UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 24-21213-CIV-WILLIAMS/GOODMAN

JAMES SMITH

Plaintiff,

v.

CARNIVAL CORPORATION and
SCOOTAROUND, INC.

Defendants.
_____/

REPORT AND RECOMMENDATIONS ON DEFENDANT CARNIVAL'S MOTION TO DISMISS COUNT VI OF THE THIRD AMENDED COMPLAINT

Plaintiff James Smith ("Smith" or "Plaintiff") filed a Complaint against Defendant Carnival Corporation ("Carnival") and Defendant Scootaround, Inc. ("Scootaround"). [ECF No. 1]. Scootaround is no longer a party. Smith's claim arises from his use of a motorized scooter/wheelchair which tipped and fell when he was reversing out of a restaurant onboard Carnival's ship, the *Glory*. Carnival filed [ECF No. 45] a Motion to Dismiss Count VI of Plaintiff's Third Amended Complaint ("TAC"). Count VI was added in Plaintiff's fourth version of the Complaint. Count VI is a vicarious liability claim against Carnival for the "negligent design, installation and/or approval of the subject surface and vicinity." Count V of Plaintiff's TAC asserts a direct liability claim for negligent design.

Carnival contends that the newly-added vicarious liability claim for negligent design (in Count VI) should be dismissed because it is redundant and duplicative of Count V's direct liability claim for negligent design. In its reply, Carnival argues for the first time that Count VI should be dismissed for an additional reason -- it was improperly alleged. [ECF No. 53]. But the Court does not consider legal arguments asserted for the first time in a reply memorandum. Smith opposes the dismissal motion and filed a response. [ECF No. 47]. Carnival filed a reply [ECF No. 53] and contends that the claim should be dismissed with prejudice.

The Undersigned rejects Carnival's argument that Count VI's vicarious liability claim for negligent design is duplicative and redundant. Yes, Count V also alleges a direct liability claim for negligent design, which means Plaintiff must establish that Carnival had (actual or constructive) notice of the dangerous condition. But a plaintiff is permitted to plead alternate theories of liability. Moreover, the TAC *does* allege Carnival's employees' notice of the dangerous condition allegedly caused by the negligent design [¶¶ 114, 115, 117]. Ironically, it alleges notice even though Paragraph 116 is entitled (in bold font, no less) that "**Notice is Not Required for Employee Negligent Acts**."

It may well be that Plaintiff will be unable to produce sufficient evidence that Carnival employees negligently designed the materials for the subject area, a scenario which would doom Count VI. But, at the pleadings stage, Plaintiff is entitled to pursue alternative theories and at least attempt to advance his vicarious liability claim.

The Undersigned therefore **respectfully recommends** that United States District Judge Kathleen M. Williams, who referred [ECF No. 49] the motion to the Undersigned, **deny** the motion.

But this Report and Recommendations does not weigh in on the defense argument that Count VI does not pass muster because it fails to meet pleading requirements, as that is a new argument raised for the first time in the Reply.

I. Factual Allegations in the TAC[1]

The TAC alleges as follows:[2]

Carnival owned, leased, chartered, operated, maintained, managed, and/or controlled the vessel *Glory* and the subject surface involved in Plaintiff's incident.

Scootaround owned, and both Scootaround and Carnival inspected, operated, maintained, managed, and/or controlled the subject scooter involved in Plaintiff's incident.

Plaintiff was disabled and required the use of a mobility scooter. Therefore, at the port, he rented a scooter from Scootaround. Despite Plaintiff requesting an adequate,

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[1] The factual summary focuses on, for the most part, only the allegations concerning direct and vicarious liability claims for negligent design of the surface on which the incident occurred. Some allegations about other circumstances are included for context, however.

[2] On a motion to dismiss, "the court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff." *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1246 (11th Cir. 2016).

newer type of scooter, he was given a defective, older type of scooter that had tape on it, and was difficult to move around or turn.

On January 24, 2024, Plaintiff was using the scooter as he was reversing out of a restaurant and trying to turn the scooter around. Plaintiff fell from the scooter when he went through an unusually small and narrow doorway and hit a lump on the floor that had carpet over it. The ship was also rocking while this happened. If the scooter had been able to move around and turn more effectively, then Plaintiff would have been able to regain control after hitting the lump. These dangerous conditions of the subject scooter, including the lump and doorway, were but-for causes for his injuries.[3]

Plaintiff sustained injuries that include, but are not limited to, a fractured neck, pain, suffering, and other injuries.

Carnival and Scootaround knew or should have known of the dangerousness of the subject surface, scooter, and doorway. They should have known that the subject scooter was dangerous because it was old, worn out, had tape over it, and if they had done basic testing prior to providing it to Plaintiff, then they would have been able to notice there was a problem with the steering, such that it was dangerous to operate due to its difficulty making turns.

[3] The TAC makes multiple references to a "door." However, based on a review of the TAC, Plaintiff mistakenly wrote "door" instead of "doorway" because his accident occurred in a doorway and did not involve a physical door.

Count V (Direct Liability)

The TAC alleges that Carnival owed a duty to its passengers and to Smith to not permit dangerous conditions in places where they could harm passengers. It alleges that Carnival participated in the design process of the ship by generating design specifications for the shipbuilder and/or by approving of the vessel's design, including the design of the subject surface and vicinity. The TAC further alleges that Carnival owed a duty to its passengers to design, install and/or approve of the subject surface and door without any defects. It alleges that the subject surface and doorway violated applicable industry standards and recommendations and/or other guidelines.

More specifically, the TAC alleges that Carnival permitted the subject surface and doorway to be unreasonably lumpy and small and narrow and did not correct these design deficiencies. In addition, it alleges that Carnival did not design and install reasonable safeguards.

The TAC alleges that Carnival knew or should have known of these risk-creating and/or dangerous conditions. It contends that the design flaws made the subject surface and the vicinity involved in Smith's incident unreasonably dangerous and were the direct and proximate cause of his injuries. And the TAC also alleges that Carnival failed to correct or remedy the defective condition even though it knew or should have known of the dangers.

Count VI (Vicarious Liability)

Plaintiff alleges that Carnival's crew has a duty of care to design, construct and select materials for all areas of its vessels, including the areas involved in the incident here. More specifically, it alleges that Carnival's crew had a duty to design the subject area, including the shipboard common area doors and walkways in a reasonably safe manner and in accordance with industry standards.

The TAC alleges that the Carnival employees who were assigned to design, construct and/or select materials for Carnival ships were subject to Carnival's control and/or right to control. The TAC further alleges that Carnival operated, controlled and/or maintained departments of employees responsible for repairs, redesign, upgrades, updates and/or modifications of areas on Carnival ships.

These departments allegedly include the New Build and Refurbishment Departments. The TAC alleges that Carnival's employees (in the departments) create, review, and/or approve of all designs, construction, selection of materials, repairs, redesign, upgrades, updates, and modifications to Carnival ships.

More particularly, Plaintiff alleges that Carnival's employees custom designed and custom built the *Glory* to their specifications. He contends that these employees participated in and/or approved of the subject area's design, including the small/narrow, uneven and/or lumpy area within the door and walkway. Moreover, the TAC alleges that the employees had the right to inspect both the designs on paper and the design and

construction at the yard. According to the TAC, Carnival's employees had the contractual right to approve or reject the design, construction and selection of all materials used to construct all aspects of the *Glory*.

Similarly, the TAC alleges that Carnival's employees had the contractual right to withhold payment if an item or design was rejected or at issue and not resolved.

Although a vicarious liability claim does not require notice of the dangerous condition by the employees, the TAC alleges that Carnival's employees knew or should have known of the allegedly defective condition since the door and walkway were installed in 2003.

Plaintiff alleges that Carnival's employees were negligent by approving, designing, constructing and/or selecting materials for the area, including the area of the small/narrow and uneven lumpy door and walkway. The TAC alleges that the Carnival employees failed to design, construct, select, approve and/or select materials which complied with industry standards. Instead, the TAC alleges, the employees selected and designed materials for the subject area on the *Glory* which were unreasonably dangerous.

The TAC alleges that the Carnival employees breached their duties owed to Plaintiff (and were negligent) by approving, designing, constructing and/or selecting materials which failed to comply with industry standards and which were unreasonably dangerous.

II. Applicable Legal Standards

To survive a motion to dismiss under Rule 12(b)(6), "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)). To meet this "plausibility standard," a plaintiff must "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Twombly*, 550 U.S. at 555). "[T]he standard 'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence' of the required element." *Rivell v. Private Health Care Sys., Inc.*, 520 F.3d 1308, 1309–10 (11th Cir. 2008) (quoting *Twombly*, 550 U.S. at 545). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

This lawsuit is substantively controlled by United States general maritime law. Incidents occurring on the navigable waters and/or bearing a significant relationship to traditional maritime activities are governed by general maritime law. *See, e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959*); Kornberg v. Carnival Cruise Lines, Inc.*, 741F.2d 1332, 1334 (11th Cir. 1984). Moreover, 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 v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989). Here, according to the Complaint's allegations, Plaintiff sustained injuries aboard Carnival's vessel, *Glory*, while using the scooter he rented from Scootaround. [ECF No. 1].

Vicarious Liability

The Eleventh Circuit has considered the distinction between direct and vicarious claims. In *Yusko v. NCL (Bahamas) Ltd.*, 4 F.4th 1164 (11th Cir. 2021), the plaintiff sustained injuries while dancing with a professional dancer, a cruise crewmember, during an onboard dance competition. *See id.* at 1166. The district court granted summary judgment to the cruise line on the plaintiff's vicarious liability claim. *See id.* The district court reasoned that the cruise line lacked notice of the risk-creating condition that caused the plaintiff's injury — namely, the dancer's purportedly negligent dancing. *See id.*

The Eleventh Circuit reversed. *See id.* It observed that although in past cases it had "applied the notice requirement when a shipowner is alleged to be *directly* liable for a passenger's injuries through, for example, the negligent maintenance of its premises[,] . . . the notice requirement does not — and was never meant to — apply to maritime negligence claims proceeding under a theory of vicarious liability." *Id.* at 1167 (alterations added; emphasis in original). Vicarious liability claims are different, the *Yusko* Court explained, because vicarious liability "is not based on the shipowner's conduct." *Id.* at 1169. Indeed, "an employer can be held liable under a vicarious liability theory even if it

has not violated any duty at all." *Id.* (citing *Meyer v. Holley*, 537 U.S. 280, 285–86, 123 S. Ct. 824, 154 L. Ed. 2d 753 (2003)).

Applying these principles, the Eleventh Circuit held "that 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.

But the *Yusko* Court "nonetheless acknowledged a tension in its maritime tort precedents." *Hunter v. Carnival Corp.*, 609 F. Supp. 3d 1305, 1309 (S.D. Fla. 2022). The cruise line had argued that permitting vicarious liability claims to proceed without requiring proof of notice would make the notice element of direct liability claims "superfluous." *Id.* To illustrate the point, the *Yusko* Court compared the case to *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989). In both *Yusko* and *Keefe*, the plaintiffs sustained injuries from dancing on a cruise ship. *See Yusko*, 4 F.4th at 1166, 1170; *Keefe*, 867 F.2d at 1320. Yet, in *Yusko*, the Eleventh Circuit held that the plaintiff did **not** need to establish notice, *see* 4 F.4th at 1170, while in *Keefe*, the court held that notice was a necessary element of the plaintiff's claim. *See* 867 F.2d at 1322.

As discussed by the *Hunter* Court, the Eleventh Circuit's *Yusko* analysis defended the divergent outcomes in *Yusko* and *Keefe*. The difference between the two cases, the *Yusko* Court said, was that the *Yusko* plaintiff asserted a vicarious liability claim, but the *Keefe* plaintiff did not. *See Yusko*, 4 F.4th at 1166, 1170.

The *Hunter* Court emphasized the *Yusko* Court's rationale by quoting the following explanation:

> 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.** It may be true that, in some cases, it will be easier for a passenger to proceed under a theory of vicarious liability than under one of direct liability. But common sense suggests that there will be just as many occasions where passengers are limited to a theory of direct liability. Sometimes, as in *Keefe*, a passenger will not be able to identify any specific employee whose negligence caused her injury. In other cases, a passenger will seek to hold a shipowner liable for maintaining dangerous premises . . ., for failing to warn of dangerous conditions off-ship . . ., or for negligence related to the actions of other passengers[.]

609 F. Supp. 3d at 1309(emphasis added) (quoting *Yusko*, 4 F.4th at 1170).

III. Analysis

Here, Carnival argues that Smith's vicarious liability claim is redundant and duplicative because Count V alleges a direct liability claim for negligent design.[4] But the Undersigned disagrees for the same reasons that the District Court disagreed with an identical argument Carnival raised earlier this year in *Branyon v. Carnival Corp.*, No. 24-

[4] As noted earlier, Carnival asserted other legal arguments for the first time in its Reply, but the Court will not consider those arguments, regardless of whether they might be viable. *See e.g., Hunter*, 609 F. Supp. 3d 1305, 1311 (refusing to consider Carnival's argument that the amended complaint failed to state a claim for vicarious liability because it did not adequately identify the crewmember whose alleged negligence would make Carnival vicariously liable because it was raised for the first time in a reply and citing *SEC v. Keener*, No. 1:20-cv-21254, 2020 WL 4736205, at *6 n. 4 (S.D. Fla. Aug. 14, 2020) for the rule that "[i]t is improper to raise an argument for the first time in a reply").

Oddly enough, Carnival raised more legal arguments in its Reply than it did in its initial motion.

cv-20576, 2024 WL 3103313 (S.D. Fla. June 24, 2024).

In *Branyon,* United States District Judge Roy K. Altman noted that "many" other district judges in our district have explained that a plaintiff is "entitled to plead [vicarious-liability] claims in the alternative" to [his] direct liability claims for negligent maintenance or negligent failure to warn." *Id.* at *5. Therefore, the *Branyon* Court held, *Yusko* does not support the practice of dismissing counts "simply because the [c]omplaint also alleges those claims based on a [different theory of liability]. *Id.*

"In any event," Judge Altman succinctly held, "vicarious-liability claims and direct-liability claims **aren't duplicative of one another**" because "[i]n direct liability claims, after all, the plaintiff must show that the defendant had notice of the dangerous condition – a requirement that same plaintiff doesn't have to prove in her vicarious-liability claims." *Id.* (emphasis supplied).

Following the *Branyon* Court's analysis, the Undersigned "see[s] no reason" at "this stage of the case" to preclude Plaintiff from proceeding with his theory that Carnival is vicariously liable for the negligent acts and omissions of employees in the design and refurbishing departments. *See also Hunter,* 609 F. Supp. 3d at 1310 (describing Carnival's defense argument as "minimiz[ing] the leeway courts afford plaintiffs to frame their own claims," noting that *Yusko* permits a plaintiff to proceed under both direct and vicarious liability theories, and concluding that "Plaintiff may or may not be able to prove" the employee's negligence "in the end" **but** that Plaintiff "is certainly allowed" to allege

vicarious liability based on an employee's negligence); *Davis v. Carnival Corp.*, No. 22-cv-24109, 2023 WL 5955700 (S.D. Fla. July 31, 2023) (rejecting Carnival's challenge to vicarious liability claim and relying, in part, on *Hunter*[5] for that conclusion); *Cf. McLean v. Carnival Corp.*, No. 22-23187, 2023 WL 372061 (S.D. Fla. Jan. 24, 2023) (denying Carnival's motion to dismiss, rejecting challenge to vicarious liability count, and not accepting defense argument that the amended complaint was an attempt to plead what are in reality claims for direct negligence against Carnival as the shipowner as claims for vicarious liability instead).

Because the challenge Carnival mounted against Count VI in its motion is, in my view, unpersuasive at this point, Plaintiff was not required to allege the employees' notice of the allegedly dangerous condition. But, as noted, Plaintiff *did* allege notice. However, the mere inclusion of a *superfluous* allegation does not mean that the count should be dismissed, and Carnival cites no case to support that notion.

IV. Conclusion

The Undersigned **respectfully recommends** that the Court **deny** Carnival's motion to dismiss.

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[5] The *Hunter* Court held that courts do not have a "license to recast passengers' vicarious liability claims as negligent maintenance claims" because courts are "require[d] to tak[e] 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." *Id.* at 1310.

V. Objections

The parties will have 14 days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with the District Judge. Each party may file a response to the other party's objection within 14 days of the objection. Failure to timely file objections shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in Chambers, in Miami, Florida, November 26, 2024.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Kathleen M. Williams
All Counsel of Record