UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-24421-CIV-SMITH

ROBERT PETERSEN and
ANN PETERSEN,

Plaintiffs,

vs.

NCL (BAHAMAS) LTD.,

Defendant.
_____/

ORDER GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before the Court on Defendant, NCL (Bahamas) Ltd.'s Motion for Summary Judgment [DE 147], Plaintiff's Response [DE 152], and Defendant's Reply [DE 163]. Plaintiff Robert Petersen[1] alleges he was injured when he slipped and fell on water while aboard Defendant's ship. Defendant asserted several defenses, including that the hazard was open and obvious. The judge previously assigned to this case granted summary judgment, finding that the hazard was open and obvious. The Eleventh Circuit reversed, holding that a reasonable jury could find that the deck was unreasonably slippery and, if so, the degree of slipperiness was not open and obvious. The Eleventh Circuit then remanded for the Court to consider Defendant's other defenses – that Defendant lacked notice of the risk creating condition and that the warnings given were adequate – and to consider Plaintiff's claim that the deck was negligently maintained. For

[1] Plaintiff Ann Petersen's claim for loss of consortium was previously dismissed and the Eleventh Circuit has affirmed the dismissal. Hereinafter, "Plaintiff" shall refer to Robert Petersen only.

the reasons set forth below, Defendant's Motion for Summary Judgment is granted in part and denied in part.

I. UNDISPUTED MATERIAL FACTS[2]

Plaintiff and his wife were passengers on board Defendant's ship, the *Norwegian Breakaway*, on October 22, 2015. While the ship was docked in Bermuda, Plaintiff and his wife chose to stay aboard and visit the pool deck to use the hot tub. Before that day, Plaintiff had been in the same area as the accident and had spent time walking around the same deck area. At the time of the accident, it was rainy, overcast, and windy. As soon as he walked out onto the deck, Plaintiff felt like he was getting pelted by blowing water from a fountain at the back of the ship and it was obvious to him that there was water on the deck. (Pl. Dep. [DE 147-1] 56:16-57:9; 61:22-62:9.) At the time, there were no other passengers on the deck.

Upon arriving on the pool deck, Plaintiff and his wife walked to the bar area, where they saw the deck chairs tied up and, according to Plaintiff, the "wind was whipping." (Pl. Dep. 56:16-57:1.) Plaintiff then went to the bar to order a drink while his wife walked to and entered the hot tub. Before Plaintiff left the bar with his drink, wind-blown water drenched the area around the bar and hot tub. Plaintiff saw that the deck was wet. Plaintiff, carrying his drink, then walked barefoot to the hot tub. While walking toward the hot tub, Plaintiff slipped and fell.[3] Plaintiff has no recollection of the accident and his wife did not see the fall. Plaintiff was evaluated by the ship's medical center and then by a Bermudian emergency department for a head injury.

[2] The Court omits citations to admitted facts.

[3] In addition to documentary evidence, the parties have submitted video from Defendant's CCTV system. The video shows these events. Plaintiff also believes that the video shows that the deck was wet before he and his wife came out. In the video, the deck is visibly shiny in appearance, but it is not clear from the video that the shine was caused by water on the deck.

Plaintiff chose to reboard the ship the same day and resume his cruise.

At some point prior to Plaintiff's accident, Defendant had placed a temporary caution sign on the other side of the hot tub, out of Plaintiff's view as he approached the hot tub from the bar area. It was Defendant's practice to place such signs on the deck whenever it rained. (Zuniga Dep. [DE 49-2] 115:12-117:9.) Plaintiff had walked right by such a sign when he first came out on deck. (*Id.*) Defendant also runs videos on its ships telling passengers that the decks can get slippery when wet. (Zuniga Dep. 29:2-29:19.) In the three years prior to Plaintiff's accident, close to 60 passengers had slipped and fallen on wet decks on the same ship as Plaintiff. (DE 49-3 at 137-142.) The Chief Deck Steward testified that he has seen suntan oil, suntan lotion, and drinks spilled on the deck in the area of the bar and hot tub. (Zuniga Dep. 18:19-19:19.)

Plaintiff fell on a decking material called Bolidt Bolideck Select Soft, which Defendant used as an outside, exterior open weather decking on the ship. Bolidt, the manufacturer of the decking, recommends that the decking be cleaned using a Ruby or Cimex machine and Royal Soft detergent. (DE 49-3 at 182.) Bolidt recommends another detergent, Super Stripper, for use on a different type of decking and warned that "[p]rolonged exposure to Super Stripper may permanently damage the deck surface." (*Id.*) According to Defendant's Night Deck Washing Policy, HP washing and scrubbing machines were to be used with Edge Cleaner and Bolidt Super Stripper detergents. (DE 49-3 at 184.)

As a result of his fall, Plaintiff alleges that he suffers from severe headaches, impaired vision, and problems with his equilibrium, speech, and memory. Plaintiff's Second Amended Complaint [DE 107] alleges two counts of negligence against Defendant. The first count alleges that Defendant failed to warn passengers of a dangerous condition; failed to use an appropriate anti-slippery surface on the deck; caused an unsafe and dangerous condition on the deck and/or

failed to remedy an unsafe condition; failed to follow proper procedures for monitoring the slipperiness of the deck and failed to follow proper maintenance procedures. The second count alleges an *in rem* action against the ship based on similar alleged negligence. Defendant now moves for summary judgment on Plaintiff's failure to warn claim and negligent maintenance claim.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Once the moving party demonstrates the absence of a genuine issue of material fact, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). The Court must view the record and all factual inferences therefrom in the light most favorable to the non-moving party and decide whether "'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (quoting *Anderson*, 477 U.S. at 251-52)).

In opposing a motion for summary judgment, the non-moving party may not rely solely on the pleadings, but must show by affidavits, depositions, answers to interrogatories, and admissions that specific facts exist demonstrating a genuine issue for trial. *See* Fed. R. Civ. P. 56(c), (e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A mere "scintilla" of evidence supporting the opposing party's position will not suffice; instead, there must be a sufficient showing that the jury could reasonably find for that party. *Anderson*, 477 U.S. at 252; *see also Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

III. DISCUSSION

Defendant argues that it is entitled to summary judgment because it lacked notice of the allegedly dangerous condition and because there is no evidence to support Plaintiff's theory that the deck was negligently maintained. Under maritime law, the owner of a ship in navigable waters owes passengers a "duty of exercising reasonable care under the circumstances." *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 632 (1959). In order to prevail on a negligence claim, a plaintiff must establish 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. *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1280 (11th Cir. 2015). As discussed below, Plaintiff has established a genuine issue of material fact as to the issue of notice. Plaintiff, however, cannot establish all the elements of his negligence maintenance claim.

A. Defendant is Not Entitled to Summary Judgment on the Notice Issue

Defendant seeks summary judgment on Plaintiff's failure to warn claim because there is no evidence that it had actual or constructive notice of the allegedly dangerous condition. In the Eleventh Circuit,

> the maritime standard of reasonable care usually requires that the cruise ship operator have actual or constructive knowledge of the risk-creating condition. "[T]he benchmark against which a shipowner's behavior must be measured is ordinary reasonable care under the circumstances, a standard which requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition, at least where . . . the menace is one commonly encountered on land and not clearly linked to nautical adventure." *Keefe v. Bahama Cruise Line, Inc.,* 867 F.2d 1318, 1322 (11th Cir. 1989).

Sorrels v. NCL (Bahamas) Ltd., 796 F.3d 1275, 1286 (11th Cir. 2015).

Defendant argues that it had no actual notice of the condition because the surveillance

video shows water drenching the deck moments before Plaintiff slipped and fell. Thus, there was insufficient time for Defendant to learn of the condition or to have an opportunity to correct the situation. In response, Plaintiff maintains that the Eleventh Circuit has already found that Defendant had notice, the video shows that the deck was wet prior to the rain that appears on the video giving Defendant time to remedy the situation, and the deck was wet because of the decorative waterfall, not the rain.

Plaintiff argues that Defendant had knowledge that the deck was wet before the rain started because the deck was wet when he first came out. Plaintiff testified that the deck was wet when he first came out and that the wind was blowing water from the decorative waterfall onto the deck. Plaintiff points out that Defendant must have had notice of the condition because Defendant had put out a temporary caution sign and the safety video shows Defendant had knowledge that the deck became unreasonably slippery when wet. Thus, Plaintiff maintains that Defendant had notice of the unreasonably slippery condition of the wet deck. Defendant responds by arguing that the only water on the deck came from the rain just seconds before Plaintiff fell. However, that would not explain the presence of the temporary caution sign by the hot tub. Defendant's employee testified that such signs were placed on the deck when it rained. There is no evidence that the sign was placed in the seconds between when it started to rain on the video and when Plaintiff fell. Therefore, a reasonable inference is that the deck had gotten wet earlier that day and Defendant put the sign out then. Consequently, Plaintiff's evidence is sufficient to withstand summary judgment on the issue of whether Defendant had notice. *See Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 721-22 (11th Cir. 2019) (finding that use of a warning sign can be construed as actual

or constructive knowledge of a dangerous condition);[4] *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d at 1288-89 (defendant's employees' testimony that defendant sometimes posted warning signs after rain was sufficient to overcome summary judgment on notice issue). Consequently, Defendant's motion for summary judgment on the issue of notice is denied.

B. Defendant is Entitled to Summary Judgment on the Negligent Maintenance Claim

Defendant argues that it is entitled to summary judgment on the negligence maintenance claim because there is no evidence that the deck was negligently maintained, that the maintenance rendered the deck unreasonably slippery, or that Defendant had notice that its actions made the deck unreasonably slippery. Plaintiff contends that there is no dispute of fact that Defendant did not follow the manufacturer's instructions for cleaning the deck and, based on the Eleventh Circuit's opinion, this failure could lead to an inference that the deck was unreasonably slippery. Plaintiff offers two alternative theories of inadequate maintenance: (1) the improper maintenance damaged the decking and rendered it unreasonably slippery, and (2) the improper maintenance failed to remove oily substances spilled on the deck making it unreasonably slippery.

The evidence indicates that Defendant did not follow the manufacturer's instructions for the care of the decking; Defendant did not use the recommended machinery or cleaning detergent on the decking. Plaintiff, however, has not offered any evidence that shows how that failure led to his injury. There is no record evidence indicating how Defendant's maintenance procedures

[4] Defendant argues that *Guevara* does not help Plaintiff because the *Guevara* Court held that there must be a connection between the warning and the danger and, in the instant case, the caution sign warned that the deck was slippery when wet, not that the deck was negligently maintained. Plaintiff's claim is based on more than just negligent maintenance; Plaintiff also alleges in the Second Amended Complaint that the deck was unreasonably slippery because of the spray from the waterfall, among other things. Thus, Defendant's argument fails because it ignores Plaintiff's other claims.

for the deck affected the deck surface. While Plaintiff argues that Defendant's maintenance procedures made the deck unreasonably slippery, there is nothing in the record to support that argument. While the manufacturer did not recommend using the detergents used and did warn that use of one of the detergents could permanently damage decking, the manufacturer did not state how the decking would be damaged. There are numerous possibilities as to how improper maintenance could have damaged the decking: it could have discolored the decking, it could have damaged the finish, it could have made the decking rougher, it could have made the decking smoother, etc. What is missing is any evidence indicating how Defendant's cleaning method actually damaged or otherwise affected the decking. Thus, there is no record evidence establishing that Defendant's cleaning method made the decking slippery, let alone unreasonable slippery.

Plaintiff has also not presented any evidence indicating that Defendant's cleaning method failed to remove any oily substances from the decking. First, there is no evidence that Defendant's cleaning methods would be ineffective in removing an oily substance. Second, while there was testimony that oily substances, such as suntan lotion and drinks, sometimes spilled on the deck, there is no record evidence that, prior to Plaintiff's fall, any oily substance had spilled on the deck and Defendant had been unable to remove those substances because of its cleaning method.

Because this is summary judgment and Defendant has shown there is no genuine issue of material fact establishing a link between Defendant's cleaning method and the condition of the decking, Plaintiff, as the non-moving party, must present specific facts showing there is a genuine issue of material fact for trial. Plaintiff has presented no facts to show that Defendant's cleaning procedures caused the decking to become unreasonably slippery. Plaintiff has not presented any

facts even indicating that Defendant's cleaning methods harmed, damaged, or changed the decking in any way. Thus, there is no evidence that Defendant's cleaning method was negligent. Instead of facts, Plaintiff relies on a "logical inference" that Defendant's failure to follow the manufacturer's maintenance instructions caused the deck to become unreasonably slippery. At the summary judgment stage, Plaintiff's burden is higher than simply drawing inferences. As set out above, the non-moving party may not rely solely on the pleadings, but must show by affidavits, depositions, answers to interrogatories, and admissions that specific facts exist demonstrating a genuine issue for trial. Plaintiff has not done this. Plaintiff has not shown that Defendant breached its duty by not following the manufacturer's cleaning instructions for the decking or that Defendant's cleaning method caused the deck to become unreasonably slippery. Thus, Defendant is entitled to summary judgment on Plaintiff's negligent maintenance claim. Accordingly, it is

ORDERED that:

1. NCL (Bahamas) Ltd.'s Motion for Summary Judgment [DE 147] is **GRANTED in part and DENIED in part**:

    a. Summary judgment is **GRANTED** as to Plaintiff's negligent maintenance claim.

    b. Summary judgment is **DENIED** as to all other claims.

2. By **October 31, 2019**, the parties shall file:

    a. revised witness and exhibit lists;

    b. deposition designations and counter-designations;

    c. proposed voir dire questions; and

d. proposed joint jury instructions and joint verdict form.

DONE and ORDERED in Fort Lauderdale, Florida, this 28th day of October, 2019.

RODNEY SMITH
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record