UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:21-cv-20891-KMM

BRUNO ANDREA PENZO,

Plaintiff,

v.

CELEBRITY CRUISES, INC., *et al.*,

Defendants.
_____/

OMNIBUS ORDER ON MOTIONS TO DISMISS

THIS CAUSE came before the Court upon Defendant Oracle Elevator Company's ("Oracle") Motion to Dismiss ("Oracle Mot.") (ECF No. 34). Plaintiff Bruno Andrea Penzo ("Plaintiff") filed a response. ("Oracle Resp.") (ECF No. 37). Defendant Oracle filed a reply. ("Oracle Reply") (ECF No. 39).

Additionally, Defendant Celebrity Cruises Inc. ("Celebrity") filed a Motion to Dismiss ("Celebrity Mot.") (ECF No. 35). Plaintiff filed a response. ("Celebrity Resp.") (ECF No. 38). Defendant Celebrity filed a reply. ("Celebrity Reply") (ECF No. 40). Defendant Celebrity also filed a Notice of Supplemental Authority on September 7, 2021. ("Not.") (ECF No. 44).

Lastly, on September 1, 2021, Defendant Broward County ("Broward") filed a Motion to Dismiss. ("Broward Mot.") (ECF No. 43). Plaintiff filed a response. ("Broward Resp.") (ECF No. 46). Defendant Broward filed a reply. ("Broward Reply") (ECF No. 48).

Defendants Oracle, Celebrity, and Broward's (collectively, "Defendants") Motions are now ripe for review.[1]

[1] Defendants raise nearly identical arguments in each of their Motions to Dismiss. Accordingly, the Court addresses their arguments, together, below.

I. BACKGROUND[2]

On March 8, 2021, Plaintiff was in Terminal 25 of Port Everglades in Fort Lauderdale, Florida, and was preparing to board Defendant Celebrity's vessel, the *Celebrity Edge*. *See* Sec. Am. Compl. ¶¶ 9–10. While Plaintiff was ascending the "pre-embarkation transport escalator," the escalator "suddenly entrapped Plaintiff's carry-on bag and caused Plaintiff be [sic] violently pulled down on his back against the sharp, metal, and moving escalator steps." *Id.* Plaintiff alleges that Defendant Oracle "is contractually obligated to provide inspection, repair, and maintenance services to the" escalator at issue, that was used by Defendant Celebrity. *Id.* ¶ 11. Plaintiff also alleges that Defendant Broward "owned, operated, and/or managed the [Port Everglades] Terminal for Celebrity Cruise Ships" during all times relevant to this case. *Id.* ¶ 52.

Plaintiff has invoked the Court's jurisdiction over issues arising under maritime law, pursuant to 28 U.S.C. § 1333, which provides that district courts shall have original jurisdiction in "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." § 1333.[3]

The Second Amended Complaint states seven causes of action against Defendants: **(1)** negligence as to Defendant Celebrity ("Count I"), *see* Sec. Am. Compl. ¶¶ 12–22; **(2)** negligent failure to maintain as to Defendant Celebrity ("Count II"), *see id.* ¶¶ 23–29; **(3)** negligent failure

[2] The background facts are taken from the Second Amended Complaint ("Sec. Am. Compl.") (ECF No. 31) and accepted as true for purposes of ruling on the Motion. *Bacon v. McKeithen*, No. 5:14-CV-37-RS-CJK, 2014 WL 12479640, at *1 (N.D. Fla. Aug. 28, 2014) ("[The Court] must construe all allegations in the complaint as true and in the light most favorable to the plaintiff.").

[3] Although the incident occurred before Plaintiff boarded the vessel, the Court finds that its jurisdiction over cases arising under maritime law extends to this action. *See Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 902 (11th Cir. 2004); *see also Lipkin v. Norwegian Cruise Line Ltd.*, 93 F. Supp. 3d 1311, 1318 (S.D. Fla. 2015) (finding maritime jurisdiction to exist in case involving accident that occurred while plaintiff was disembarking from a vessel).

to warn as to Defendant Celebrity ("Count III"), *see id*. ¶¶ 30–34; **(4)** negligence as to Defendant Oracle ("Count IV"), *see id*. ¶¶ 35–40; **(5)** *res ipsa loquitur* as to Defendant Oracle ("Count V"), *see id*. ¶¶ 41–50; (6) negligence as to Defendant Broward ("Count VI"), *see id*. ¶¶ 51–56; (6) *res ipsa loquitur* as to Defendant Broward ("Count VII"), *see id*. ¶¶ 57–66.

Now, Defendants have each moved, separately, to dismiss the Plaintiff's Second Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6). *See generally* Celebrity Mot.; Oracle Mot.; and Broward Mot.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides that a court may dismiss a complaint for failing to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "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 alteration omitted). The court takes the 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). 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, 1187 (11th Cir. 2002).

III. DISCUSSION

Defendants' arguments fall into three categories: **(1)** Plaintiff has failed to allege specific facts stating what dangerous condition caused the accident, Celebrity Mot. at 3–5; Oracle Mot. at 2–5; Broward Mot. at 2–4; **(2)** Plaintiff has failed to adequately allege that Defendants had notice of a dangerous condition, Celebrity Mot. at 5–10; Oracle Mot. at 5–8; Broward Mot. at 4–7; and **(3)** Plaintiff's claims entitled "*res ipsa loquitur*" are improperly asserted as stand-alone causes of action as to Defendants Oracle and Broward, Oracle Mot. at 8; Broward Mot. at 7–8. The Court considers each argument in turn below.

A. Applicable Law.

"[I]t is a settled principle of maritime law that a shipowner owes a duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew." *Smith v. Royal Caribbean Cruises, Ltd*., 620 F. App'x 727, 729 (11th Cir. 2015) (quoting *Doe v. Celebrity Cruises, Inc*., 394 F.3d 891, 908 (11th Cir. 2004) (citation omitted)). However, "[a] carrier by sea does not serve as an insurer to its passengers; it is liable only for its negligence." *Weiner v. Carnival Cruise Lines,* No., 2012 WL 5199604, at *2 (S.D. Fla. Oct. 22, 2012) (citing *Kornberg v. Carnival Cruise Lines, Inc*., 741 F.2d 1332, 1334 (11th Cir. 1984)).

"To prevail on a maritime tort 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." *Smith*, 620 F. App'x at 730 (citing *Chaparro v. Carnival Corp*., 693 F.3d 1333, 1336 (11th Cir. 2012) (other citations omitted)). The Eleventh Circuit has held that "[t]he ordinary-reasonable-care-under-the-circumstances standard we apply, as a prerequisite to imposing liability, requires that the shipowner have had actual or constructive notice of the

risk-creating condition, at least where, as here, the risk is one just as commonly encountered on land (or, in a pool built on land) and not clearly linked to nautical adventure." *Id.* (citing *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989)).

B. Plaintiff Has Failed to State a Claim upon Which Relief Can Be Granted.

Defendants contend that the Second Amended Complaint should be dismissed, in its entirety, because Plaintiff has failed to adequately allege facts stating how a dangerous condition caused injury to Plaintiff. Celebrity Mot. at 3–5; Oracle Mot. at 2–5; Broward Mot. at 2–4. Defendant Celebrity argues that Plaintiff has "not alleg[ed] what the malfunction was, what caused it, or how it caused the entrapment of the bag." Celebrity Mot. at 3–5. Defendant Celebrity asserts that based upon Plaintiff's "bare allegations, it is impossible to tell whether anything Defendant Celebrity did or did not do could have been the cause of the accident." *Id*. at 4. Defendants Oracle and Broward make similar arguments. Oracle Mot. at 2–5; Broward Mot. at 2–4.

In response, Plaintiff contends that he cannot identify an exact mechanical failure or maintenance deficiencies because such facts can only be ascertained through inspection of the escalator, and the discovery process in general. Celebrity Resp. at 4. Plaintiff explains that because he was removed from the area by paramedics, he has limited information and has attempted to recall the events to the best of his ability. *Id*. at 5. Plaintiff also points out that some of the cases relied upon by Defendant Celebrity are from the summary judgment phase, where there is a higher factual burden imposed following discovery—which has not unfolded in this case. *Id*. at 6.[4]

[4] Plaintiff has raised similar arguments in response to Defendant Oracle and Defendant Broward's Motions to Dismiss. *See* Oracle Resp. at 4–6; *see also* Broward Resp. at 5, 7.

In reply, Defendants Celebrity and Oracle contend that Plaintiff is not entitled to proceed to discovery without pleading a plausible claim for relief that is supported by factual allegations. Celebrity Reply at 1–3; Oracle Reply at 1–2. Defendant Celebrity contends that Plaintiff "at least must allege facts, aside from the occurrence of his accident alone, [from] which it can be inferred that evidence will bear out his assertion that the escalator malfunctioned." Celebrity Reply at 2–3. Defendant Celebrity also refutes Plaintiff's claim that the "bulk" of the cases on which it relied involved summary judgment and provides a citation to ten (10) cases from the motion to dismiss phase. *Id*. at 4. Defendant Celebrity also points out that Plaintiff has failed to distinguish these cases. *Id*. Defendants Oracle and Broward made similar arguments in reply. *See generally* Oracle Reply; Broward Reply.

"Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff's complaint to provide 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Taylor v. Royal Caribbean Cruises, Ltd*., No. 20-14754, 2021 WL 3502626, at *3 (11th Cir. Aug. 10, 2021) (quoting Fed. R. Civ. P. 8(a)(2)). "The pleading standard in Rule 8 'does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Id*. (quoting *Chaparro v. Carnival Corp*., 693 F.3d 1333, 1335 (11th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678)).

In *Taylor*, the Eleventh Circuit upheld a district court's dismissal of a complaint where the plaintiff failed to allege *how* the defendant's actions or inactions were the proximate cause of her injuries. *Id*. at *4. In that case, the plaintiff alleged that:

> (1) while she was disembarking the *Allure*, "she tripped and fell . . . on a dangerous condition"; (2) the fall caused her injuries; and (3) Royal Caribbean was "aware that with a lack of organization, proper warnings, and direction by crewmembers, passengers can crowd the disembarkation area on the gangway, which can cause jams, slowed exiting, and packed crowds, resulting in potential pushing and shoving and people tripping, falling and injuring themselves on the uneven

> gangway" when disembarking the ship. In her negligent failure to warn claim, she alleged that Royal Caribbean's failure to warn her "of the dangerous condition of the uneven flooring" caused her injuries. In her negligent maintenance claim, Taylor alleged that Royal Caribbean's failure to reasonably maintain the gangway flooring by inspecting the gangway for damaged treading, unreasonably large gaps in the flooring, loose screws in the flooring, and structural components of the flooring caused her injuries. And, in her negligent failure to follow policies claim, she alleged that Royal Caribbean's failure to "limit[ ] the number of passengers exiting the gangway at a single time," to "reduc[e] the flow of passengers' movement" off the ship, to "permit[ ] too many passengers to carry luggage and other items" off the ship, and to not "hav[e] only the scheduled passengers exit during their proper disembarkation time" caused her injuries.

Id. The Eleventh Circuit upheld the district court's dismissal of the plaintiff's failure to warn claim, which was premised upon uneven flooring, because the complaint did "not provide factual detail as to *how* the gangway flooring was uneven and *how* that unevenness caused [the plaintiff]'s trip and fall." *Id*. at *5 (emphasis in original). The court stated that the plaintiff's "'naked assertion[ ]' devoid of 'further factual enhancement' [was] not sufficient to state a plausible claim for relief as to the causation element of [the plaintiff]'s negligent failure to warn claim." *Id*. (citing *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557)) (internal quotation marks omitted). Relatedly, the court upheld the dismissal of the plaintiff's negligent maintenance claim because the plaintiff "failed to plausibly allege what actually and proximately caused her to trip and fall, leaving Royal Caribbean to guess which alleged failure was the cause of her injuries." *Id*. at *4.

Here, as in *Taylor*, Plaintiff has failed to adequately allege how a dangerous condition caused his injuries. The entirety of the factual allegations regarding Plaintiff's accident amounts to two sentences: (1) "On March 8, 2020, [Plaintiff] was injured while preparing to board []the M/V *Celebrity Edge*, when the pre-embarkation transport escalator he was riding malfunctioned," and (2) "While Plaintiff was on [the] pre-embarkation transport escalator, the escalator suddenly entrapped Plaintiff's carry-on bag and caused Plaintiff be [sic] violently pulled down on his back against the sharp, metal, and moving escalator steps." Sec. Am. Compl. ¶¶ 9–10.

Thus, like in *Taylor*, the Court is left without factual allegations as to *how* the escalator caused Plaintiff's injuries. Plaintiff has not alleged: (1) how the escalator "malfunctioned" or otherwise operated differently than expected, (2) what about the escalator was dangerous, (3) which part of his bag got entrapped in the escalator, and (4) what part of the escalator his bag got caught in. Consequently, as in *Taylor*, the Court is left to guess as to what, if anything, Defendants could have done differently to prevent Plaintiff's accident. 2021 WL 3502626, at *4 ("[W]e are only left to guess what warnings Royal Caribbean could have given as to the gangway's unevenness and whether the failure to provide such warnings was the proximate cause of Taylor's injuries."); *see also Long v. NCL (Bahamas) Ltd*., No. 19-cv-23324, 2020 U.S. Dist. LEXIS 3008, *15 (S.D. Fla. Jan. 6, 2020) ("[T]he 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."). Accordingly, these allegations are insufficient to give Defendants "fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (internal citation and alteration omitted).

Plaintiff argues that he has alleged sufficient facts through his claims that Defendant Celebrity caused his injury by: (1) "[f]ailing to provide a safe, properly maintained escalator," (2) "[f]ailing to maintain its premises in a reasonably safe condition, free of hazards to [Plaintiff," (3) "[f]ailing to adequately inspect its premises for the purposes of detecting any dangerous or unsafe conditions and to correct or otherwise guard against such conditions," (4) "[f]ailing to properly inspect, or cause the proper inspection of, the escalator equipment involved," (5) "[f]ailing to train its crew in risk assessment and safe practices," and (6) [f]ailng to warn [Plaintiff] of the dangerous condition which Defendant knew existed, or by the use of reasonable care, should have known existed at the time of injury." Celebrity Resp. at 3–4 (citing Sec. Am. Compl. ¶ 19). However,

again, as in *Taylor*, these theories lack a basis in fact and it is impossible to tell what, if anything, Defendants could have done differently to prevent this incident. 2021 WL 3502626, at *4. In the absence of any specific allegations as to what dangerous condition caused Plaintiff's injuries, each of Plaintiff's theories of negligence fail as a matter of law. *Jaharis*, 297 F.3d. at 1187 ("[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.").

A review of Plaintiff's claims makes this clear. Plaintiff alleges that Defendant Celebrity failed to warn Plaintiff as to a dangerous condition that Defendant Celebrity knew existed. Sec. Am. Compl. ¶¶ 19(e); 30–34. Yet, it is unclear from the allegations in the Second Amended Complaint what dangerous condition caused Plaintiff's accident to begin with. Plaintiff also alleges that Defendant Celebrity failed to maintain the pre-embarkation areas of the vessel, and thereby created, or had knowledge of, "the dangerous condition." Sec. Am. Compl. ¶¶ 25–27. But, again, it is unclear what the dangerous condition is. The other theories of liability, such as failure to train or failure to follow policies, also fail in the absence of a specific factual allegation as to the existence of a dangerous condition. Sec. Am. Compl. ¶¶ 19(e). The claims of negligence asserted against Defendants Oracle and Broward, in Counts IV and VI, respectively, are deficient for the same reasons. Sec. Am. Compl. ¶¶ 35–40, 51–56. The fact that an accident occurred on an escalator, alone, is insufficient to state a claim for negligence. *Weiner*, 2012 WL 5199604, at *2 ("A carrier by sea does not serve as an insurer to its passengers; it is liable only for its negligence." (citing *Kornberg*, 741 F.2d at 1334)).

Plaintiff argues that without discovery, Plaintiff cannot ascertain: (1) the specific cause of the escalator's malfunction, (2) Defendants' efforts to maintain and repair the escalator, or (3) whether prior incidents have occurred on this escalator. Celebrity Resp. at 5. However, "[t]he

complaint when filed must allege sufficient facts to raise a right to relief above the speculative level." *Arora v. Paige*, 855 F. App'x 667, 670 (11th Cir. 2021) (citing *Twombly*, 550 U.S. at 555). "As such, discovery 'follow[s] the filing of a well-pleaded complaint. It is not a device to enable a plaintiff to make a case when his complaint has failed to state a claim.'" *Id*. (quoting *Chudasama v. Mazda Motor Corp*., 123 F.3d 1353, 1367 (11th Cir. 1997)). Simply put, Plaintiff does not need access to Defendants' records in order to allege the existence of a dangerous condition or to explain in more detail the manner in which the accident occurred. Plaintiff is presumably aware of how an escalator operates in the ordinary course and, therefore, can state how the escalator malfunctioned in a manner that caused him harm. As it stands, there is no allegation as to how the escalator malfunctioned, or even how it operated differently from how it was expected to. *See generally* Sec. Am. Compl. These are facts that Plaintiff is capable alleging, without discovery—if there was in fact a dangerous condition. For these reasons, the Court finds that dismissal without prejudice is appropriate, in order to afford Plaintiff an opportunity to address the concerns raised above. *Tell v. L.A. Fitness Int'l, LLC*, No. 11-CV-80011, 2011 WL 13107424, at *2 (S.D. Fla. Mar. 4, 2011) (dismissing complaint without prejudice where plaintiff failed to allege how exactly he suffered injuries while using exercise machine)[5]; *Greene v. Covidien LP*, Case No. 20-cv-80760, 2020 U.S. Dist. LEXIS 171438, *10 (S.D. Fla. Sept. 15, 2020) (rejecting argument that discovery was necessary to state a claim and dismissing without prejudice because

[5] In *Tell*, the court stated that Plaintiff's allegations, which arose from an injury suffered while using exercise equipment, "beg[] the question: how did the machine malfunction and did that malfunction cause Mr. Tell's injuries? Did a pin break? Did a bracket crack? Did the machine topple over? The purpose of a complaint is to put the defendant on notice of the claims against him or her. This complaint fails to do so. The Court is cognizant that in the products liability context, plaintiffs often do not know precisely how or why a machine malfunctioned. The Court is not demanding such allegations. Rather, the Court demands only that the plaintiffs tell the Court and the defendants how Mr. Tell allegedly suffered his injury." 2011 WL 13107424, at *2.

the court could not decide that liability existed as a matter of law based upon the factual allegations in the complaint).[6]

For these reasons, the Court finds that Plaintiff has failed to state a claim upon which relief can be granted as to the following causes of action: (1) Count I—Negligence as to Defendant Celebrity, (2) Count II—Negligent failure to maintain as to Defendant Celebrity, (3) Count III—Negligent failure to warn as to Defendant Celebrity, (4) Count IV—Negligence as to Defendant Oracle, and (5) Count VI—Negligence as to Defendant Broward. Accordingly, Counts I, II, III, IV, and VI must be dismissed without prejudice.

C. The Court Need Not Reach the Issue of Defendants' Notice of a Dangerous Condition.

Defendants argue Plaintiff has failed to adequately allege that Defendants had notice of a dangerous condition, Celebrity Mot. at 5–10; Oracle Mot. at 5–8; Broward Mot. at 4–7. Plaintiff contends that he cannot plead facts as to Defendants' notice of a dangerous condition because, without discovery and an inspection of the escalator, there is no way for Plaintiff to obtain the information necessary to plead notice. Celebrity Resp. at 6; Oracle Resp. at 6–7.

"Under federal maritime law, the duty of care owed by a cruise operator to its passengers is ordinary reasonable care under the circumstances, which requires, as a prerequisite to imposing liability, that the carrier have actual or constructive notice of the risk-creating condition." *Harding v. NCL (Bahamas) Ltd*., 90 F. Supp. 3d 1305, 1307 (S.D. Fla. 2015) (internal quotation marks and citation omitted). "Actual notice exists when 'the defendant knows of the risk creating condition.'" *Cavitt v. Carnival Corp*. ("*Cavitt II*"), No. 20-cv-22259, 2021 WL 1998368, at *3 (S.D. Fla. May

[6] The Court discusses whether discovery would be necessary for Plaintiff to adequately plead that Defendants were on notice of a dangerous condition below.

19, 2021) (quoting *Bujarski v. NCL (Bahamas) Ltd*., 209 F. Supp. 3d 1248, 1250 (S.D. Fla. 2016) (citing *Keefe*, 867 F.2d at 1322)). "Constructive notice arises when 'a dangerous condition has existed for such a period of time that the shipowner must have known the condition was present and thus would have been invited to correct it.'" *Id*. (citing *Bujarski*, 209 F. Supp. 3d at 1250).

Other courts in this district have required plaintiffs to specifically allege facts constituting notice in a complaint in order to state a claim. *See Harding*, 90 F. Supp. 3d at 1307 (dismissing complaint for failure to adequately allege facts demonstrating that defendant was on notice of a dangerous condition); *Cavitt v. Carnival Corp.* ("*Cavitt I*"), No. 20-cv-22259, 2021 WL 2682257, at *3 (S.D. Fla. Mar. 2, 2021) ("Without supporting facts demonstrating that it was plausible that Defendant knew or reasonably should have known of the risk-creating conditions, Plaintiff's complaint does not suffice to establish notice."); *Holland v. Carnival Corp*., No. 20-cv-21789, 2021 WL 86877, at *3 (S.D. Fla. Jan. 11, 2021) (dismissing case for failure to allege facts constituting notice). Yet, in certain instances, courts have noted that the issue of notice is better suited for review at the summary judgment phase of a litigation. For example, Plaintiff points out that in *Cavitt II*, after initially dismissing a complaint for failure to adequately plead notice in *Cavitt I*, the court subsequently found a plaintiff adequately pleaded notice based on a handful of new facts and, in so doing, the court also noted that it would be more appropriate to evaluate the issue of notice at the summary judgment phase based upon a "complete record." *Cavitt II*, 2021 WL 1998368, at *3 ("[T]he Court finds it appropriate to evaluate the evidence of prior incidents at summary judgment on a complete record to determine whether a reasonable jury could find Defendant had actual or constructive notice.").

Here, the Court is sensitive to Plaintiff's concern that he will not be able to plead facts relating to notice without discovery, because certain information relating to the issue of notice is

naturally under Defendants' control. However, at this time, the Court need not reach the Parties' arguments about whether Plaintiff has adequately alleged notice of a dangerous condition because Plaintiff has failed to allege the existence of a dangerous condition in the first place. In the event Plaintiff files a Third Amended Complaint that addresses the concerns raised above, the Court will consider (1) whether Plaintiff has adequately pleaded facts upon which a Court could find that Defendants had notice of a dangerous condition, and (2) if Plaintiff cannot plead facts as to notice, the Court will consider whether, due to the constraints imposed on Plaintiff's inability to access certain records or to inspect the escalator, the issue of notice should be handled at the summary judgment phase of the case. The Court notes, however, that even in *Cavitt II*, the plaintiff pleaded at least some new facts relating to the issue of notice. *Cavitt II*, 2021 WL 1998368, at *3 ("This Second Amended Complaint asserts that Defendant knew or should have known of the dangerous condition based on nine prior falls on the gangway and one that happened on the same day before Plaintiff's fall. Plaintiff also alleges the employees knew of the dangerous condition because they tried to remedy it by putting carpeting to cover the slippery floor."). Thus, at a minimum, it appears that strictures of Rule 8 do not go entirely out the window in circumstances where a plaintiff must plead notice and Plaintiff should, therefore, be prepared to plead at least some facts as to the issue of notice. At this point, because Plaintiff has not even pleaded the existence of a dangerous condition, the Court need not—and does not—reach the issue of whether Plaintiff has adequately pleaded notice.[7]

[7] Plaintiff contends a contractual relationship between the Parties "points directly to an understanding of [Defendants] that the escalator is a dangerous instrumentality[.]" Broward Resp. at 8; Oracle Resp. at 6. Plaintiff appears to contend that based upon a contract between some or all of Defendants to maintain the escalator, the Court can find that Defendants were on notice of a dangerous condition. Thus, by Plaintiff's reasoning, anything that requires maintenance would constitute a *per se* dangerous condition, the existence of which a defendant would necessarily be aware of. Plaintiff's argument, which is unsupported by any citation to legal authority, is without

D. Plaintiff Has Improperly Alleged *Res Ipsa Loquitur* as an Independent Cause of Action in Counts V and VII.

In Counts V and VII, Plaintiff alleges "*res ipsa loquitur*" as a stand-alone cause of action against Defendants Oracle and Broward, respectively. Sec. Am. Compl. ¶¶ 41–50, 57–66.

Defendants Oracle and Broward argue that the *res ipsa loquitur* claim should be dismissed because *res ipsa loquitur* is an evidentiary doctrine, not a stand-alone cause of action. Oracle Mot. at 7; Broward Mot. at 7–8. In response, Plaintiff contends that he is free to include *res ipsa loquitur* as an independent cause of action and notes that courts have allowed *res ipsa loquitur* to be pursued as a stand-alone claim in the Southern District of Florida. Oracle Resp. at 8 (citing *Rockey v. Royal Caribbean Cruises, Ltd*., No. 99-708-CIV-GOLD, 2001 WL 420993, at *6 (S.D. Fla. Feb. 20, 2001)). In reply, Defendant Oracle explains that the court in *Rockey* stated that the issue of *res ipsa loquitur* as a stand-alone argument "was not developed by the parties." Oracle Reply at 5 (*Rockey*, 2001 WL 420993, at *6, n.2). Additionally, Defendant Oracle points to several instances in which courts have dismissed *res ipsa loquitur* claims when asserted as independent causes of action. *Id*. (citing *Lobegeiger v. Celebrity Cruises, Inc*., 11-21620-CIV, 2011 WL 3703329, at *8 (S.D. Fla. Aug. 23, 2011); *Wohlford v. Carnival Corp*., 1:17-CV-20703-UU, 2017 WL 7731225, at *5 (S.D. Fla. May 11, 2017); *Gandhi v. Carnival Corp*., 13-24509-CIV, 2014 WL 1028940, at *2 (S.D. Fla. Mar. 14, 2014); *Gardner v. Ford Motor Co*., 614CV508ORL18DAB, 2015 WL 12841007, at *3 (M.D. Fla. Mar. 9, 2015)). Defendant Oracle also argues that in any event, *res ipsa loquitur* would not apply on the facts as alleged in the Second Amended Complaint because the instrumentality which caused injury to Plaintiff was not under the exclusive control of

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merit. The fact that Defendants are obligated to maintain the escalator, as a general matter, does not mean that the escalator is malfunctioning or is otherwise dangerous.

Defendant Oracle. Oracle Reply at 5 (citing *Johnson v. United States*, 333 U.S. 46 (1948); *United States v. Baycon Indus., Inc.*, 804 F.2d 630, 633 (11th Cir. 1986)).

"*R*es *ipsa loquitur* is a Latin phrase translating to 'the thing speaks for itself,' which is a 'rule of evidence that permits, but does not compel, an inference of negligence under certain circumstances.'" *Wohlford*, 2017 WL 7731225, at *5 (citing *Marrero v. Goldsmith*, 486 So. 2d 530, 531 (Fla. 1986); *Baycon Indus.*, 804 F.2d at 633 (11th Cir. 1986)). "Under maritime law, '[t]he doctrine of *res ipsa loquitur* applies if: (1) the injured party was without fault, (2) the instrumentality causing the injury was under the exclusive control of the defendant, and (3) the mishap is of a type that ordinarily does not occur in the absence of negligence.'" *Id*. (quoting *Terry v. Carnival Corp*., 3 F. Supp. 3d 1363, 1372 (S.D. Fla. 2014)).

Courts in the Southern District of Florida are split on the issue of whether *res ipsa loquitur* may be asserted as an independent claim, in addition to a negligence claim. *Id*. (collecting cases). In many instances, courts have dismissed *res ipsa loquitur* claims when asserted as a stand-alone cause of action because "*res ipsa loquitur* is 'not a separate cause of action but an evidentiary doctrine that permits the trier of fact to infer negligence from circumstantial evidence.'" *Id*. (quoting *Lobegeiger*, 2011 WL 3703329, at *8; citing *Gardner*, 2015 WL 12841007, at *3). While, on the other hand, some courts have allowed *res ipsa loqutur* claims to proceed as independent causes of action. *See Rockey*, 2001 WL 420993, at *6 (allowing a *res ipsa loquitur* claim to proceed as an independent cause of action).

To begin, in the context of maritime law, the Supreme Court has discussed *res ipsa loquitur* as a doctrine that permits a trier of fact to draw inferences of negligence, under certain circumstances. *Johnson v. United States*, 333 U.S. 46, 48 (1948). In *Johnson*, the Supreme Court discussed a paradigmatic application of the inference permitted under the doctrine of *res ipsa*

loquitur—a circumstance in which a workman has a brick dropped on him from above and therefore, "the falling of the block is alone sufficient basis for an *inference* that the man who held the block was negligent." *Id*. (emphasis added). Given that the Supreme Court has cast this doctrine as a rule of evidence permitting a trier of fact to draw certain inferences, and not as an independent cause of action, the Court agrees with other courts in this district that have dismissed claims asserting *res ipsa loquitur* as an independent cause of action. *Wohlford*, 2017 WL 7731225, at *5; *Gardner*, 2015 WL 12841007, at *3; *Lobegeiger*, 2011 WL 3703329, at *8).[8]

Additionally, in any event, although Plaintiff may assert a theory of *res ipsa loquitur* if this litigation ultimately proceeds past the motion to dismiss phase, the Court notes that the inference permitted under the doctrine of *res ipsa loquitur* does not appear to be implicated in this case. Here, it is not alleged that "the instrumentality causing the injury was under the exclusive control of" Defendant Oracle or Defendant Broward. *Wohlford*, 2017 WL 7731225, at *5. To the contrary, it is alleged that Plaintiff's bag became ensnared in the escalator, causing Plaintiff to fall. Sec. Am. Compl. ¶¶ 9–10. Needless to say, Defendants Oracle and Broward were not in exclusive control of Plaintiff's bag, which was one of two objects that, together, caused the alleged accident. Thus, this case is not analogous to the circumstance of a brick falling on a workman's head—but rather involves Plaintiff's own property as a key part of the causal chain. *Id*. Moreover, this incident was not the sort of mishap that ordinarily does not occur in the absence of negligence. *Wohlford*, 2017 WL 7731225, at *5. Indeed, it is certainly possible that an individual could

[8] Additionally, the Court notes that in *Rockey*, the only case cited by Plaintiff for the proposition that *res ipsa* can be asserted as a stand-alone cause of action, the court specifically stated that the parties did not "develop" that issue and found that it was "merely one of semantics." *Rockey*, 2001 WL 420993, at *6, n.2. The apparent lack of briefing on this issue in *Rockey*, which the court specifically noted, renders Plaintiff's reliance on that case to be less persuasive.

negligently place his or her luggage on an escalator in a manner that causes the bag to push or pull an individual down—without any fault on the part of those responsible for the operation and maintenance of the escalator. Therefore, the Court finds that even if *res ipsa loquitur* was properly asserted as a stand-alone cause of action, the factual allegations in the Second Amended Complaint would not give rise to a scenario where the doctrine is implicated to begin with.

For these reasons, the Court finds that Counts V and VI must be dismissed.

IV. CONCLUSION

Accordingly, 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 Defendants' Motions to Dismiss (ECF Nos. 34, 35, 43) are GRANTED. The Second Amended Complaint (ECF No. 31) is hereby DISMISSED WITHOUT PREJUDICE, in its entirety. Plaintiff may file an amended complaint on or before October 28, 2021.

DONE AND ORDERED in Chambers at Miami, Florida, this 15th day of October, 2021.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: All counsel of record