United States District Court
for the
Southern District of Florida

Leroy B. Rygula, III, Plaintiff,	)	
	)	
v.	)	Civil Action No. 18-24535-Civ-Scola
	)	**In Admiralty**
NCL (Bahamas) Ltd., dba Norwegian Cruise Line, Defendant.	)	

Order Granting Motion to Dismiss

Plaintiff Leroy B. Rygula, III, seeks to recover for injuries he sustained when he jumped into a pool, which was mostly drained of water, on a cruise ship owned by Defendant NCL (Bahamas) Ltd., doing business as Norwegian Cruise Line. (Am. Compl., ECF No. 17.) Although count one is captioned simply, "Negligence," Rygula also packs vaguely alleged claims for negligent failure to warn and negligent maintenance into this count. Similarly, in count two, captioned, "Negligence for Medical Malpractice," Rygula crams in several more claims: direct negligence, negligence through vicarious liability, and negligent selection or retention. Norwegian maintains Rygula's complaint is defective because he fails to state a claim upon which relief may be granted and, additionally, has presented a shotgun pleading. (Def.'s Mot., ECF No. 21.) After careful review of the complaint and the parties' briefing, the Court agrees with Norwegian that Rygula's complaint should be dismissed because it fails to state a claim and therefore **grants** the motion (**ECF No. 21**).

1. Background[1]

Rygula embarked on Norwegian's *Pearl*, in October 2107, for a music festival cruise. A few days into the cruise, on October 31, 2017, Rygula jumped

[1] The Court accepts Rygula's factual allegations as true for the purposes of evaluating Norwegian's motion to dismiss. *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997). At the same time, the Court nonetheless points out a concerning discrepancy between Rygula's and Norwegian's accounts of the incident. Norwegian, in its motion to dismiss, says that Rygula did not simply jump into the pool but instead entered the pool, which had been closed for the night, by jumping from the thirteenth deck to the twelfth deck where the pool was located. (Def.'s Mot. at 1.) The Court can divine a number of explanations for this inconsistency: (1) plaintiff's counsel did not sufficiently apprise themselves of all the facts before filing Rygula's complaint; (2) plaintiff's counsel intentionally omitted the nature of Rygula's jump to cast his claims in a deceptively more favorable light; or (3) defense counsel is mistaken. Any of these possibilities would be troubling. And while the Court did not take these factual incongruities into account in evaluating Rygula's complaint (since it must accept all the complaint's allegations as true at this stage of the litigation), the Court nonetheless flags the issue in the event either party pursues further relief with respect to this case.

into a pool that was "mostly drained of water" and suffered serious injuries: a comminuted open intra-articular fracture of his left distal femur; a patella fracture; "radiopaque foreign bodies" in his foot which required multiple surgeries; and severe infections. (Am. Compl. at ¶¶ 7, 10, 12.) Rygula describes the pool as not being "adequately covered or secured" and says that the pool area did not have adequate lighting. (*Id.* at ¶¶ 7, 10, 11.) He also complains that the infections he developed resulted from the subpar onboard medical attention he received and Norwegian's failure to evacuate him from the ship in a timely manner. (*Id.* at ¶¶ 8, 16.)

2. Legal Standard

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must accept all the complaint's allegations as true, construing them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). A pleading must only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of a complaint. *See* Fed. R. Civ. P. 12(b)(6). In assessing the legal sufficiency of a complaint's allegations, the Court is bound to apply the pleading standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). That is, the complaint "must . . . contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Twombly*, 550 U.S. at 570). "Dismissal is therefore permitted when on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Glover v. Liggett Grp., Inc.*, 459 F.3d 1304, 1308 (11th Cir. 2006) (internal quotations omitted) (citing *Marshall Cnty. Bd. of Educ. v. Marshall Cnty. Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). "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." *Iqbal*, 556 U.S. at 678. "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." *Id.* A court must dismiss a plaintiff's claims if he fails to nudge his "claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

Thus, a pleading that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" will not survive dismissal. *See Twombly*, 550 U.S. at 555. "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior

era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 679.

3. Analysis

A. Rygula fails to allege enough facts to support any of his negligence claims.

"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) (quotations omitted). "With respect to the duty element in a maritime context, a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel . . . ." *Id.* (quotations omitted). To prevail on a negligence, duty-to-warn, or negligent-maintenance claim with respect to a dangerous condition, a plaintiff must show that the defendant "had actual or constructive notice of a risk-creating condition, at least where, as here, the menace is one commonly encountered on land and not clearly linked to nautical adventure." *Id.* (quotations and alterations omitted); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989) (requiring notice with respect to a duty-to-warn claim); *Horne v. Carnival Corp.*, 741 Fed. App'x 607, 609 (11th Cir. 2018) (requiring notice with respect to a failure-to-maintain claim). Norwegian's liability for Rygula's negligence claims, under whatever theory alleged, then "hinges on whether it knew or should have known about the dangerous condition." *Guevara*, 920 F.3d at 720 (quotations omitted).

Rygula has not alleged any facts showing that Norwegian had either constructive or actual notice. "A maritime plaintiff can establish constructive notice with evidence that the defective condition existed for a sufficient period of time to invite corrective measures." *Id.* (quotation and alteration omitted). "Alternatively, a plaintiff can 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." *Id.* (quotations omitted). Actual notice can be alleged by, for example, pointing to evidence that the defendant placed a warning sign in the area, alerting passengers to the relevant danger. *See id.* at 721 (noting that a warning sign can indicate actual notice). Here, the sum total of Rygula's notice allegations are that Norwegian "created or had actual or constructive notice of the dangerous condition." (Am. Compl. at ¶ 11.) Notably missing are any actual facts supporting Rygula's legal conclusion that Norwegian knew or should have known of the alleged dangerous condition.

The Court additionally notes that, in his initial complaint Rygula's notice allegations were even sparser than in his amended complaint: "The Defendant had actual or constructive notice of the dangerous condition but did nothing to prevent the subject incident." (Compl. ¶ 11, ECF No. 1.) In seeking to dismiss this initial complaint, Norwegian alerted Rygula to, among other issues, his defective notice allegations. (Def.'s Mot. to Dismiss the Init. Compl., ECF No. 13.) Rygula responded to this first motion to dismiss by amending his complaint and in doing so appears to have attempted to address the notice deficiencies by alleging instead, "The Defendant *created or* had actual or constructive notice of the dangerous condition, *specifically, a pool that was mostly drained of water and was not adequately covered/protected in the dark;* but did nothing to prevent the subject incident." (Am. Compl. at ¶ 11 (amended language emphasized).) Nothing Rygula added by way of his amended complaint provides any factual basis from which the Court can reasonably infer Norwegian's notice of the dangerous condition: simply describing the alleged danger does not lend any support to the notice allegation.

Further, Rygula is mistaken in his contention that he need not show notice if he alleges Norwegian created the dangerous condition. While some courts in this district may have determined otherwise, the Eleventh Circuit has been unequivocal in "reject[ing] the possibility that the operator [of a cruise ship] could be liable in the absence of actual or constructive notice." *Pizzino v. NCL (Bahamas) Ltd.*, 709 Fed. App'x 563, 567 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 244 (2018) (noting that although there may be "sound policy justifications" supporting the notion that a defendant's creation of a risk might obviate the need for notice, such a rule "simply cannot be squared with . . . prior [Eleventh Circuit] precedent").

In short, even after amending his complaint, Rygula has failed to allege a single actual fact from which the Court might infer that Norwegian either knew or should have known of any dangerous condition relating to the level of the pool water. As such, the Court dismisses Rygula's negligence claims as presented in count one.

B. Rygula fails to allege enough facts to support his medical malpractice claims.

In count two, Rygula appears to comingle claims for medical malpractice both directly against Norwegian as well as under a theory of vicarious liability. Regardless of the theory of liability, however, Rygula has, once again failed to allege actual facts that would support his claim. Instead, he supplies only legal conclusions and labels describing the ways Norwegian breached the duty it owed him. This is not enough for his claims to survive dismissal. Rygula needs

to provide factual content that would allow the Court to draw a reasonable inference that Norwegian's actions, or lack of action, caused Rygula's injuries—here, serious infections.

Rygula summarizes his medical malpractice claims as follows: "the Plaintiff did not receive adequate medical attention by the ship's staff and he was not timely evacuated from the ship" (Am. Compl. at ¶ 8). He then expounds on this by adding that Norwegian breached its duty of care by (1) "[f]ailing to employ and/or contract competent and qualified medical personnel"; (2) "[f]ailing to properly assess Plaintiff's condition"; (3) "[f]ailing to timely, properly, and appropriately treat Plaintiff"; (4) "[f]ailing to properly monitor Plaintiff's condition"; (5) "[f]ailing to evacuate Plaintiff from the vessel for an unreasonable length of time"; (6) "[d]eviating from the standard of care for patients in Plaintiff's circumstances who require medical assistance"; and (7) "[i]n other ways which may be revealed through discovery." (Am. Compl. at ¶ 15.) Every single allegation amounts to nothing more than speculation, a legal conclusion, or a label.

For example, it is not enough for Rygula to simply announce that Norwegian's medical staff was not "competent" or "qualified." Instead, Rygula must set forth actual facts that might reasonably support the otherwise "bald assertions" or "mere speculation" that they were incompetent or unqualified. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005).[2] Likewise, Rygula's description of Norwegian's actions as not being "proper," "timely," "appropriate," or otherwise "deviating from the standard of care," are all legal conclusions, unbuttressed by a "factual predicate concrete enough to warrant further proceedings." *Id.* (quotation omitted). What did Norwegian, or its medical personnel, actually *do* that was improper or inappropriate? How much time actually passed before Rygula was evacuated? What is it about this time frame that renders it unreasonable? What factual support is there for Rygula's conclusion that evacuating him sooner—by one day, one hour, or one minute—would have prevented his infections? Rygula's allegations, without more, amount to nothing more than "unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *Iqbal*, 556 U.S. at 678. There

[2] The Court notes that this particular allegation also suffers from the additional infirmity in that the tort of negligent hiring or retentions also requires a plaintiff to allege facts showing that "(1) the employee/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 (3) the incompetence or unfitness was a proximate cause of the plaintiff's injury." *Gharfeh v. Carnival Corp.*, 309 F. Supp. 3d 1317, 1332 (S.D. Fla. 2018) (Goodman, Mag. J.). These allegations are also missing from Rygula's complaint.

are simply no facts alleged that would enable the Court to reasonably infer that Norwegian or its medical personnel actually committed medical malpractice.

Rygula's allegation that Norwegian also breached its duty to him "[i]n other ways which may be revealed through discovery" is also insufficient, as well as improper. The plausibility standard enunciated in *Twombly* "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of the defendant's liability. *Twombly*, 550 U.S. at 556. Putting the cart before the horse, through this allegation, Rygula instead seeks discovery so that he can allege facts in his complaint supporting his claim: the very model of a fishing expedition. While a plaintiff need not "allege a specific fact to cover every element or allege with precision each element of a claim, it is still necessary that a complaint contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282–83 (11th Cir. 2007) (quotations omitted). To that end, before drafting a complaint, counsel must exhibit at least *some* diligence in seeking to ascertain enough facts that could support a court's reasonable inference that a defendant is plausibly liable for the injuries alleged. Here, the Court finds no indication of any such diligence.

Norwegian has twice pointed out these pleading deficiencies, in its motion to dismiss Rygula's initial complaint and in the instant motion. But rather than supply actual facts supporting his claims, Rygula continues to rely solely on his legal conclusions and speculative allegations. In doing so, Rygula fails to state a claim for medical malpractice and so the Court also dismisses count two.

4. Conclusion

For the reasons set forth above, the Court **grants** Norwegian's motion to dismiss (**ECF No. 21**) and dismisses Rygula's claims without prejudice. Rygula, "in the alternative" seeks permission to file a second amended complaint. (Pl.'s Resp. at 8, 12.) This request is improper and is therefore denied. *See Newton v. Duke Energy Florida, LLC,* 895 F.3d 1270, 1277 (11th Cir. 2018) ("[W]here a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly."); *Avena v. Imperial Salon & Spa, Inc.*, 740 Fed. App'x 679, 683 (11th Cir. 2018) ("[W]e've rejected the idea that a party can await a ruling on a motion to dismiss before filing a motion for leave to amend.") (noting also that "a motion for leave to amend should either set forth the substance of the proposed amendment or attach a copy of the proposed amendment") (quotations omitted). The Court thus dismisses the complaint **without leave to amend**.

The Clerk is directed to **close** this case. Any pending motions are **denied as moot**.

Done and ordered at Miami, Florida, on August 28, 2019.

Robert N. Scola, Jr.
United States District Judge