UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 1:19-cv-20179-KMW

ENID PORRATA DORIA,

Plaintiff,

vs.

ROYAL CARIBBEAN CRUISES, LTD., *et al.*

Defendant.

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ORDER

THIS MATTER is before the Court on Defendant Royal Caribbean Cruises Ltd.'s ("Royal Caribbean") Motion to Dismiss Plaintiff's amended complaint (DE 22). Plaintiff Enid Porrata Doria ("Doria") filed a response in opposition (DE 26), and Royal Caribbean filed a reply (DE 32). For the reasons set forth below, Defendant's Motion to Dismiss (DE 22) is **DENIED**.

I. BACKGROUND

On April 5, 2018, Doria was a passenger aboard Royal Caribbean's *Harmony of the Seas* when he purchased an ATV excursion experience in Cozumel, Mexico, operated by Renta Safari Sa De CV ("Renta") from Royal Caribbean. That day, while participating in the ATV excursion, he suffered injuries when he crashed his ATV into a tree. Doria submits that while on the excursion, Renta staff failed to provide adequate direction to participants, and that Royal Caribbean misrepresented that the excursion would occur on "dirt roads" when it actually took place over "rough terrain."

Doria alleges that, in purchasing the excursion, he relied on Royal Caribbean's representations that the excursion would be safe. Such representations included promotional materials made available by Royal Caribbean through their website, brochures, presentations, and staff at the cruse ship's shore excursion desk, indicating the shore excursions were "operated by Royal Caribbean and/or safe."

Accordingly, Doria filed this lawsuit alleging eight different causes of action arising from his injuries. Royal Caribbean moved to dismiss the counts against it for failure to state a claim. (DE 9). On June 20, 2019, the Court granted in part and denied in part Royal Caribbean's motion to dismiss. (DE 13). On July 10, 2019, Doria filed an amended complaint (DE 14) alleging the following causes of action: (1) misleading advertising in violation of Florida Statute Section 817.41 against Defendants; (2) negligent misrepresentation against Royal Caribbean; (3) negligent selection and/or retention against Royal Caribbean; (4) negligent failure to warn against Royal Caribbean; (5) negligence against Royal Caribbean; (6) negligence against Renta; (7) negligence against Defendants based on apparent agency or agency by estoppel; and (8) *quasi in rem* attachment and garnishment against Renta. Royal Caribbean has moved to dismiss the amended complaint for failure to state a claim under Rule 12(b)(6).

II. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead sufficient facts to state a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The purpose of this requirement is "to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. The Court's consideration is limited to the allegations presented. *See GSW, Inc. v. Long Cty.*, 999 F.2d 1508, 1510 (11th Cir. 1993).

All factual allegations are accepted as true and all reasonable inferences are drawn in the plaintiff's favor. *See Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010); *see also Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir. 1998). Nevertheless, while a plaintiff need not provide "detailed factual allegations," the allegations must consist of more than "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555 (internal citations and quotations omitted). "Additionally, 'conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal.'" *U.S. ex rel. Keeler v. Eisai, Inc.*, 568 F. App'x 783, 792-93 (11th Cir. 2014) (*quoting Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003)). The "[f]actual allegations must be enough to raise a right of relief above the speculative level." *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007) (quoting *Twombly*, 550 U.S. at 545).

In addition to the requirements of *Twombly*, *Iqbal*, and Federal Rules of Civil Procedure 8(a) and 12(b)(6), claims sounding in fraud are subject to the pleading standards of Federal Rule of Civil Procedure 9(b). *See U.S. ex. rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1309-10 (11th Cir. 2002); *Gayou v. Celebrity Cruises, Inc.*, No. 11-23359-CIV, 2012 WL 2049431, at *3 (S.D. Fla. June 5, 2012). Rule 9(b)(6) provides that "[i]n allegations of fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake" but that "[m]alice, intent, knowledge, and other conditions of a person's mind shall be averred generally." Fed. R. Civ. P. 9(b). Rule 9(b) is satisfied if the plaintiff pleads "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and

place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (quoting *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1371 (11th Cir. 1997)).

Further, when an injury is alleged to have occurred "upon a ship in navigable waters," federal maritime law applies. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1334 (11th Cir. 1984) (citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959)). Passenger suits against a cruise line alleging torts are subject to general maritime law. *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320 (11th Cir. 1989). Maritime law also applies to alleged incidents that occur during the course of the cruise at offshore excursions or other ports-of-call since the "necessary precursors . . . occurred while the ship was on navigable waters." *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 901 (11th Cir. 2004).

III. DISCUSSION

A. Counts I, II – Misleading Advertising and Negligent Misrepresentation

Doria alleges that Royal Caribbean made and disseminated false or misleading materials regarding the safety of the ATV excursion. Claims arising under Florida Statute Section 817.41 and Florida common law negligent misrepresentation must allege:

> (1) misrepresentation of a material fact; (2) that the representor made the misrepresentation without knowledge as to its truth or falsity or under circumstances in which he ought to have known its falsity; (3) that the representor intended that the misrepresentation induce another to act on it; and (4) that injury resulted to the party acting in justifiable reliance on the misrepresentation.

Ceithaml v. Celebrity Cruises, Inc., 207 F. Supp. 3d 1345, 1352-3 (S.D. Fla. 2016) (citing *Holguin v. Celebrity Cruises, Inc.*, No. 10-20212-CIV, 2010 WL 1837808, at *1 (S.D. Fla. May 4, 2010)); *see also Smith v. Mellon Bank*, 957 F. 2d 856, 858 (11th Cir. 1992) ("In order to prove a violation of Section 817.41, Florida law requires the plaintiff to prove reliance on the alleged misleading advertising, as well as each of the other elements of the common law tort of fraud in the inducement.").

As an allegation of fraud, negligent misrepresentation is subject to the heightened pleading standard of Rule 9(b) which requires a plaintiff to establish "the 'who, what, when, where, and how' of the fraud." *Ceithaml,* 207 F. Supp. 3d at 1353 (citing *Garfield v. NDC Health Corp.*, 466 F. 3d 1255, 1262 (11th Cir. 2006)); *see Ziemba*, 256 F. 3d at 1202 ("Rule 9(b)'s heightened pleading standard requires that the complaint set forth . . . precisely what statements were made in what documents or oral representations."); *see also Gayou*, No. 11-23359-Civ-SCOLA, 2012 WL 2049431, at *7 (dismissing an allegation of misleading advertisement and negligent misrepresentation because the complaint was not temporally precise).

In its Motion, Royal Caribbean argues that Doria has failed to meet the Rule 9(b) standard. In support of this contention, Royal Caribbean cites Judge Ungaro's recent decision in *Serra-Cruz v. Carnival Corp.* No. 1:18-cv-23033-UU, (DE 30 at 7) (S.D. Fla. Feb. 12, 2019). There, Judge Ungaro applied the Rule 9(b) standard to claims of negligent misrepresentation under Florida common law and Florida Statute Section 817.41 where the facts were substantially similar to those in this case. *Id.* The plaintiff in *Serra-Cruz* alleged Carnival made misleading statements as to the safety of an ATV excursion sold on its cruise ship. *Id.* at 11.

Doria concedes that the heightened pleading standard of Rule 9(b) is applicable to Counts I and II, but argues that he has pleaded his factual allegations with sufficient particularity to satisfy the heightened standard. Although the Court previously found Doria's allegations to be lacking specificity, the amended pleading now provides: (1) the exact statements that are alleged to be misleading or false; (2) the sources of the allegedly misleading materials; (3) and where and when the allegedly misleading or false statements were made. Consequently, the amended allegations provide the Defendants with the respective sources of the representations and facts supporting Doria's claim that negligent representations were actually made to him. Therefore, the Court finds that Doria has met the heightened pleading standard of Rule 9(b). *See Ceithaml*, 207 F. Supp. 3d at 1353. Royal Caribbean's motion to dismiss Counts I and II of the amended complaint is denied.

B. Counts III, IV, V – Negligent Selection/Retention, Negligent Failure to Warn, and Negligence

Doria's third, fourth, and fifth counts allege Royal Caribbean was negligent in promoting the ATV excursion, selecting and retaining Renta as an excursion operator, and not warning passengers of the alleged dangers involved in the ATV excursion. To state a claim for negligence against a shipowner, a plaintiff "must show: (1) that defendant owed plaintiff a duty; (2) that defendant breached that duty; (3) that this breach was the proximate cause of plaintiff's injury; and (4) that plaintiff suffered damages." *Isbell v. Carnival Corp.*, 462 F. Supp. 2d 1232, 1236 (S.D. Fla. 2006) (citing *Hasenfus v. Secord*, 962 F.2d 1556, 1559-60 (11th Cir. 1992)); *see also Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) ("In analyzing a maritime tort case, we rely on general

principles of negligence law.") (quoting *Daigle v. Point Landing, Inc.*, 616 F.2d 825, 827 (5th Cir.1980)).

Pursuant to federal maritime law, the duty of care that cruise operators owe passengers is ordinary reasonable care under the circumstances, "which requires, as a prerequisite to imposing liability, that the carrier have actual or constructive notice of the risk-creating condition." *See Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989). A facet of the duty of reasonable care is the cruise ship operator's "duty to warn of known dangers beyond the point of debarkation in places where passengers are invited or reasonably expected to visit." *Serra-Cruz*, No. 1:18-cv-23033-UU, at 14 (quoting *Chaparro,* 694 F.3d at 1336). The duty to warn only extends to dangers "which the carrier knows, or reasonably should have known" to exist. *See id.* (quoting *Wolf v. Celebrity Cruises Inc.*, 683 F. App'x 786, 794 (11th Cir. 2017)).

First, Doria alleges Royal Caribbean had a duty to reasonable select and retain excursion operators to ensure the safety of passengers. Doria also alleges Royal Caribbean had a duty to warn passengers against the inherent dangers of the ATV excursion. Doria alleges Royal Caribbean's duty to warn was triggered when it received notice of the excursion's allegedly unsafe conditions through its "initial approval process and/or its yearly inspections of the subject excursion" and "other cruise ship passengers being injured on ATV excursions." (DE 14 at 10). In the amended complaint, Doria provides sufficient factual detail regarding alleged prior incidents that occurred with either Royal Caribbean and/or Renta involving ATV excursions. Doria cites to multiple cases involving similar incidents, which Doria alleges should have put Royal Caribbean on notice that the ATV excursion was unreasonably dangerous. Thus, the Court finds that

Doria has pled sufficient facts in the amended complaint alleging Royal Caribbean had actual or constructive notice of the dangerous conditions of the ATV excursion. The Court also finds that the amended complaint now pleads facts sufficient to support the remaining elements of Doria's negligence claims, including that Royal Caribbean breached its duty by failing to warn Doria that the ATV excursion was dangerous and by offering an unreasonably dangerous excursion to passengers such as Doria. Moreover, Doria's amended complaint adequately pleads causation and damages as to the negligence claims. Thus, Royal Caribbean's motion to dismiss Counts III, IV, and V of the amended complaint is denied.

C. Count X – Negligence Based on Apparent Agency or Agency by Estoppel

Next, Doria claims Royal Caribbean is liable for Renta's negligence under a theory of apparent agency. In its prior order on Royal Caribbean's first motion to dismiss, the Court agreed with Royal Caribbean that, because Doria's underlying negligence claim was dismissed without prejudice, his claim for negligence based on apparent agency must also be dismissed without prejudice. *Brown v. Carnival Corp. et al.*, 202 F. Supp. 3d 1332, 1340 (S.D. Fla. 2016) (dismissing "apparent agency" claim where the court had already found that plaintiff failed to state a plausible negligence claim).

However, the Court also stated that, "were Doria's underlying negligence claim sufficiently pleaded, his claim for apparent agency would be factually supported at the motion to dismiss stage." (DE 13). Allegations supporting Doria's claim include: (1) Royal Caribbean making all "arrangements for the subject excursion without effectively disclosing that the subject excursion was being run by another entity;" (2) marketing "the subject excursion using its company logo;" (3) recommending that passengers "not

engage in excursions . . . not sold through" Royal Caribbean; (4) maintaining a "shore excursion desk" where it sold and provided information for excursions; (5) collecting Doria's fee; and (6) issuing Doria a receipt for his fee. (DE 1 at 27-28). Several other courts in this District have found similar factual allegations sufficient to support a negligence claim under an apparent agency theory of liability. *See, e.g.*, *Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1396-97 (S.D. Fla. 2014); *Gayou*, 2012 WL 2049431, at *8-9; *Zapata*, 2013 WL 1296298, at *5; *Lapidus v. NCL America LLC, et al.*, No. 12-21183, 2012 WL 2193055, at *5 (S.D. Fla. Jun. 14, 2012); *Gibson v. NCL (Bahamas) Ltd. et al.*, No 11-24343-CIV, 2012 WL 1952667, at *7 (S.D. Fla. May 30, 2012). Thus, because the underlying negligence claim has now been sufficiently pled, Doria's claim for negligence based on apparent agency or agency by estoppel may also proceed because it too is sufficiently pled.

IV. CONCLUSION

For the reasons set forth above, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss (DE 22) is **DENIED**. Royal Caribbean shall file an answer to the amended complaint within 21 days of the date of this order.

DONE AND ORDERED in Chambers in Miami, Florida, this 26th day of August, 2019.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE