UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 23-23785-CIV-MORENO

ADEIA BREWTON,

Plaintiff,

vs.

CARNIVAL CORPORATION,

Defendant.

_____/

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

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss Plaintiff's Amended Complaint **(D.E. 11)**, filed on **December 6, 2023**. THE COURT has considered the motion, the response in opposition, the reply, and pertinent portions of the record. For the reasons set forth below, the Court GRANTS Defendant's Motion to Dismiss Count 3 (Negligent Misrepresentation) and DENIES Defendant's Motion to Dismiss Count 1 (Negligent Retention), Count 2 (Negligent Failure to Warn), and Count 5 (Negligence Based on Joint Venture).

FACTS

In September 2023, Plaintiff Adeia Brewton was a passenger aboard the Carnival cruise ship, *Sunrise*. Plaintiff purchased the "Jungle ATV & Secret Blue Hold Adventure" excursion ("subject excursion") as offered and advertised by Defendant Carnival Corporation. The subject excursion was to take place at the Yaaman Adventure Park in Ocho Rios, Jamaica.

Defendant's website contained information and descriptions of shore excursions, including the subject excursion. Plaintiff alleges that Defendant represented on its website that its excursions were safe and operated and overseen by Defendant or its agents. The subject excursion was marketed, sponsored, recommended, sold, arranged, and managed by Defendants. Plaintiff stated that the subject excursion was operated by agents of Defendant. Ultimately, the subject excursion was purchased by Plaintiff through Defendant's website.

When Plaintiff participated in the subject excursion, Plaintiff, on an ATV, approached a puddle of muddy water and hit a series of rocks underneath the water, which was deceptively deep. As a result, the ATV flipped over, she fell off it, and the ATV fell on her leg. Plaintiff suffered severe injuries, pain, and suffering, including injuries to her left elbow and knee, cellulitis, and infections.

Plaintiff claims that she was not properly warned or instructed on how to safely operate the ATV, particularly about avoiding or minimizing hazards, and especially regarding what to do to avoid an ATV flipping over. Plaintiff further claims that she received no warning regarding the deep muddy puddles with hidden rocks underneath that could flip her ATV over.

Finally, Plaintiff claims that Defendant should not have given her a poorly maintained ATV that had poor responsiveness, tires with virtually no tread, and loose steering such that when

Plaintiff hit the rocks underneath the water, she was unable to control the ATV, causing it to flip over.

Plaintiff brings five claims for relief against Defendant Carnival: Count 1, Negligent Retention; Count 2, Negligent Failure to Warn; Count 3, Negligence Misrepresentation; Count 4, Negligence Based on Apparent Agency or Agency by Estoppel; and Count 5, Negligence Based on Joint Venture Between Carnival and the Excursion Entities.

Motion to dismiss.

Defendant subsequently moves to dismiss Counts 1, 2, 3, and 5 of the Amended Complaint.

I. LEGAL STANDARD: RULE 12(b)(6) MOTION TO DISMISS

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim the Court considers only the four corners of the complaint. A court must accept as true the facts as set forth in the complaint.

"To survive a motion to dismiss, plaintiffs must do more than merely state legal conclusions," instead plaintiffs must "allege some specific factual basis for those conclusions or face dismissal of their claims." *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1263 (11th Cir. 2004). When ruling on a motion to dismiss, a court must view the complaint in the light most favorable to the plaintiff and accept the plaintiffs well-pleaded facts as true. *See St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 953 (11th Cir. 1986). This tenet, however, does not apply to legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Moreover, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 1950. Those

"[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). In short, the complaint must not merely allege misconduct, but must demonstrate that the pleader is entitled to relief. *See Iqbal*, 129 S. Ct. at 1950.

II. FEDERAL MARITIME LAW

Incidents occurring on navigable waters and bearing a significant relationship to traditional maritime activities are governed by maritime law. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1321 (11th Cir. 1989). It is well settled that the law governing passenger suits against cruise lines is the general maritime law. *See, e.g.,* Schoenbaum, Thomas J., Admiralty and Maritime Law §3-5 (4th Ed. 2004); *Keefe*, 867 F.2d at 1321. This principle extends to torts occurring at offshore locations or ports-of-call during the course of a cruise. *See Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 901 (11th Cir. 2004); *Isbell v. Carnival Corp.*, 462 F. Supp. 2d 1232, 1236 (S.D. Fla. 2006) (applying federal maritime law in negligence action against cruise line company stemming from accident occurring during an offshore excursion).

Defendant points out that according to the allegations of the Amended Complaint, Plaintiff was allegedly injured while exiting the shore excursion during her voyage on the Carnival *Sunrise* and thus writes that federal maritime law applies here. Plaintiff agrees that federal maritime law applies to this motion. Accordingly, the Court holds that federal maritime law applies to the instant action.

III. DISCUSSION

As stated *supra*, Defendant now moves for dismissal of Count 1 (Negligent Retention), Count 2 (Negligent Failure to Warn), Count 3 (Negligent Misrepresentation), and Count 5 (Joint Venture). The Court discusses each count in turn.

a. Count 1 (Negligent Retention) & Count 2 (Negligent Failure to Warn)

i. Legal Standard

To plead a *prima facie* claim for negligent retention, a plaintiff must demonstrate that: (1) the contractor was incompetent or unfit to perform the work; (2) the employer knew or reasonably should have known of the particular incompetence or unfitness, and that (3) the incompetence or unfitness was a proximate cause of the plaintiff's injuries. *Wolf v. Celebrity Cruises, Inc.*, 683 Fed. Appx. 786 (11th Cir. 2017). To state a claim for negligent failure to warn, Plaintiff must allege: (1) that Defendant knew of the allegedly dangerous conditions; and (2) that the condition was not open and obvious. *Carroll v. Carnival Corp.*, 955 F.3d 1260, 1264 (11th Cir. 2020) (citing to *Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 720 n.5 (11th Cir. 2019)).

Notably, in both prong two of negligent retention and prong one of negligent failure to warn, Plaintiff must allege actual or constructive notice. *See Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1321 (11th Cir. 1989); *See also Holland v. Carnival Corp.*, 50 F.4th 1088, 1095 (11th Cir. 2022). "Actual notice exists when the defendant knows about the dangerous condition." *Holland*, 50 F.4th at 1095. Constructive notice can be established when a plaintiff plausibly alleges that: (1) the hazardous condition existed "for a sufficient length of time"; or (2) substantially similar conditions must have caused substantially similar prior incidents. *Id.* at

1096. Because both parties merge the notice arguments for Count 1 and 2, the court analyzes the claims in the same way.

ii. Legal Analysis

Plaintiff writes that Defendant's Motion to Dismiss should be denied with regards to Count 1 and 2 because notice was sufficiently pled. Accepting the allegations in the Amended Complaint as true, Plaintiff states that: (1) the subject excursion was purchased by Plaintiff through Defendant's website; (2) Defendant had an ongoing business relationship with the excursion entity where Defendant would market, sell, and collect pay from the excursion on which Plaintiff was injured; (3) Defendant represented in its website that the tours are run by insured operators and that such operators were safe and agents of Defendant; (4) Defendant, in its approval process of the excursions, would having representatives take the excursion, and also have yearly inspections of the excursions like site inspections for evaluations complaint reviews. For the purposes of the motion to dismiss, the Court finds that Plaintiff's actual notice allegations are enough to withstand the pleading standard.

Other courts in this district have found similarly. *See Bonck v. Carnival Corp.*, No. 18-23991-CIV, 2019 U.S. Dist. LEXIS 107037 (S.D. Fla. June 25, 2019) (citing *Kennedy v. Carnival Corp.*, No. 18-20829-CIV, 385 F. Supp. 3d 1302, 2019 U.S. Dist. LEXIS 36878, 2019 WL 2254918 at *19 (S.D. Fla. March 6, 2019) ("[P]laintiffs sufficiently alleged that the defendant had actual notice of the dangerous condition through their familiarity with the excursions through their sales relationship, inspections and continued partnership.") (report and recommendation adopted by *Kennedy*, 2019 U.S. Dist. LEXIS 92417, 2019 WL 2254962 (S.D. Fla. March 21, 2019)); *Heller v. Carnival Corp.*, 191 F.Supp.3d 1352, 1358 (S.D. Fla. 2016)

(finding plaintiff adequately pleaded failure to warn claim because "Plaintiff's allegation that Carnival should have become of aware of the risk-creating condition during inspections of the Excursion Entities is sufficient regarding Carnival's actual or constructive notice of the risk-creating condition."); *Steffan v. Carnival Corp.*, No. 16-25295-CIV, 2017 U.S. Dist. LEXIS 78242, 2017 WL 7796726 at *3 (S.D. Fla. May 22, 2017) (allegation that Carnival represented that it conducted regular inspections and audits of its tour providers' operations sufficient to plead a claim of failure to warn)).

For completeness purposes, the Court will dig into constructive notice as well. Defendant writes that Plaintiff's arguments on "sufficient length of time" are conclusory, and that the allegations made through prior lawsuits on "substantially similar conditions" were not made on the same subject excursion. First, the standard written by the Eleventh Circuit in *Holland* does not ask for exact same conditions—it asks for "substantially similar conditions that have caused substantially similar prior incidents." 50 F.4th at 1095-96. Plaintiff has pled exactly that. *See Thompson v. Carnival Corp.*, No. 20-22217-CIV, 2021 WL 7542954, at *1 (S.D. Fla. Sept. 17, 2021) ("While participating in the excursion, Plaintiff traversed the trails when she discovered that the terrain had mud holes. Plaintiff was unable to steer around the mud holes because Carnival instructed her to stay on the trail. Plaintiff struck the mud holes, and it caused her ATV to stop abruptly while throwing her through the air and into a tree. Plaintiff suffered a compound fracture to her left leg and the injury rendered her unconscious."), *Richards v. Carnival Corp.*, No. 14-23212-CIV, 2015 WL 12851709, at *2 (S.D. Fla. Aug. 26, 2015) ("The 'subject ATV' is defined as 'the ATV that flipped over, throwing the Plaintiff off, and landing on Plaintiff's leg ... during the subject excursion.'").

Lastly, the Court does not find Plaintiff's allegations on the sufficient length of time conclusory. Plaintiff alleges that knowledge should have been acquired during the time when Defendant performed its initial approval process, yearly inspections, prior substantially similar incidents, and examining complaints and reviews of former customers.

Accordingly, because Plaintiff has adequately pled notice, the Motion to Dismiss is denied with respect to Count 1 and 2.

b. Count 3: Negligent Misrepresentation

i. Legal Standard

Negligent Misrepresentation requires a plaintiff to allege that: (1) the representor made a misrepresentation of a material fact; (2) the representor knew or should have known of the falsity of the statement; (3) the representor intended the representation would induce another to rely and act on it; and (4) the plaintiff suffered injury in justifiable reliance on the representation. *See Brown v. Oceania Cruises, Inc.*, 17-22645-CIV, 2018 WL 2446032, at *6 (S.D. Fla. May 31, 2018).

Negligent Misrepresentation is held to the higher pleading standard of Federal Rule of Civil Procedure 9(b). To comply with Rule 9(b), Plaintiff must allege "precisely what statements were made . . . plus the time and place of each statement and the person responsible for making . . . same, plus the content of such statements and the manner in which they misled the Plaintiff." *Gayou v. Celebrity Cruises, Inc.*, No. 11-23359-Civ., 2012 U.S. Dist. LEXIS 77536, 2012 WL 2049431 (S.D. Fla. June 5, 2012). In other words, the Complaint must set forth the, "who, what when, where, and how" of the fraud. *See Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1262 (11th Cir. 2006).

ii. Legal Analysis

Defendant argues that the general promise of a safe, reliable, licensed, excursion is not actionable. That argument is generally well-established in this district. *See Gibson v. NCL (Bahamas) Ltd.*, 11-24343-CIV, 2012 U.S. Dist. LEXIS 74653, 2012 WL 1952667, at *6 (S.D. Fla. May 30, 2012) (Seitz, J.); *see also Hoard v. Carnival Corp.*, 14-23660-CIV, 2015 U.S. Dist. LEXIS 57538, 2015 WL 1954055, at *3 (S.D. Fla. Apr. 17, 2015) (King, J.) (holding the same with respect to statements that an operator was "handpicked," "insured, reliable, and reputable"). Ultimately, a "general promise that the trip will be 'safe and reliable' does not constitute a guarantee that no harm will befall plaintiff." *Young v. Carnival Corp.*, 09-21949-CIV, 2011 U.S. Dist. LEXIS 10899, 2011 WL 465366, at *3 (S.D. Fla. Feb. 4, 2011) (King, J.) (quoting *Wilson v. Am. Trans Air, Inc.*, 874 F.2d 386, 391 (7th Cir.1989)). Such language is considered mere puffery and cannot, therefore, support a claim for misrepresentation. *See Mogensen v. Body Cent. Corp.*, 15 F. Supp. 3d 1191, 1211 (M.D. Fla. 2014) (describing puffery as "generalized, non-verifiable, vaguely optimistic statements" that "are immaterial as a matter of law and therefore inactionable").

Plaintiff cites to *Reed v. Royal Caribbean Cruises Ltd.*, 618 F. Supp. 3d 1346, 1356 (S.D. Fla. 2022). There, the court acknowledged the well-established rule, but made an exception because "it was empirically demonstrable that a volcanic eruption was more likely than usual," and "omit[ting] significant information regarding the risk of eruption such that they can be considered materially misleading." *Id.* The Court does not find the *Reed* facts like the facts here as maintenance of the vehicles and safety of the area does not present the same materiality as the active state of a volcano. The Court instead finds the facts here like the facts in *Sanlu Zhang v. Royal Caribbean Cruises, Ltd.*, No. 19-20773-CIV, 2019 WL 8895223 (S.D. Fla. 2019). There,

the *Zhang* court found the plaintiff's the following allegations unpersuasive: "the plaintiff would enjoy peace of mind with guaranteed return to ship," "the excursion providers are safe, reliable and reputable," and "the shore excursions are insured." *Id.* at 19. The plaintiff's allegations in *Zhang* with regards to negligent misrepresentation mirror Plaintiff's allegations here. Further, the Court does not find *Storm v. Carnival Corp.*, No. 20-22227-Civ, 2020 U.S. Dist. LEXIS 166676 (S.D. Fla. Sep. 10, 2020) persuasive. There, the defendant argued that dismissal of negligent misrepresentation was warranted because the plaintiff never made clear how many times he viewed and visited the website. *Id.* at 9. The court there found that while the heightened pleading standard requires the "who, what, where, when, and how," no case has imposed such a heightened requirement. *Id.* Defendants here do not make that argument—it instead argues that the alleged misrepresentation related to the safety of the excursion are not actionable. The bottom line is that the general promise of a safe and reliable excursion is not actionable, which is fatal for Plaintiff's claim.

Accordingly, the Court holds that Plaintiff has not met the heightened pleading standard and did not set forth facts showing that Defendant's statements were false. Thus, the Court grants Defendant's motion to dismiss Count 3.

c. Count 5: Joint Venture

i. Legal Standard

To successfully bring a Joint Venture claim, a plaintiff must plead the following: "(1) a community of interest in the performance of a common purposes; (2) joint control or right of control; (3) a joint proprietary interest in the subject matter; (4) a right to share in the profits; and (5) a duty to share in any losses which may be sustained." *Barham v. Royal Caribbean Cruises*,

Ltd., 556 F. Supp. 3d 1318, 1331 (S.D. Fla. 2021). In stating a claim for joint venture, a plaintiff need not explicitly plead that the parties intended to enter into a joint venture; the intent of the venturers may be inferred from the conduct alleged in the complaint. *Fulcher's Point Pride Seafood, Inc. v. M/V "Theodora Maria"*, 935 F.2d 208, 213 (11th Cir. 1991).

ii. Legal Analysis

Defendant focuses its argument not on the elements of a joint venture claim, but that the Tour Operator Agreement expressly denies such a relationship. The Tour Operator Agreement states that "[t]he parties agree that Operator shall be treated as an independent contractor of Carnival and the Operating Companies and shall not be considered an employee of Carnival or any Operating Company."

In general, when considering a motion to dismiss a plaintiff's complaint, "a court may not consider anything beyond the face of the complaint and any documents attached thereto." *Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1397 (S.D. Fla. 2014) (citing *Financial Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007)). There is an exception to this rule, under which a document may be considered—provided plaintiff refers to the document in its complaint, the document is central to plaintiff's claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss. *Id.* Courts in this district have found ticket contracts "not to be central to Plaintiffs' claims when the claims are based in tort rather than contract." *Barham*, 556 F. Supp. 3d at 1330 (citing *Kennedy v. Carnival Corp.*, 385 F. Supp. 3d 1302 (S.D. Fla. 2019).

Here, Plaintiff did not attach any exhibit to the Complaint. Further, the Joint Venture claim brought by Plaintiff is based in tort rather than contract. The *Doria* case is not as helpful

as Defendant makes it out to be. There, the court considered a tour operating agreement, but it did not dismiss the claim exclusively because of it. *See Doria v. Royal Caribbean Cruises, Ltd.*, No. 1:19-CV-20179-KMW, 2019 WL 13151601 (S.D. Fla. 2019). The court explained that "because Doria has failed to allege the existence of a joint venture, and because the terms of the TOA unambiguously foreclose any argument that that Royal Caribbean intended to enter into a joint venture with Renta," it dismissed the joint venture claim. *Id.* at 15. Tour Operating Agreements are not dispositive. The court will follow the greater majority of precedent and look to the facts in Plaintiff's Amended Complaint to determine if Plaintiff sufficiently pled its Joint Venture claims.

Plaintiff alleges that Defendant entered into an agreement where it would sell the subject excursion to its passengers and the Entities would operate the subject excursion. It is also alleged that Defendant sponsored, recommended, marketed, operated, and collected money for the subject excursion, and the money was then shared between defendant and the Entities. Plaintiff states that there was shared control—Entities controlled the day-to-day and Defendant required the Entities to exercise reasonable care in the operation of the subject excursion. Lastly, it was alleged that there was a shared duty to the losses that may have been sustained with the subject excursion. The Court finds that these allegations are sufficient to support an inference that the parties intended to create a joint venture. Therefore, Defendant's Motion to Dismiss Count 5 of the Amended Complaint is Denied.

CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that the Motion, is GRANTED IN PART AND DENIED IN PART consistent with this Order.

DONE AND ORDERED in Chambers at Miami, Florida, this 27th of February 2024.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record