UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:19-cv-20964-KMM

MANUEL ASUNCION ORO,

Plaintiff,

v.

NORWEGIAN CRUISE LINE HOLDINGS LTD.,

Defendant.
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ORDER

THIS CAUSE came before the Court upon Defendant Norwegian Cruise Line Holdings Ltd.'s Motion to Dismiss Count I of Plaintiff's Second Amended Complaint ("SAC") (ECF No. 26). ("Mot.") (ECF No. 30). Plaintiff filed a response in opposition. ("Resp.") (ECF No. 34). Defendant filed a reply. ("Reply") (ECF No. 35). The Motion is now ripe for review.

I. BACKGROUND

This is a personal injury action under general maritime law. SAC at 1. Defendant owns and operates the cruise ship M/S Norwegian Jade (the "Jade") and Plaintiff was a passenger aboard the Jade on Voyage No. JAD180312. *Id.* During the voyage, Plaintiff suffered a fall while walking on a pathway covered with divots, potholes, uneven surfaces, and debris from the Jade to a tour bus to participate in a shore excursion. *Id.* at 2. After the fall, Plaintiff continued to the tour bus but remained on the bus suffering for the duration of the excursion. *Id.* When Plaintiff returned to the Jade, he was escorted in a wheelchair to the medical center where Plaintiff was diagnosed with one fractured rib on the right side. *Id.* The Jade's medical records state that the medical center discharged Plaintiff from its care with no follow up required. *Id.* Plaintiff returned to the medical center the next morning after an agonizing night and the medical center informed him that

he had been discharged and there was no further treatment they could provide to him. *Id.* Plaintiff continued to suffer throughout the remaining eight (8) days of the cruise as his condition deteriorated. *Id.* Upon the Jade's return to Miami, Florida, Plaintiff immediately went to a hospital where he was diagnosed with multiple rib fractures and admitted into the Intensive Care Unit. *Id.*

Plaintiff filed a Complaint on March 13, 2019 ("Original Compl.") (ECF No. 1) and a First Amended Complaint ("FAC") (ECF No. 11) on April 22, 2019, both alleging claims of negligence for inadequate healthcare and medical malpractice. Original Compl. at 5–10; FAC at 5–9. On October 10, 2019, Plaintiff moved the Court for leave to file a second amended complaint and the Court granted Plaintiff's motion. (ECF Nos. 24, 25). On October 11, 2019, Plaintiff filed his SAC, alleging claims of negligence for failure to warn (Count I), negligence for inadequate healthcare (Count II), and medical malpractice (Count (III). *See generally* SAC. Now, Defendant moves to dismiss Count I of Plaintiff's SAC, arguing that Count I is time-barred by the contractual limitation contained in the passenger ticket contract ("Passenger Contract") (ECF No. 30–1) and does not relate back to the Original Complaint. Mot. at 2.

II. LEGAL STANDARD

"To survive a motion to dismiss, 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) (citation and internal quotation marks omitted). This requirement "give[s] the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation and alterations omitted). The court takes a plaintiff's factual allegations as true and construes them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008).

A complaint must contain enough facts to plausibly allege the required elements. *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295–96 (11th Cir. 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." *Iqbal*, 556 U.S. at 678. A pleading that offers "a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "[C]onclusory 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).

III. DISCUSSION

In Count I of the SAC, Plaintiff alleges that Defendant was negligent for failing "to either warn of the tripping hazards of the pathway and/or to ensure that elderly passengers such as Mr. and Mrs. Oro were accompanied down the pathway." SAC at 4. Pursuant to the Passenger Contract, the contractual limitation to file a suit to recover damages for physical injury is one (1) year from the date of the injury. Passenger Contract ¶ 10(a). Plaintiff suffered the fall on March 15, 2018, *see* SAC at 1, which means Plaintiff could file a claim on or before March 15, 2019, *see* Passenger Contract ¶ 10(a). Plaintiff filed the Original Complaint on March 13, 2019, which was within the contractual limitation. *See* Original Compl. However, Plaintiff's SAC was filed on October 11, 2019, after the one-year contractual limitation, rendering any new allegations therein time-barred unless they relate back to the filing of Plaintiff's Original Complaint. *See Caron v. NCL (Bahamas), Ltd.*, 910 F.3d 1359, 1368 (11th Cir. 2018) (quoting *Moore v. Baker*, 989 F.2d 1129, 1132 (11th Cir. 1993)).

Federal Rule of Civil Procedure 15(c)(1)(B) states that "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense

that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading[.]" Fed. R. Civ. P. 15(c)(1)(B). "[T]he critical issue in [relation back] determinations is whether the original complaint gave notice to the defendant of the claim now being asserted." *Moore*, 989 F.2d at 1131; *see also Twyman v. Carnival Corp.*, Case No. 19-21896-CIV-ALTONAGA/Goodman, 2019 WL 5257539, at *3 (S.D. Fla. Oct. 16, 2019). "When the facts in the original complaint do not put the defendant 'on notice that the new claims of negligence might be asserted,' but the new claims instead 'involve[ ] separate and distinct conduct,' such that the plaintiff would have to prove 'completely different facts' than required to recover on the claims in the original complaint, the new claims do not relate back." *Caron*, 910 F.3d at 1368 (quoting *Moore*, 989 F.2d at 1132); *see also Twyman*, 2019 WL 5257539, at *3 (citing *Moore*, 989 F.2d at 1131) ("When new or distinct conduct, transactions, or occurrences are alleged as grounds for recovery, there is no relation back, and recovery under the amended complaint is barred by limitations if it was untimely filed.").

First, Plaintiff's Original Complaint, including Plaintiff's Notice of Claim ("Notice"),[1] did not put Defendant on notice of a claim for negligent failure to warn. The Original Complaint and

[1] The Court considers Plaintiff's Notice despite that it is not within the four corners of the Original Complaint. "In the Rule 12(b) motion-to-dismiss context, a judge generally may not consider materials outside of the four corners of a complaint without first converting the motion to dismiss into a motion for summary judgment," but "where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, [] the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal[.]" *Pouyeh v. Bascom Palmer Eye Inst.*, 613 F. App'x 802, 808 (11th Cir. 2015) (citing *Day v. Taylor*, 400 F.3d 1272, 1275–76 (11th Cir. 2005)); *Brooks v. Blue Cross & Blue Shield of Fla.*, 116 F.3d 1364, 1369 (11th Cir. 1997); *see also SFM Holdings, Ltd. v. Banc of Am. Secs., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010) ("In ruling upon a motion to dismiss, the district court may consider an extrinsic document if it is (1) central to the plaintiff's claim, and (2) its authenticity is not challenged."). Here, Plaintiff's Notice was referenced in and attached to the Original Complaint and its authenticity is not contested. *See* Original Compl. at 2, Ex. 1. *Compare* (ECF No. 34–2) (Plaintiff's copy of the Notice), *with* (ECF No. 35–2) (Defendant's copy of the Notice). Further, the Notice is central to Plaintiff's claim because, pursuant to the Passenger Contract, providing notice is a

Notice did not include facts supporting a claim of negligent failure to warn and instead focused on the inadequacy of the medical care Plaintiff received aboard the Jade and the harm resulting from that subpar care. *See* Original Compl. at 2. Specifically, there was no mention of the pathway's "divots and potholes and uneven surfaces and debris" or that Plaintiff and his wife "were provided no warning by [Defendant's] personnel of the tripping hazards of the pathway, nor did anyone from [Defendant] accompany [them] down the pathway" in the Original Complaint. *Compare* Original Compl. at 2, *with* SAC at 2. Further, the facts required to prove a negligent failure to warn claim completely differ from those required to prove medical negligence and medical malpractice. *See* Order Denying Motion to Dismiss at 6, *O'Brien v. NCL (Bahamas) LTD.*, Case No. 1:16-cv-23284-JAL, ECF No. 18 (stating that various negligence theories "are conceptually different and require different proof"); *Trumbull v. FFE Transp. Servs., Inc.*, Case No. 5:09-CV-006, 2009 WL 10675310, at *2 (M.D. Ga. Sept. 11, 2009); *see also McLaren v. Celebrity Cruises, Inc.*, Case No. 11-23924-CIV, 2012 WL 1792632, at * 8 (S.D. Fla. May 16, 2012) (providing failure to warn definition); *Chiarino v. U.S.*, 189 F. Supp. 3d 1371, 1382 (S.D. Fla. 2016) (citation and internal quotation marks omitted) (enumerating elements for a Florida medical malpractice claim); Fla. Stat. § 766.102 (providing standard for medical negligence claim).

Second, Plaintiff's argument that Defendant's letter in response to Plaintiff's Notice ("Letter") demonstrates that Defendant was on notice of a negligent failure to warn claim is unpersuasive. Resp. at 5. As stated above, a district court may consider an extrinsic document

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condition precedent to Plaintiff's claim and therefore Plaintiff must offer the Notice to prove his case. *See* Passenger Contract ¶ 10(a); *Wausau Underwriters Ins. Co. v. Econosweep & Maint. Servs., Inc.*, Case No. 3:17-cv-723-J-34JBT, 2017 WL 6942651, at *2 (citation and internal quotation marks omitted) ("[F]or documents to be considered central, it must be unquestionable at this stage that Plaintiff would have to offer these documents in order to prove its case."). Accordingly, the Court may properly consider Plaintiff's Notice.

referenced in a complaint if it is central to the plaintiff's claim and its authenticity is not challenged. *Brooks*, 116 F.3d at 1369; *SFM Holdings, Ltd.*, 600 F.3d at 1337. Plaintiff attaches the Letter to the Response, but it is not referenced in the Original Complaint or attached thereto. *See generally* Original Compl. Further, because Plaintiff does not refer to the Letter in the Original Complaint, it is not central to Plaintiff's Claim. *See Heller v. Carnival Corp.*, 191 F. Supp. 3d 1352, 1361 n.9 (S.D. Fla. 2016) ("[A]s Plaintiff's Complaint does not refer to [the document], the document is not central to her claim[.]"). Therefore, the Court declines to consider it for purposes of this Motion. *See Prickett v. BAC Home Loans*, 946 F. Supp. 2d 1236, 1243 (N.D. Ala. 2013) (declining to consider allegations made in plaintiff's response because they are outside of the four corners of the complaint); *J'CARPC, LLC v. Wilkins*, Case No. 1:06-cv-2357-WSD, 2007 WL 1541955, at *2 (N.D. Ga. May 22, 2007) (declining to consider documents that were not referred to in the complaint).

Even if the Court considered the Letter, it does not demonstrate that Defendant had notice of a negligent failure to warn claim. Plaintiff argues that because the Letter indicates that Defendant was on notice of a "fall down negligence case," Defendant was also on notice of a negligent failure to warn claim. Resp. at 5. However, the Letter, at best, implies that Defendant understood Plaintiff's allegations to constitute a "fall down negligence case." *See* Def.'s Letter at 1. Plaintiff also fails to cite authority supporting its contention that notice of a "fall down negligence case" inherently provides notice of a negligent failure to warn claim. *See* Resp. at 5. Moreover, the Letter does not recite, nor indicate that Defendant is aware of, the facts supporting a negligent failure to warn claim. *See* Def.'s Letter at 1. Therefore, the Letter does not demonstrate that Defendant was on notice of a negligent failure to warn claim. *See Moore*, 989 F.2d at 1131; *Caron*, 910 F.3d at 1368.

Because Count I "involve[s] separate and distinct conduct, such that [] [P]laintiff would have to prove completely different facts than required to recover on the claims in the [O]riginal [C]omplaint," and neither the Original Complaint nor Plaintiff's Notice provided notice to Defendant of a negligent failure to warn claim, Count I of the SAC for negligent failure to warn does not relate back to the Original Complaint. *Caron*, 910 F.3d at 1368 (citation and internal quotation marks omitted). Accordingly, Count I of the SAC is barred by the contractual limitation and should be dismissed. *See id.*; *Hajtman v. NCL (Bahamas) Ltd.*, Case No. 07-22429-CIV, 2008 WL 1803630, at *2 (S.D. Fla. Apr. 21, 2008); *see also Moore*, 989 F.2d at 1132.

IV. CONCLUSION

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Defendant's Motion to Dismiss Count I of the Second Amended Complaint (ECF No. 30) is GRANTED. Accordingly, Count I of the Second Amended Complaint is DISMISSED WITH PREJUDICE.[2]

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of December 2019.

K. MICHAEL MOORE
UNITED STATES CHIEF DISTRICT JUDGE

c: All counsel of record

[2] *See Abram-Adams v. Citigroup, Inc.*, 491 F. App'x 972, 975–76 (11th Cir. 2012) (affirming dismissal with prejudice of plaintiff's complaint because, *inter alia*, the claims did not relate back); *Zorn v. Integon Ins. Co.*, Case No. 1:07cv1048-MEF, 2008 WL 410622, at *5 (M.D. Ala. Feb. 13, 2008) (dismissing claims with prejudice as time-barred); *O'Halloran v. First Union Bank of Fla.*, Case No. 8:01-CV-1779-T-17EAJ, 2007 WL 9723484, at *8 (M.D. Fla. Sept. 28, 2007).