UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-CV-21678-RAR

RICHARD ROMANO,

Plaintiff,

v.

NCL (BAHAMAS) LTD.,
d/b/a Norwegian Cruise Lines, Inc.,

Defendant.
_____/

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

THIS CAUSE comes before the Court upon Defendant NCL (Bahamas) LTD.'s Motion to Dismiss Counts I, II, and V ("Motion"), filed on August 25, 2023. [ECF No. 11].[1] The Court having carefully reviewed the pleadings, the record, the relevant caselaw, and being otherwise fully advised, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion is **GRANTED IN PART** and **DENIED IN PART** as set forth herein.

BACKGROUND

This action arises from injuries sustained by Plaintiff while participating in an offshore excursion tour in the Dominican Republic during a cruise aboard NCL's passenger vessel, the Breakaway. Compl., [ECF No. 1] ¶¶ 5, 21, 28. While Plaintiff purchased the excursion from NCL (Bahamas) LTD. ("NCL"), it was independently operated by Chukka Caribbean Adventures, and provided passengers with an experience navigating through various natural waterfall slides and

[1] The Motion is fully briefed and ripe for adjudication. *See* Pl.'s Resp. in Opp'n to Defs.' Mot., [ECF No. 16]; Reply to Pl.'s Resp. in Opp'n to Defs.' Mot., [ECF No. 19].

pools. *Id.* ¶¶ 13–15. When proceeding to go down one of the waterfall slides, Plaintiff alleges that a "twisting push" from a tour guide caused his elbow to impact the natural rock wall, resulting in a large gash and severe pain. *Id.* ¶ 20–21. Plaintiff claims, based on information and documents provided by NCL, that he believed NCL was the operator and provider of the excursion. *Id.* ¶ 10.

LEGAL STANDARD

To survive a motion to dismiss, 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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When reviewing a motion to dismiss pursuant to Rule 12(b)(6), a court must accept as true all factual allegations contained in the complaint, and the plaintiff should receive the benefit of all favorable inferences that can be drawn from the facts alleged. *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012); *see also Iqbal*, 556 U.S. at 678. A court considering a Rule 12(b)(6) motion is generally limited to the facts contained in the complaint and attached exhibits but may also consider documents referred to in the complaint that are central to the claim and whose authenticity is undisputed. *See Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009). "Dismissal pursuant to Rule 12(b)(6) is not appropriate unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004) (citation and quotation omitted).

ANALYSIS

As a result of Plaintiff's misadventure, he brings this five-count action against the cruise line, filed on May 4, 2023. Plaintiff asserts claims for Breach of Non-Delegable Duty (Count I), based on an oral modification regarding the safety of the excursion; Negligence Apparent Agency

or Agency by Estoppel (Count II), based on the claim that NCL held out the excursion operators as its apparent agent; Negligent Selection and Hiring of Excursion Tour Operator (Count III); Negligent Retention of Excursion Tour Operator (Count IV); and Negligent Failure to Warn (Count V). Defendant has moved to dismiss Counts I, II, and V.

A. Breach of Non-Delegable Duty (Count I)

Plaintiff claims that NCL contractually offered to provide the excursion and, importantly, orally modified the excursion contract by promising that they "utilized the best local providers at every port of call . . . vouching for the safety record of the party with whom it had contracted." Compl. ¶¶ 30–32. Defendant asks the Court to reference the language (or lack thereof) in the shore excursion ticket to dispel the claim that NCL contractually guaranteed safe passage on the excursion, arguing that a cruise ship passenger may not hold the cruise line responsible for breaching a contract of carriage unless "there is an express provision . . . guaranteeing safe passage." Mot. at 4–6 (quoting *Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 1372-73 (S.D. Fla. 2005)).

However, similar allegations have been deemed sufficient to survive a motion to dismiss where an excursion contract entered into by a shipowner and a passenger is alleged to include some sort of intervening guarantee or assurance—even if the contract of carriage or excursion ticket does not contain an express provision guaranteeing safe passage. *See, e.g., Witover v. Celebrity Cruises, Inc.*, 161 F. Supp. 3d 1139, 1146 (S.D. Fla. 2016) (finding passenger's allegation that shipowner orally "guarantee[d] . . . the excursion was handicapped accessible . . . sufficient to survive a motion to dismiss"); *Bailey v. Carnival Corp.*, 369 F. Supp. 3d 1302, 1309 (S.D. Fla. 2019) (denying dismissal where plaintiff sufficiently pled the existence of a contractually created duty through an oral assurance of the safety of the tour); *Lienemann v. Cruise*

Ship Excursions, Inc., No. 18-21713, 2018 WL 6039993, at *8 (S.D. Fla. Nov. 15, 2018) (denying dismissal for failure to state a claim where passenger alleged the shipowner "promise[d] . . . its contracted-for excursions utilized the best local providers at every p[o]rt" and "vouch[ed] for the safety/insurance record of the party with whom it independently contracted" (cleaned up)).

Where, as here, Plaintiff alleges an oral modification to the shore excursion contract that makes an assurance of safety, dismissal is inappropriate. Even if the terms of the shore excursion and carrier contracts limit NCL's general liability, Plaintiff's allegations of oral modifications—superseding the underlying contracts—are sufficient to survive a motion to dismiss. While NCL makes a compelling argument that multiple plaintiffs asserting claims against different cruise lines have made identical allegations regarding "oral modifications,"[2] these arguments are better suited for a motion for summary judgment. *See Lienemann*, 2018 WL 6039993, at *8 (denying motion to dismiss because "[w]hether Plaintiff will ultimately be able [to] prove her theories of how Carnival breached the non-delegable duty arising out of the Shore Excursion Contract" is a matter that should be reserved for later in litigation).

B. Negligence Claims (Counts II and V)

To state a 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

[2] *See, e.g., Martinez v. Celebrity Cruises, Inc.*, No. 20-23585, 2021 WL 356159, at *4 (S.D. Fla. Jan. 8, 2021), *report and recommendation adopted*, No. 20-23585, 2021 WL 355134 (S.D. Fla. Feb. 2, 2021) ("[Celebrity] and Plaintiff agreed to orally modify the excursion contract based upon [Celebrity's] promises that its contracted-for-excursions utilized 'the best local providers at every port of call' and by virtue of [Celebrity] vouching for the safety/insurance record of the party with whom it independently contracted (Cayman)." (quoting the complaint)); *Doe v. Royal Caribbean Cruises, Ltd.*, No. 20-22229, 2021 WL 8775731, at *1 (S.D. Fla. Mar. 22, 2021) ("RCCL and Plaintiff agreed to orally modify the excursion contract based upon RCCL's promises that its contracted-for excursions utilized 'the best local providers at every port of call' and by virtue of RCCL vouching for the safety/insurance record of the party with whom it independently contracted." (quoting the complaint)).

actually and proximately caused the plaintiffs injury; and (4) the plaintiff suffered actual harm. *Chaparro*, 693 F.3d at 1336.

In a claim based on an alleged tort occurring at an offshore location during the course of a cruise, federal maritime law applies, just as it would for torts occurring on ships sailing in navigable waters. *See Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1315 (S.D. Fla. 2011) (citing *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 901 (11th Cir. 2004)). Generally, under maritime law a ship owner "owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1321 (11th Cir. 1989) (quoting *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959)). This standard of negligence "requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition, at least where . . . the menace is one commonly encountered on land and not clearly linked to nautical adventure." *Keefe*, 867 F.2d at 1322.

i. Negligence/Apparent Agency or Agency by Estoppel[3] (Count II)

The Eleventh Circuit has "repeatedly observed that apparent agency liability requires finding three essential elements: first, a representation by the principal to the plaintiff, which,

[3] As an initial matter, apparent agency and agency by estoppel are theories of liability, not independent causes of action. *See Gayou v. Celebrity Cruises, Inc.*, No. 11-23359, 2012 WL 2049431, at *8 n.4 (S.D. Fla. June 5, 2012); *Barabe v. Apax Partners Eur. Managers, Ltd.*, 359 F. App'x 82, 84 (11th Cir. 2009) (holding that there is no cause of action for "agency"). Nevertheless, Plaintiff's apparent agency and agency by estoppel claims may be construed as vicarious liability claims based on NCL's alleged negligence. And because apparent agency and agency by estoppel are so similar, the Court need only analyze whether Plaintiff has sufficiently stated a claim for negligence under one theory. *See Whetstone Candy Co. v. Kraft Foods, Inc.*, 351 F.3d 1067, 1078 (11th Cir. 2003) ("Whetstone also argues that the doctrine of agency by estoppel applies. That doctrine, however, is so similar to apparent authority that there is no significant difference between them. Consequently, we do not consider agency by estoppel separately and hold that it is inapplicable to the facts of this case." (citations and quotations omitted)).

second, causes the plaintiff reasonably to believe that the alleged agent is authorized to act for the principal's benefit, and which, third, induces the plaintiff's detrimental, justifiable reliance upon the appearance of agency." *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1252 (11th Cir. 2014). Defendant principally argues that Plaintiff's claim of apparent agency fails because NCL's website and passenger ticket contract available on the website—which Plaintiff references but does not attach—contains disclaimers that the shore excursions are operated by independent contractors. Resp. at 8. Therefore, Defendant argues, Plaintiff cannot establish a reasonable belief that NCL was the excursion operator. *Id.* at 9.

Defendant requests that the Court go beyond the four corners of the Complaint and consider the contents of NCL's website, arguing that such extrinsic evidence is central to Plaintiff's claims.[4] However, while Plaintiff makes reference to the website and ticket contract, he does not rely on these materials to establish his claims. Compl. ¶¶ 7, 38 (alleging that NCL marketed the excursion on its website); *see Franza*, 772 F.3d at 1237–38 (considering whether it was proper to look beyond the complaint and declining to consider the passenger ticket contract because the plaintiff did not attach it to the complaint, the complaint made no mention of it, and it was inappropriate at the motion to dismiss stage to determine the status of independent contractors). Further, considering such evidence at this stage would be premature. *See Ceithaml v. Celebrity Cruises, Inc.*, 207 F. Supp. 3d 1345, 1356 (S.D. Fla. 2016) ("Celebrity argues that Ceithaml's apparent agency theory, even if successfully pled as a negligence claim, must fail because the shore excursion ticket, shore excursion brochure, and passenger ticket contract all release Celebrity from liability. However,

[4] At the motion to dismiss stage, the Court is generally limited to the four corners of the complaint unless (1) a plaintiff refers to a document in the complaint; (2) the document is central to its claim; (3) the document's contents are not in dispute; and (4) the defendant attached the document to its motion to dismiss. *See Fin. Sec. Assurance, Inc. v. Stephens, Inc.,* 500 F.3d 1276, 1284 (11th Cir. 2007) (internal citation omitted).

consideration of these releases would be premature at the motion to dismiss stage as the release of liability is more properly considered an affirmative defense." (citing Fed. R. Civ. P. 8(c)(1))).

Plaintiff has plausibly alleged the appearance of agency with respect to the shore excursion such that a reasonable person would have believed that the shore excursion operator was authorized to act for NCL's benefit. *See Reed v. Royal Caribbean Cruises Ltd.*, 618 F. Supp. 3d 1346, 1355–56 (S.D. Fla. 2022); *Doria v. Royal Caribbean Cruises, Ltd.*, 393 F. Supp. 3d 1141, 1147 (S.D. Fla. 2019). Here, Plaintiff describes how NCL held out the owners and/or operators of the waterfall tour as its apparent agents, alongside allegations pertaining to the website, including how NCL "bombarded its passengers with a series of internet, brochures and other media"; maintained a shore excursion desk manned by crew members; and passengers paid for the excursions through their onboard account or cruise line website. Compl. ¶ 38. Accordingly, Plaintiff's claim for negligence based on apparent agency does not warrant dismissal.

ii. Negligent Failure to Warn (Count V)

As a prerequisite to imposing liability, the carrier must have had actual or constructive notice of the risk-creating condition. *Keefe*, 867 F.2d at 1322 (finding the duty of care owed by a shipowner to its passengers is "ordinary reasonable care under the circumstances . . . which requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition" (alteration added)). And while a cruise line operator has a duty to warn its passengers of dangers, "this obligation extends only to those dangers which are not apparent and obvious to the passenger." *Isbell v. Carnival Corp.*, 462 F. Supp. 2d 1232, 1237 (S.D. Fla. 2006). Because cruise ship operators are common carriers with a "continuing obligation of care for their passengers," *see Carlisle v. Ulysses Line Ltd., S.A.*, 475 So. 2d 248, 251 (Fla. 3d DCA 1985), their duty of care includes a duty to warn passengers of the "known dangers" which

exist "beyond the point of debarkation in places where passengers are invited or reasonably expected to visit." *Chaparro*, 693 F.3d at 1336; *see also Smolnikar*, 787 F. Supp. 2d at 1322–23.

Defendant does not dispute the Complaint sufficiently alleges that the condition was open and obvious. Rather, Defendant argues that the Complaint does not sufficiently plead actual or constructive notice. Resp. at 12. Specifically, Defendant maintains that Plaintiff has advanced "conclusory allegations" regarding NCL's purported notice of the excursion operator's alleged failure to train and/or supervise its tour guides—without pleading sufficient facts to support the claim that Defendant had knowledge of a specific hazardous condition. *Id.* at 12 (citing *Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1394 (S.D. Fla. 2014)).

The Court agrees. Plaintiff relies on the insufficient, ambiguous assertion that NCL "either had no idea about the safety of the tour because it had failed to make a reasonable investigation of the tour, or having made such an investigation learned that the tour was unsafe." Compl. ¶ 62; These allegations fail to adequately establish a claim for negligence based on a failure to warn. *See Chaparro*, 693 F.3d at 1337; *Woodley v. Royal Caribbean Cruises, Ltd.*, 472 F. Supp. 3d 1194, 1205 (S.D. Fla. 2020) (dismissing allegations based on cruise ship owner's failure to conduct an adequate and proper investigation of contractor that operated the excursion as insufficient because the allegations were temporally ambiguous, such that the court was unable to determine when plaintiffs were alleging the owner failed to investigate); *see also Adams v. Carnival Corp.*, 482 F. Supp. 3d 1256, 1269 (S.D. Fla. 2020) (concluding that allegations that Carnival monitored the safety of its excursion providers through initial and annual inspections of its shore excursions—coupled with allegations of co-ownership/co-control and Carnival selling the excursion through its website—were sufficient to establish notice at the pleading stage).

That being said, Plaintiff does appear to have articulated throughout other parts of the Complaint that prior injuries on the excursion occurred and that complaints regarding the tour operator were made—both of which would suffice to put NCL on notice of a dangerous condition, thereby triggering a duty to warn. *See* Compl. ¶¶ 49, 56. But these facts regarding actual or constructive notice are not found within Count V of the Complaint. Consequently, amendment is warranted to incorporate these allegations into Count V if Plaintiff wishes to state a valid claim for negligence based on failure to warn.

CONCLUSION

Based upon the foregoing, it is hereby **ORDERED and ADJUDGED** as follows:

1. Defendant's Motion, [ECF No. 11], is **DENIED** as to Counts I and II.
2. Defendant's Motion, [ECF No. 11], is **GRANTED** as to Count V, ***with leave to amend***. Plaintiff shall file an Amended Complaint addressing the deficiencies present in Count V as explained herein on or before **December 15, 2023**. Failure to timely file an Amended Complaint will result in the dismissal of Count V without further notice.

DONE AND ORDERED in Miami, Florida, this 7th day of December, 2023.

RODOLFO A. RUIZ II
UNITED STATES DISTRICT JUDGE