UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-23324-CIV-ALTONAGA/Goodman

RODRICK LONG,

Plaintiff,

v.

NCL (BAHAMAS) LTD.,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant, NCL (Bahamas) Ltd.'s Motion to Dismiss Plaintiff's Second Amended Complaint [ECF No. 34]. Plaintiff filed a Response in Opposition to the Motion [ECF No. 35]; to which Defendant filed a Reply [ECF No. 36]. The Court has carefully considered the Second Amended Complaint ("SAC") [ECF No. 33], the parties' written submissions, the record, and applicable law.

I. BACKGROUND

This action arises out of an injury Plaintiff, Rodrick Long, sustained while engaged in an off-shore jet-skiing excursion as a passenger on Defendant, NCL (Bahamas) Ltd.'s vessel, the Norwegian Sky. (*See generally* SAC). After Plaintiff purchased his ticket to board the Norwegian Sky, he was provided the option to purchase vouchers to participate in shore excursions. (*See id.* ¶¶ 17–18). Defendant marketed these excursions in various ways; the excursions could only be purchased by confirmed passengers holding reservations on Defendant's cruises. (*See id.* ¶¶ 14–15). Defendant incentivized passengers to purchase its excursions by marketing the excursions as "planned by insured partners who are supposed to adhere to the highest safety standards in the industry." (*Id.* ¶ 16).

On February 25, 2019, Plaintiff purchased a voucher for the Wave Runner Tour (the "Excursion"). (*See id*., Ex. 1, Shore Excursion Confirmation [ECF No. 33-1]). The voucher's fee was collected exclusively by Defendant. (*See* SAC ¶ 19). Based upon Defendant's marketing of the Excursion and collection of the payment, Plaintiff believed the Excursion was operated by Defendant. (*See id*. ¶ 20). Plaintiff was not informed Defendant did not operate the Excursion, nor did Defendant disclose the identity of the Excursion operator,[1] preventing Plaintiff from inquiring into the Excursion operator's safety measures and standards. (*See id*. ¶ 21). Plaintiff relied on his belief that Defendant operated the Excursion when he purchased his voucher. (*See id*. ¶ 22).

The cruise on the Norwegian Sky included a visit to Great Stirrup Cay.[2] (*See* Shore Excursion Confirmation ¶¶ 23–24). On March 23, 2019, the Norwegian Sky reached Great Stirrup Cay, and Plaintiff and his wife disembarked the vessel to partake in the Excursion. (*See id*.). An Excursion tour guide reviewed safety protocols, including water-skiing hand signals and simple jet ski maneuvers. (*See id*. ¶ 25). The Excursion's participants were not required to undergo sobriety tests, nor were they warned of the dangers posed by inebriated and/or intoxicated participants. (*See id*. ¶¶ 26–27).

Following the safety presentation, Plaintiff boarded a jet ski behind his wife. (*See id*. ¶ 28). During the Excursion, the tour guide signaled for Plaintiff's wife to come to a stop. (*See id*.). Once stopped, Plaintiff raised his hand using the water-skiing gesture for "stop" he had been shown

[1] Plaintiff originally brought claims against the Excursion's owner and operator, Icor Limited (*see* Amended Complaint [ECF No. 14] ¶¶ 10, 62–72, 79–93), but voluntarily dismissed that defendant (*see* Notice of Voluntary Dismissal [ECF No. 24]; Order [ECF No. 25]).

[2] Great Stirrup Cay is an island in The Bahamas owned by Defendant. (*See* SAC ¶ 10). Defendant has invested money and resources in developing the island into a tourist-oriented destination for its cruise ship passengers. (*See id.* ¶¶ 10–12). Great Stirrup Cay is staffed with more than 60 full-time employees who live on the island and prepare it for Defendant's passengers. (*See id*. ¶ 11).

during the safety briefing. (*See id*.). While Plaintiff and his wife were stopped, another Excursion participant crashed into Plaintiff's jet ski. (*See id*. ¶ 29). As a result of the collision, Plaintiff was thrown from his jet ski and suffered a fractured tibia. (*See id*. ¶¶ 29–30). Plaintiff was taken to the Norwegian Sky's medical center, where Defendant's medical staff failed to properly diagnose his injury. (*See id*. ¶ 31).

The Second Amended Complaint states two claims for relief: Negligence Against Defendant (Count I) and Negligent Selection and Retention of the Tour Operator (Count II). (*See generally* SAC). Defendant moves to dismiss both counts for failure to state claims for relief under Federal Rule of Civil Procedure 12(b)(6). (*See generally* Mot.).

II. LEGAL STANDARD

"To survive a motion to dismiss [under Rule 12(b)(6)], 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) (alteration added; quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although this pleading standard "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (alteration added; quoting *Twombly*, 550 U.S. at 555). Pleadings must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted). Indeed, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (citing *Twombly*, 550 U.S. at 556).

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." *Id.* at 678 (alteration added; citing *Twombly*, 550 U.S. at 556). "The mere possibility the defendant

acted unlawfully is insufficient to survive a motion to dismiss." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009) (citation omitted), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012).

When reviewing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations therein as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (citing *SEC v. ESM Grp., Inc.*, 835 F.2d 270, 272 (11th Cir. 1988)).

III. DISCUSSION

Defendant argues Count I should be dismissed because (1) Plaintiff does not allege Defendant knew or should have known about any of the purportedly dangerous and risk-creating conditions that caused Plaintiff's injury and (2) Plaintiff fails to allege the dangerous and risk-creating conditions proximately caused his injury. (*See* Mot. 3–6; Reply 1–3). Defendant argues Count II should be dismissed based on the same failures regarding notice and proximate cause that it claims defeat Count I. (*See* Mot. 6–7; Reply 3). The Court addresses the arguments in turn.

A. Negligence (Count I)

The parties agree the action is governed by federal maritime law. (*See* Mot. 3; Resp. 4); *see also Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1392 (S.D. Fla. 2014) ("In a claim based on an alleged tort occurring at an offshore location during the course of a cruise, federal maritime law applies, just as it would for torts occurring on ships sailing in navigable waters." (citations omitted)). To properly state a negligence claim under federal maritime law, a plaintiff must allege four elements: "(1) a legal duty on the defendant to protect the plaintiff from particular injuries; (2) the defendant's breach of that duty; (3) the plaintiff's injury being actually and proximately caused by the breach; and (4) the plaintiff suffering actual harm from the injury."

Heller v. Carnival Corp., 191 F. Supp. 3d 1352, 1357 (S.D. Fla. 2016) (internal quotation marks and citation omitted).

With regard to duty, a ship owner owes its passengers "the duty of exercising reasonable care under the circumstances of each case." *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1321 (11th Cir. 1989) (internal quotation marks and citation omitted). In the case of shore excursions, a carrier's duty of reasonable care includes a "duty to warn of known dangers beyond the point of debarkation in places where passengers are invited or reasonably expected to visit." *K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041, 1046 (11th Cir. 2019) (internal quotation marks and citation omitted). A prerequisite to liability under this standard is the ship owner having actual or constructive notice of the risk-creating condition at issue. *See Keefe*, 867 F.2d at 1322.

i. Whether Plaintiff Sufficiently Pleads Notice of the Risk-Creating Conditions

Defendant argues Plaintiff has failed to adequately allege Defendant knew or should have known of the dangerous and risk-creating conditions — further described below — giving rise to a duty to warn. (*See* Mot. 3–6). Defendant states the Second Amended Complaint contains only conclusory allegations without stating any facts establishing Defendant was on notice of the purported dangers. (*See id*. 4). Plaintiff disagrees, arguing the pleading contains enough facts to support the inference that Defendant was on actual or constructive notice of specific hazards relating to the Excursion. (*See* Resp. 6). The Court agrees with Plaintiff.

The undersigned recently addressed a similar argument. *See Twyman v. Carnival Corp.*, No. 19-21896-Civ, 2019 WL 5257539 (S.D. Fla. Oct. 16, 2019). In *Twyman*, a cruise ship passenger was killed during a jet ski excursion that took place at a private cruise center allegedly owned by the defendant-cruise line. *See id*. at *1. The plaintiffs — the decedent's parents — brought several claims, including negligence against the defendant-cruise line based on a failure-

to-warn that the excursion operators were providing inadequate operational instructions. *See id*. at *2. The cruise line similarly argued the plaintiffs failed to allege sufficient facts to show the defendant knew or should have known of a dangerous condition giving rise to a duty to warn. *See id*. at *4.

The undersigned rejected the cruise line's argument, noting the plaintiffs alleged the following:

> (1) the Cruise Center was owned, operated, managed, maintained and/or controlled by [the defendant]; (2) [the defendant] represented jet skis would be available to rent at the Cruise Center; (3) [the defendant] directed its passengers to the jet ski rental vendors operating from the Cruise Center, including [the excursion operator]; (4) [the defendant] had crewmembers and personnel at the Cruise Center; (5) [the defendant] knew or should have known, based on inspections and its operation of the Cruise Center, of the possible dangers involved in having [the excursion operator] rent jet skis to passengers without adequate operational instructions; (6) Decedent rented a jet ski from [the excursion operator] at the Cruise Center; (7) [the excursion operator] failed to provide Decedent adequate operational instructions; and (8) Decedent died while operating a jet ski when he and another participant collided.

Id. at *5 (alterations added). The undersigned found these "factual allegations of notice relating to the dangers involved with [the excursion operator] and the Cruise Center are sufficient to survive a motion to dismiss." *Id*. (alteration added; citation omitted). So, too, here.

Plaintiff alleges the Excursion was subject to numerous dangerous and risk-creating conditions, including the use of poorly trained tour guides and employees, inadequate supervision of Excursion participants, and the failure to ensure the sobriety of the Excursion participants. (*See* SAC ¶ 40). Concerning Defendant's notice of these conditions, Plaintiff alleges: (1) Defendant owned, operated, maintained, and or controlled Great Stirrup Cay; (2) Defendant employs a staff of more than 60 people living on the island full-time to prepare it for visits by Defendant's cruise ship passengers; (3) Defendant marketed and sold the Excursion; (4) the Excursion is only available to Defendant's passengers; (5) Defendant exercised control over the Excursion through

its requirements for the Excursion's operation, insurance, and safety; (6) Defendant visited and participated in the Excursion as part of its approval process; (7) the Excursion's employees were not properly trained; (8) the Excursion failed to enforce Defendant's policy regarding the consumption of alcohol; (9) the Excursion failed to provide any warning regarding the dangers of intoxicated participants; and (10) the Excursion's employees failed to supervise participants. (*See generally id*.).

As in *Twyman*, these factual allegations of notice concerning the specific dangers involved with the Excursion survive a motion to dismiss. *See* 2019 WL 5257539, at *5; *see also Chaparro v. Carnival Corp*., 693 F.3d 1333, 1337 (11th Cir. 2012) (reversing the district court and finding failure to warn adequately pleaded where the plaintiff alleged the defendant-cruise line knew or should have known of the danger of gang violence at a specific beach location); *Heller*, 191 F. Supp. 3d at 1358 (finding allegations that defendant should have become aware of the risk-creating condition during inspections of the off-shore excursions sufficient regarding defendant's actual or constructive notice of the risk-creating condition).

Defendant argues Plaintiff's allegations in paragraph 42 are insufficient to establish notice.[3] (*See* Mot. 4–5). While these allegations alone may be insufficient, Defendant's argument

[3] Paragraph 42 states Defendant had knowledge of the dangerous and risk-creating conditions aboard the Excursion because it:

> a) . . . visited and participated in the subject shore excursion as part of its approval process for selecting the subject shore excursion to be offered to its passengers and thus knew or should have known of the dangerous, risk-creating, and/or defective conditions of the subject shore excursion;
> b) Received complaints from previous passengers about the dangerous conditions presented by inexperienced and/or inebriated excursion participants being allowed to ride jet skis; and/or, [sic]
> c) Was told by its passenger(s) that they suffered injuries on the excursion as a result of the tour operator's negligent operation of same[.]

(SAC ¶ 42(A)(a–c) (alterations added)).

"overlooks [Plaintiff's] factual allegations supporting an inference [Defendant] knew or should have known of the risk-creating condition associated with the [Excursion]." *Twyman*, 2019 WL 5257539, at *6 (alterations added). Plaintiff alleges Defendant owns, operates, and maintains Great Stirrup Cay (*see* SAC ¶ 10); where the Excursion was offered exclusively to Defendant's passengers (*see id.* ¶ 15). As the owner and operator of Great Stirrup Cay, Defendant maintains a staff on the island (*see id.* ¶ 11) and exercises control over the Excursion as a requirement for its operation, insurance, and safety (*see id.* ¶ 35). In exercising this control, Defendant visited and participated in the Excursion as part of its approval process and thus knew or should have known of the dangerous, risk-creating conditions. (*See id.* ¶ 42(A)(a)). These additional facts adequately "nudge[] [Plaintiff's notice allegations] across the line from conceivable to plausible[.]" *Twombly*, 550 U.S. at 570 (alterations added).

ii. Whether Plaintiff Sufficiently Pleads Proximate Cause

Defendant next argues Plaintiff's failure to allege specific facts about the other Excursion participant "leaves [Defendant] and the Court guessing as to what risk creating conditions known to [Defendant] Plaintiff claims proximately caused his injuries." (Reply 1–2 (alterations added); *see also* Mot. 4). Plaintiff insists the pleading allows Defendant to draw reasonable inferences as to what caused his accident. (*See* Resp. 5). According to Plaintiff, Defendant's Motion is evidence of the sufficiency of his allegations because "Defendant has deduced from a reading of Plaintiff's Second Amended Complaint [which] conditions apply to Plaintiff's accident." (*Id.* 6 (alteration added)). In this, Plaintiff fails to persuade.

Despite sufficiently pleading a breach of the duty to warn Plaintiff of the Excursion's risk-creating conditions, Plaintiff fails to plead this breach was the proximate cause of his injury. (*See*

generally SAC).

In *Brown v. Oceania Cruises, Inc.*, the Court addressed a similar issue of causation. *See* No. 17-22645-Civ, 2017 WL 10379580, at *1 (S.D. Fla. Nov. 20, 2017). The plaintiff, a cruise ship passenger, sued the defendant-cruise line for negligence resulting from an injury the plaintiff sustained while participating in a shore-excursion. *See id.* During the excursion, the plaintiff fractured her ankle while traversing rocky terrain. *See id.* The plaintiff alleged the defendant breached its duty by failing to warn the plaintiff of the dangerous terrain she would traverse as part of the excursion. *See id.* at *3.

The undersigned held the plaintiff failed to sufficiently plead defendant's failure to warn proximately caused her injury because the complaint was "lacking in facts demonstrating *how* [p]laintiff was injured." *Id.* at *4 (alteration and emphasis added). By failing to allege facts regarding what caused the plaintiff's injury, the Court was left guessing as to whether the injury was a result of the defendant's failure to warn or an unrelated cause which may have absolved the defendant of liability. *See id.* at *5.

As in *Oceania Cruises*, the Second Amended Complaint is devoid of any facts demonstrating what caused Plaintiff's injury. (*See generally* SAC). Plaintiff alleges the Excursion's dangerous and risk-creating conditions included the inadequate supervision of Excursion participants, the failure to ensure the sobriety of Excursion participants, and the use of inexperienced and untrained employees and tour guides. (*See id.* ¶ 40). Yet, Plaintiff fails to explain how any of these conditions caused the accident. (*See generally id.*).

The only factual allegations concerning *how* the accident occurred appear in paragraph 29:

> As Plaintiff and his wife sat on the stopped jet ski with Plaintiff's hand raised in the water-skiing gesture for "stop," the jet ski riding behind them – whose driver was also participating in the subject shore excursion – suddenly rammed into Plaintiff's jet ski causing the two jet skis to collide. Upon impact, Plaintiff was thrown from

the jet ski and into the water.

(*Id*. ¶ 29).[4]

No information is provided as to what caused the Excursion participant to crash into Plaintiff's jet ski. Certainly, jet ski accidents may occur even where the riders involved are sober and properly supervised. For instance, the accident may have been caused by a mechanical issue with the jet ski or the negligent conduct of the other Excursion participant. While Plaintiff may have been injured as a direct result of one or more of the alleged dangerous conditions, it is also possible Plaintiff was injured by "a supervening cause absolving Defendant of liability." *Oceania Cruises, Inc*., 2017 WL 10379580, at *4 (footnote call number and citation omitted)).

Accepting the allegations in the Second Amended Complaint as true, the Court cannot say whether Defendant's failure to warn Plaintiff of the dangerous and risk-creating conditions proximately caused his injury. The pleading standards do not require Plaintiff to allege a "specific fact" to cover every element or to plead "with precision" each element of a claim, but they do require the complaint to "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) (quoting *Roe v. Aware Woman Ctr. for Choice, Inc*., 253 F.3d 678, 683 (11th Cir. 2001) (internal quotation marks omitted)). As the Court can only speculate as to what caused one jet ski to collide with Plaintiff's, the Second Amended Complaint fails to show Defendant's alleged failure to warn was the proximate cause of Plaintiff's injury. *See Lexmark Int'l, Inc. v. Static Control Components, Inc*., 572 U.S. 118, 134 n.6 (2014)

[4] Plaintiff also alleges his injury was "a direct and proximate result of" Defendant's failure to warn. (SAC ¶ 44). This conclusory allegation does not receive the deference given to allegations of fact. *See, e.g., S. Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 408 n.10 (11th Cir. 1996) ("As a general rule, conclusory allegations and unwarranted deductions of fact are not admitted as true in a motion to dismiss." (citation omitted)).

("If a plaintiff's allegations, taken as true, are insufficient to establish proximate causation, then the complaint must be dismissed[.]" (alteration added)). Consequently, Count I is dismissed without prejudice.

B. Negligent Selection and Retention (Count II)

To state a claim for negligent selection or negligent retention of an independent contractor, "a plaintiff must generally plead ultimate facts showing: (1) the 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." *McLaren v. Celebrity Cruises, Inc.*, No. 11-23924-Civ, 2012 WL 1792632, at *4 (S.D. Fla. May 16, 2012) (internal quotation marks and citation omitted). Defendant argues Count II must be dismissed because Plaintiff has failed to plead a *prima facie* case for negligent hiring and/or retention. (*See* Mot. 6–7; Reply 3). The parties reiterate their respective positions regarding the sufficiency of the factual allegations establishing notice and proximate cause. (*See generally* Mot.; Resp.). For the reasons previously stated, the Court finds Plaintiff has properly alleged Defendant knew or reasonably should have known about the alleged incompetence of the Excursion operator but has failed to allege the incompetence was the proximate cause of Plaintiff's injury. Accordingly, Count II is also dismissed without prejudice.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendant, NCL (Bahamas) Ltd.'s Motion to Dismiss Plaintiff's Second Amended Complaint **[ECF No. 34]** is **GRANTED**. Plaintiff, Rodrick Long's Second Amended Complaint **[ECF No. 33]** is **DISMISSED** without prejudice. Plaintiff has until **January 16, 2020**, to file a final amended complaint.

DONE AND ORDERED in Miami, Florida, this 6th day of January, 2020.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record