UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-CV-23511-WILLIAMS/MCALILEY

MARK AROUZA-PAI,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

REPORT AND RECOMMENDATION ON MOTION TO DISMISS

Defendant Carnival Corporation filed a Motion to Dismiss the Second Amended Complaint, which the Honorable Kathleen M. Williams referred to me for a report and recommendation. (ECF Nos. 64, 65). The Motion is fully briefed. (ECF Nos. 68, 69). Having carefully reviewed the parties' memoranda, the pertinent portions of the record and the applicable law, for the reasons I explain below I recommend that the Court deny the Motion to Dismiss.

I. BACKGROUND

Plaintiff was a passenger on the Carnival *Pride* in March 2018 when he allegedly slipped on a "wet or slippery transient foreign substance" while walking on the Lido Deck near the pool, sustaining serious injuries including a fractured left femur. (ECF No. 62 at ¶ 13). Plaintiff sought treatment from the onboard physician and medical staff at the time of his injuries. (*Id*. at ¶¶ 37-8). Plaintiff alleges that the physician and nursing staff

failed to properly diagnose and treat Plaintiff, which aggravated his injuries and caused preventable displacement of the fracture. (*Id*. at ¶¶ 39-40). Plaintiff alleges that as a result of Carnival's negligence, he is no longer able to walk and permanently requires a wheelchair for mobility. (*Id*. at ¶ 13).

Plaintiff filed this action against Carnival in October 2021, in which he asserted claims for negligent maintenance of the Lido Deck and negligent failure to warn. (ECF No. 1). The Complaint did not include any medical negligence claims or mention the onboard physician or nursing staff. (*Id*.). Plaintiff filed a First Amended Complaint in July 2022, which raised the same claims as his initial Complaint, and again made no mention of purported negligence by the onboard medical staff. (ECF No. 53).

In August 2022, Plaintiff filed a Second Amended Complaint ("SAC"), now the operative complaint. He again raises claims for negligent maintenance and negligent failure to warn. (ECF No. 62 at Counts I, II). In connection with those claims, Plaintiff alleges that Carnival had actual and/or constructive notice of the alleged dangerous condition because, among other reasons:

- "The wet area on which the Plaintiff fell appeared large immediately after the Plaintiff fell, indicating that the wet area had been present for some period of time before the Plaintiff fell";
- "As disclosed in Defendant's answers to interrogatories, a single yellow caution cone was placed by the Defendant due to the proximity of the deck area to the pool, in light of and acknowledging defendant's actual constructive knowledge that deck areas near the pool, such as the area where the Plaintiff fell, were likely to become wet frequently and thereby require both frequent drying and frequent caution to passengers";
- A Carnival Security Watch Report from the day of the incident states

that the area where Plaintiff fell was later "found partially wet due to its proximity to the pool but [housekeeping] personnel are constantly mopping the floor";

- Carnival's policies recognize that the inside and outside areas of "Lido Dining" are "areas of most potential slips and falls";
- Carnival's policies instruct "all team members assigned to Lido/open decks" that "[s]pills should be cleaned up as soon as seen to avoid slips and falls";
- Carnival's housekeeping personnel "have been trained by Defendant to dry the [Lido] deck frequently"; and
- Carnival "disclosed the existence of more than 30 prior slip and falls on the same portion of the Lido Deck on the "PRIDE" where Plaintiff slipped and fell, during the three years prior to the Plaintiff's fall, as well as an additional 36 prior slip and falls on sister class ships."

(*Id*. at ¶ 14a-f; *see also* ECF No. 62-1, 62-2, 62-3, 62-4).

Plaintiff also raises claims for Medical Negligence/Negligent Failure to Treat and Negligent Credentialing. (*Id.* at Counts III, IV). The medical negligence claim alleges that the onboard medical staff knew or should have known that Plaintiff suffers from muscular dystrophy, and that the x-ray machine onboard the *Pride* was malfunctioning or inoperable such that medical staff lacked the capability to identify or rule out a potential fracture that required immobilization, which resulted in their failure to timely and appropriately diagnose and treat Plaintiff's injuries. (*Id*. at Count III). The negligent credentialing claim alleges that Carnival knew or should have known that its onboard medical staff were not qualified or competent to perform their duties or appreciate the limitations on their medical capabilities. (*Id*. at Count IV).

Carnival filed a Motion to Dismiss the SAC which raises three arguments. (ECF No. 64). First, Carnival argues that the negligent maintenance and negligent failure to warn

claims should be dismissed because Plaintiff has not adequately alleged that Carnival had notice of the allegedly dangerous condition. (*Id*. at 2-8). Second, Carnival argues that the medical negligence and negligent credentialing claims are time barred because they were filed outside the one-year limitations period set forth in the ticket contract, and do not relate back to the initial Complaint because they involve separate and distinct conduct. (*Id*. at 8-11). Last, Carnival argues that the medical negligence and negligent credentialing claims are barred by laches. (*Id*. at 11-14). In his response, Plaintiff contends that he alleged sufficient facts to support an inference that Carnival had constructive notice of the alleged hazard. (ECF No. 68 at 1-6). With respect to the medical negligence and negligent credentialing claims, Plaintiff responded that the relation back doctrine applies because these claims arise out of the same occurrence set forth in the initial Complaint, that is, Plaintiff's slip and fall. (*Id*. at 6-8). Finally, Plaintiff argues that laches does not apply because Carnival was not prejudiced by the delay, and Plaintiff did not learn until later that the lack of an x-ray machine led to a misdiagnosis and aggravation of his injury. (*Id*. at 8-9).

For the reasons explained below, I conclude that Plaintiff has sufficiently alleged notice for purposes of his negligent maintenance and negligent failure to warn claims. I also conclude that it is improper at this stage to determine whether the medical negligence and negligent credentialing claims are untimely or barred by laches because the Court would have to look outside the SAC to resolve those issues. Accordingly, I recommend that the Court deny Carnival's Motion to Dismiss.

II. ANALYSIS

A. Standard

Federal Rule of Civil Procedure Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To satisfy this standard, a plaintiff must plead facts that make out a claim that is plausible on its face and raises the right to relief beyond a speculative level. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 510 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court must accept all of the plaintiff's factual allegations as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). However, "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002). Importantly, the court must draw "all reasonable inferences" in favor of the plaintiff. *St. George v. Pinellas Cty*, 285 F.3d 1334, 1337 (11th Cir. 2002).

B. Plaintiff Adequately Alleges That Carnival Had Constructive Notice

Carnival argues that Counts I and II of the SAC fail to state a claim because Plaintiff has not alleged that Carnival had notice of the allegedly dangerous condition. "Claims arising from alleged tort actions aboard ships sailing in navigable waters are governed by general maritime law." *Luther v. Carnival Corp.*, 99 F. Supp. 3d 1368, 1370 (S.D. Fla. 2015) (citing *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320 (11th Cir. 1989)). "To prevail on a negligence claim, a plaintiff must show 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." *Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 720 (11th Cir. 2019) (quotation marks and citation omitted).

The duty element in the maritime context "requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition." *Keefe*, 867 F.2d at 1322. A plaintiff may satisfy this requirement through either actual notice or constructive notice. "Actual notice exists when the defendant knows about the dangerous condition." *Holland v. Carnival Corp.*, 50 F.4th 1088, 1095 (11th Cir. 2022) (citing *Keefe*, 867 F.2d at 1322; *Guevara*, 920 F.3d at 720. Plaintiff does not argue that he alleged actual notice.

Constructive notice exists where "the shipowner ought to have known of the peril to its passengers, the hazard having been present for a period of time so lengthy as to invite corrective measures." *Keefe*, 867 F.2d at 1322. At the motion to dismiss stage, a plaintiff can establish constructive notice by alleging that the "defective condition exist[ed] for a sufficient period of time to invite corrective measures." *Guevara*, 920 F.3d at 720 (citation omitted). A plaintiff can also demonstrate constructive notice, sufficient to withstand a motion to dismiss, by alleging "substantially similar incidents in which conditions substantially similar to the occurrence in question must have caused the prior accident." *Id.* (quotation marks and citation omitted). A plaintiff must allege facts to support his allegations of constructive notice and cannot rely on mere generalities or conclusory assertions. *Holland*, 50 F.4th at 1095 (dismissing amended complaint that "contains only

conclusory allegations as to constructive notice" because plaintiff "failed to include factual allegations that plausibly suggest Carnival had constructive notice of the dangerous condition."). Applying this standard, the Court concludes that Plaintiff sufficiently alleged that Carnival had constructive notice of the allegedly dangerous condition.

The scope of this Court's analysis was made clear in a recent decision of the Eleventh Circuit, *Brady v. Carnival Corporation*. In *Brady*, the plaintiff slipped on a puddle of water on the Lido deck of a Carnival cruise ship and broke her hip. 33 F. 4th 1278, 1280 (11th Cir. 2022). She sued Carnival for negligence, and the district court entered summary judgment for Carnival, finding that "its crewmembers had neither actual nor constructive notice of the particular puddle that caused her fall." *Id*. The Eleventh Circuit reversed and stated:

> At the outset, we clarify what, under our precedent, the relevant "risk-creating condition" was here. It was not, as the district court suggested, the presence of the particular "puddle on which [Brady] slipped." Rather, the salient issue is whether Carnival knew, more generally, that the area of the deck where Brady fell had a reasonable tendency to become slippery – and thus dangerous to passengers – due to wetness from the pool.

Id. at 1281.[1] Following *Brady*, this Court asks whether the SAC plausibly alleges that Carnival had constructive notice that the area of the Lido deck where Plaintiff fell was

[1] Carnival argues that *Brady* is distinguishable because it dealt with "the *deck's* propensity to become slippery." (ECF No. 69 at 2). The *Brady* Court did not reference any such limitation in its decision, and the complaint in *Brady* did not focus on the deck itself as Carnival asserts. Rather, the *Brady* complaint stated that "Carnival breached its duty to the Plaintiff by…failing to clean or warn its passengers about the standing water on the deck where Plaintiff fell…." (*Brady v. Carnival Corp*., Case No. 19-cv-22989-MGC (S.D. Fla. July 18, 2019), ECF No. 1 at ¶ 12). The *Brady* plaintiff alleged the same type of negligent maintenance and negligent failure to warn claim as Plaintiff alleges here. *Brady* is not distinguishable.

likely to get wet due to its proximity to the pool and was slippery when wet. The answer is yes.

First, the SAC alleges numerous prior substantially similar incidents on the Lido Deck of the Pride, and attaches, as an exhibit to the SAC, a summary that Carnival provided in discovery of each prior slip and fall incident on the Lido Deck of both the *Pride* and its sister ships.[2] (ECF Nos. 62 at ¶ 14f.; 62-4). This summary includes more than 40 prior instances when a passenger slipped and fell on a wet floor on the Lido deck, and more than half of those (25) occurred on the *Pride*. (ECF No. 62-4). These factual allegations are sufficient to establish constructive notice at this stage of the proceedings.[3] *See Green v. Carnival Corp.*, No. 22-cv-20192, 2022 WL 2702789, at *4 (S.D. Fla. July 12, 2022) ("Here, Plaintiff alleges fifteen (15) prior substantially similar incidents. Those factual allegations do not merely support a generalized theory of foreseeability. Rather, the allegations support that Defendant was on constructive notice of a risk-creating condition that was recurring in the same location on its vessels."); *Lopez v. Carnival Corp.*, No. 22-cv-21308, 2022 WL 4598657, at *3 (S.D. Fla. Sept. 30, 2022) (plaintiff tripped on loose or defective metal plate while descending staircase and allegation of "numerous prior

[2] Exhibits are considered part of pleadings for all purposes, to include motion to dismiss. *Solis-Ramirez v. U.S. Dept. of Justice*, 758 F.2d 1426, 1430 (11th Cir. 1985) (citing Fed. R. Civ. P. 10(c)).

[3] The Court need not, and does not, decide how many of the prior incidents meet the standard of substantial similarity, such that they put Carnival on constructive notice. This determination requires more information than is available at the pleading stage. The SAC alleges facts, plausible on their face, that these earlier slip-and-fall accidents on wet surfaces on the Lido deck constructively notified Carnival of the risk that the area where Plaintiff fell was likely to get wet and was slippery when wet. These allegations are sufficient to survive a motion to dismiss.

passenger injuries involving metal nosing on stairs on Defendant's ships" supported inference that Defendant had constructive notice."); *Cogburn v. Carnival Corp.*, No. 21-11579, 2022 WL 1215196, at *4 (11th Cir. Apr. 25, 2022) ("[A] plaintiff may establish constructive notice with evidence of substantially similar incidents in which conditions substantially similar to the occurrence in question must have caused the prior accident.").

The SAC also alleges that "Defendant claims it had placed a single yellow caution cone in [sic] near the area or vicinity where Plaintiff slipped and fell…." (ECF No. 62 at ¶ 14b.). Defendant argues that this allegation is insufficient to establish constructive notice because "[a] yellow cone at a different portion of the deck does not share a connection with the specific alleged slippery substance, as it was not near the slippery substance nor was it visible from the location of the slippery substance, according to the Plaintiff." (ECF No. 69 at 3). The Court does not agree. As the *Brady* Court explained, "[t]he fact that warning signs were posted on the pool deck in the general area of Brady's fall, when viewed in the light most favorable to Brady, is enough to withstand summary judgment as to notice. That's because a reasonable inference from the placement of the caution sign is that Carnival knew that the Lido Deck would become slippery when wet. In other words, a jury could reasonably find that placing a warning sign on the deck served as Carnival's acknowledgement of the danger." *Brady*, 33 F. 4th at 1283 (citations and quotation marks omitted). The allegations about a warning cone, together with the other allegations of constructive notice, are sufficient to survive a motion to dismiss.

Further, the SAC alleges that Carnival's housekeeping personnel are "specifically instructed to be constantly mopping the floor in the area where Plaintiff fell" and its policies

require personnel assigned to the Lido Deck to clean up spills "as soon as seen to avoid slips and falls." (ECF Nos. 62 at ¶ 14c., d.; 62-1; 62-2). These allegations reflect preventative or corrective measures that allow a reasonable inference that Carnival had notice of the allegedly dangerous condition, that the area where Plaintiff fell is often wet and becomes slippery when wet. *See Carroll v. Carnival Corp*., 955 F.3d 1260, 1265-66 (11th Cir. 2020) (passenger tripped over lounge chair; summary judgment in favor of Carnival on failure to warn claim reversed because "evidence reflecting that Carnival took corrective measures to prevent people from tripping over the lounge chairs in the walkway on Deck 11" can establish constructive notice.); *Brady*, 33 F. 4th at 1282 ("Under *Carroll*, the issue of notice turns more broadly on (1) whether Carnival had notice that the area where Brady fell had a reasonable tendency to become wet, [citing *Carroll*], and (2) whether it had actual or constructive knowledge that the pool deck where Brady fell could be slippery (and therefore dangerous) when wet.") (citation omitted).

Lastly, the Court notes that the Eleventh Circuit's recent decisions in *Holland v. Carnival Corporation*, 50 F.4th 1088 (11th Cir. 2022), and *Newbauer v. Carnival Corporation*, 26 F. 4th 931 (11th Cir. 2022), do not change the result. In those cases, the Court of Appeals concluded that the complaints at issue failed to plausibly allege that Carnival had constructive notice of the dangerous condition. *Holland*, 50 F.4th at 1095; *Newbauer*, 26 F. 4th at 935-36. However, there, unlike here, the complaints included only conclusory allegations of notice. *Holland*, 50 F.4th at 1096 ("conclusory allegations that 'there are frequently spills on the staircase' and 'prior slip and fall incidents on this staircase' are insufficient…Holland has not alleged any facts concerning a substantially

similar incident to the one at issue."); *Newbauer*, 26 F. 4th at 936 ("Newbauer failed to allege a sufficient factual basis to support her conclusory allegation that Carnival had actual or constructive knowledge of the hazard based on the 'regularly and frequently recurring nature of the hazard in that area'."). By contrast, as explained above, the SAC includes specific factual allegations regarding Carnival's constructive notice that the area where Plaintiff fell could be slippery, and therefore dangerous, when wet.

For the foregoing reasons, the Court concludes that Plaintiff states a claim for negligent maintenance (Count I) and negligent failure to warn (Count II), and Carnival's Motion to Dismiss those claims must be denied.

C. It is Premature to Determine Whether Plaintiff's Medical Negligence Claims are Untimely or Barred by Laches

Carnival argues that the claims in Counts III and IV of the SAC, for medical negligence and negligent credentialing, are untimely because they were filed outside the one-year limitations period set forth in the cruise ticket contract and do not relate back to the initial Complaint. (ECF No. 64 at 8-11).

The Court cannot resolve Carnival's argument on a motion to dismiss for two reasons. First, "[t]he scope of review [at the motion to dismiss stage] must be limited to the four corners of the complaint." *St. George v. Pinellas Cnty.*, 285 F.3d 1334, 1337 (11th Cir. 2022). Plaintiff did not attach the ticket contract to the SAC and thus it is beyond the Court's consideration at this time.[4] Second, the Eleventh Circuit instructs that "[f]or a

[4] Further, Carnival did not attach the ticket contract to its motion to dismiss, and even if it had, the Court could not consider it. A court may "consider documents attached to the motion to dismiss if they are referred to in the complaint, central to the plaintiff's claim, and of undisputed

limitations period to be enforceable, it must have been reasonably communicated to the passenger." *Roberts*, 824 F. App'x at 828 (citing *Caron v. NCL (Bahamas) Ltd.*, 910 F.3d 1359, 1367 (11th Cir. 2018). Courts "apply a two-factor test for reasonable communication, which evaluates (1) the physical characteristics of the clause and (2) the passenger's opportunity to become meaningfully informed of the contract terms." *Id*. The second factor, in particular, "takes into account facts beyond the contract" and "focuses on the subjective circumstances attending a particular plaintiff's opportunity to review the ticket terms before embarkation." *Roberts*, 824 F. App'x at 828 (citations omitted). The SAC does not include any facts relevant to the "reasonable communication" test and, thus, the Court cannot decide this issue on a motion to dismiss.

The same is true for Carnival's other argument, that Counts III an IV are barred by laches. Laches is an affirmative defense, as Carnival acknowledges. *See Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 616 F.2d 1315, 1325 (5th Cir. 1980) ("Laches and estoppel are equitable defenses whose appropriateness must be determined in each case under its particular factual situation.");[5] *see also Motion to Dismiss*, ECF No. 64 at 11) ("There are three requirements that must be met to assert the defense of Laches."). "Generally, the existence of an affirmative defense will not support

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authenticity." *Hi-Tech Pharm., Inc. v. HBS Int'l Corp.*, 910 F.3d 1186, 1189 (11th Cir. 2018). That is not the case here. "The ticket contract is not central to [Plaintiff's] claims because it is not a necessary or essential part of [his] effort to show that [he] was injured due to Carnival's negligence." *Roberts v. Carnival Corp.,* 824 F. App'x 825, 826 (11th Cir. 2020).

[5] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

a motion to dismiss." *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir. 1984). An exception exists if "the existence of an affirmative defense ... appears on the face of the complaint." *Id.* at 1069. That is not the case here.

To establish that Plaintiff's claims are barred by laches, Carnival must demonstrate "(1) a delay in asserting a right or a claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted." *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1545 (11th Cir. 1986). The facts required to determine the reasonableness of Plaintiff's delay and any resulting prejudice to Carnival are not present in the SAC. As such, Carnival's argument that the medical negligence and negligent credentialing claims are barred by laches is beyond the scope of a motion to dismiss.

III. CONCLUSION

Based on the foregoing, I **RESPECTFULLY RECOMMEND** that the Court **DENY** Defendant's Motion to Dismiss, (ECF No. 64).

IV. OBJECTIONS

No later than fourteen days from the date of this Report and Recommendation the parties may file any written objections to this Report and Recommendation with the Honorable Kathleen M. Williams, who is obligated to make a *de novo* review of only those factual findings and legal conclusions that are the subject of objections. Only those objected-to factual findings and legal conclusions may be reviewed on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985), *Henley v.* Johnson, 885 F.2d 790, 794 (11th Cir. 1989), 28

U.S.C. § 636(b)(1), 11th Cir. R. 3-1 (2016).

RESPECTFULY RECOMMENDED in chambers at Miami, Florida, this 16th day of December 2022.

CHRIS MCALILEY
UNITED STATES MAGISTRATE JUDGE

cc: Honorable Kathleen M. Williams
Counsel of Record