. Carnival argues that, like *Holland*, Davis cannot rely on a vicarious liability theory, but even if she were allowed to, she has failed to plead sufficient facts in support of a vicarious liability claim. Carnival contends that Davis cannot identify a specific employee whose negligence caused the injury. [ECF No. 14 at 6].

In response, Davis argues there is binding precedent that vicarious liability is a valid theory of liability even when it overlaps with premises liability. [ECF No. 17]. She argues that Carnival misconstrues *Holland* and other cases. She refutes that she has not alleged sufficient facts in support of the vicarious liability claim, and points to allegations regarding the crewmembers, including the crewmember shown in the photograph. [*Id.*]

Davis is right. She may base her claims on both theories of liability. In *Hunter v. Carnival Corp.*, 609 F. Supp. 3d 1305, 1310 (S.D. Fla. 2022), Chief Judge Altonaga reiterated *Yusko*'s holding 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." There, the plaintiff asserted both direct and vicarious liability claims against Carnival after he was injured by an unsecured bunk bed ladder in

a passenger cabin. *Id.* at 1307. Plaintiff claimed Carnival was liable for the active negligence of the cabin steward that placed the ladder, and that notice was not required to state a vicarious liability claim. *Id.* The court rejected Carnival's argument that Count 1 of the complaint attempted to circumvent the pleading requirements of direct negligence claims by styling itself as a vicarious liability claim. *Id.* at 1308. The court explained: "Plaintiff may or may not be able to prove the cabin steward's negligence in the end. But Plaintiff is certainly allowed to allege that the cabin steward negligently set up Plaintiff's cabin and that Defendant is vicariously liable as a result." *Id.* at 1310.

Here too, as *Hunter* explained, Davis may be unable to prove the crewmembers' negligence, but she must nonetheless be allowed to assert a vicarious liability claim against Carnival. Davis has pleaded sufficient facts in the Amended Complaint to support her claim for vicarious liability. Specifically, Davis alleges that the specific crewmembers owed her a duty of reasonable care, that the crewmembers breached that duty, and that the breach proximately caused her actual harm. [ECF No. 11 ¶ 18–23]. And she asserts that those crewmembers were acting within the scope of their employment. [*Id.* ¶ 19]. Those facts alone are sufficient to support that the crewmembers acted negligently, and that Carnival may be vicariously liable for the crewmembers' active negligence.

Although Davis does not specifically name the crewmembers, this district court recently explained:

> [T]here is no requirement in the law that she do so, and it would seem fundamentally unfair to require the Plaintiff to remember the names of each of the crewmembers involved in the incident simply to file a complaint. There were, undoubtedly, specific crewmembers involved in the incident that the Plaintiff alleges. The Plaintiff's allegations are not general allegations of a failure to maintain a safe premises.

Mclean v. Carnival Corp., 22-23187-CIV, 2023 WL 372061 (S.D. Fla. Jan. 24, 2023); *see also Hunter*, 609 F. Supp. 3d at 1311 n.3 (explaining the allegations would enable defendant to identify the employee during discovery). Davis, too, should not be required to name each crewmember involved in the incident and her allegations are not general allegations of a failure to maintain a safe premises. She alleges, for instance, that "these crewmembers knew or should have known of the dangerous condition **because they saw the condition** before Davis's incident . . ." [ECF No. 11 at 6]. This allegation could well relate to the crewmembers' own breach and not Carnival's. But in any case, Davis has already narrowed down one of the crewmembers by including a photograph in the Amended Complaint. Taking these allegations as true, as the court must do, Davis has sufficiently stated a vicarious liability claim.

Lastly, Carnival's reliance on *Holland* is misplaced. There, the plaintiff alleged Carnival, and not a specific crewmember, owed him a duty of reasonable care. 50 F.4th at 1094. He also alleged that *Carnival* had actual or constructive notice of the dangerous conditions. *Id.* Those allegations, the Eleventh Circuit explained, were irrelevant to a claim based on vicarious liability. *Id.* at 1095. The court concluded that "[o]ther than the claims' titles and conclusory allegation asserting that [the shipowner] was vicariously liable, there is nothing in [the plaintiff]'s complaint" to support a claim for vicarious liability. *Id.* at 1094. Unlike *Holland*, here, Davis has clearly asserted under Count 6 that the *crewmembers*, not Carnival, owed Davis a duty of reasonable care, and she has not improperly comingled allegations regarding notice.

Worley is also distinguishable. 2022 WL 845467, at *2. The plaintiff in that case pleaded the vicarious liability claim in the alternative, and she appeared to concede in her response to the motion to dismiss that the duty breached was the duty of the cruise line, and not the duty of an employee. *Id.* Finally, *Britt* is unpersuasive. Judge Altonaga carefully explained in *Hunter* that

Britt's understanding of *Yusko* was too narrow, and she reiterated and that courts are not licensed "to recast passengers' vicarious liability claims as negligent maintenance claims." *Hunter*, 609 F. Supp. 3d at 1310.

In sum, Davis has properly pleaded a claim for vicarious liability. I respectfully recommend **DENYING** Carnival's request to dismiss Count 6 of the Amended Complaint.

B. Direct Liability and Notice

Because Counts 1–5 are direct liability claims and therefore require notice, the second and only remaining issue is whether Davis has adequately pled that Carnival was on notice of the alleged dangerous condition. *See Worley*, 2022 WL 845467, at *2. As discussed, to state a claim for negligence, the 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).

"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." *Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 720 (11th Cir. 2019) (cleaned up). A defendant has actual notice when the "defendant knows of the risk creating condition" and has constructive notice "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." *Bujarski v. NCL (Bahamas) Ltd.*, 209 F. Supp. 3d 1248, 1250-51 (S.D. Fla. 2016)

Carnival argues that Counts 1-5 should be dismissed because they do not plausibly allege Defendant's notice of a dangerous condition. [ECF No. 14 at 7]. In trying to make its case, Carnival

devotes much time to arguing that Davis's allegations of actual or constructive notice are too conclusory to survive a motion to dismiss. [*Id.* at 10–18]. I disagree.

Davis alleges several specific facts that "push her claims across the line from conceivable to plausible" *Hunter*, 609 F.Supp.3d at 1313 (cleaned up) (quoting *Twombly*, 550 U.S. at 570). Plaintiff, for instance, alleges that she observed approximately three crewmembers in the area where she fell, that these crewmembers saw the condition before the incident, and that one of those crewmembers cleaned the spill after she fell as depicted in the photograph. [ECF No. 11 at 3, 6]. These facts place the crewmembers in the immediate vicinity of the transitory liquid substance. Drawing all reasonable inferences in Davis's favor, it is reasonable to infer that these crewmembers knew or should have known about the substance and either removed the hazard or warned Davis of it. *See Aponte v. Royal Caribbean Cruise Lines Ltd*., 739 F. App'x 531 (11th Cir. 2018) (explaining that in some cases the proprietor may be held to have constructive knowledge if the plaintiff shows that an employee of the proprietor was in the immediate area of the dangerous condition and could have easily seen the substance and removed the hazard).

Davis's allegations thus support the plausible theory that Carnival should have been aware of the transitory foreign substance. Further, Davis has alleged that Carnival failed to exercise reasonable care by approving a floor design and pattern that made it impossible for Davis to see the foreign substance as she walked through the area. [ECF No. 11 at 17]. At this stage, these allegations provide enough to establish a plausible theory of Defendant's liability. The allegations "raise a reasonable expectation that discovery will reveal evidence" that Carnival had actual or constructive notice. *See Rivell v. Private Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008).

In all, Counts 1–5's allegations "contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. Plaintiff has met her burden, and Carnival is not entitled to dismissal pursuant to Rule 12(b)(6). I respectfully **RECOMMEND** that Carnival's Motion to Dismiss the Amended Complaint [ECF No.14] be **DENIED**.

Objections to this Report may be filed with the district judge within **FOURTEEN** (14) days of receipt of a copy of the Report. Failure to timely file objections will bar a *de novo* determination by the district judge of anything in this Report and shall constitute a waiver of a party's "right to challenge on appeal the District Court's order based on unobjected-to factual and legal conclusions." 11th Cir. R. 3-1; *see also Harrigan v. Metro-Dade Police Dep't Station #4*, 977 F.3d 1185, 1191-92 (11th Cir. 2020); 28 U.S.C. § 636(b)(1)(C).

SIGNED this 31st day of July, 2023.

LISETTE M. REID
UNITED STATES MAGISTRATE JUDGE

cc: All Counsel of Record