Ruben v. Silversea Cruises LTD (Inc)

2019 | Cited 0 times | S.D. Florida | October 11, 2019

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA Case No. 19-cv-22241-BLOOM/Louis RONNA RUBEN, Plaintiff, v. SILVERSEA CRUISES, LTD. (INC.) and MEDIPORT SERVICES, Defendants. _____/

ORDER THIS CAUSE Motion,

reviewed the Motion, all opposing and supporting submissions, the record in this case, and is

otherwise fully advised. As explained below, the Motion is granted in part and denied in part. I. BACKGROUND

Plaintiff initiated the instant negligence action against Defendant on May 31, 2019. ECF Defendant, Mediport Services .

In the Amended Complaint, Plaintiff alleges that she was a passenger on one of the Silver Muse during an eight-day voyage beginning on July 8, 2018. Id. ¶ 16. On July 10, 2018, Plaintiff and her husband participated in an electric bicycle excursion that consisted of a guided tour of Bastia, Corsica, France. Id. ¶ 19. Plaintiff booked this

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2 . In doing so, she relied on the fact that Defendant held the operator of the excursion out as its agent. Id. ¶ 20-21. Plaintiff alleges that

ver the tour guides, as well as the operation of the excursion itself. Id. ¶ 22. In booking the l preserve Id. ¶ 24.

Upon commencing the excursion, Plaintiff discovered that, rather than being a leisurely bicycle tour on a manual bike, the excursion involved operating electric bicycles, without prior instruction on the operation, along high-traffic roads at speeds in excess of thirty miles per hour. Id. ¶ 25. employees who accompanied them on the excursion that Defendant had not previously vetted the operator. Id. ¶ 26. Plaintiff alleges that numerous excursion participants expressed concerns about

loyee that they did not want to finish the tour because they were concerned they would be injured. Id. that the tour was not being conducted in a safe manner and was sufficiently concerned

that passengers would suffer injuries that she contacted the [Silver Muse] prior to the end of the tour and requested that a bus come pick the passengers up. Id. After contacting the cruise ship, the excursion until the group reached a better location because the bus was unable meet them at their current location. Id. Shortly thereafter, Plaintiff was thrown from her electric bicycle and sustained injuries to her mouth, face, leg, elbow, and shoulder. Id. ¶ 28.

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3 (Negligence) and Count II (Negligence Apparent Agency). Id. at 5-8. Plaintiff also asserts a third

count of negligence against Mediport, which is not at issue in the Motion before the Court today. Id. at 8-9. Motion argues that this Court should dismiss Counts I and II because Plaintiff has misstated the relevant law and the applicable legal standards, and she has failed to sufficiently plead the elements necessary to establish her causes of action. ECF No. [10]. II. LEGAL STANDARD

R. Civ.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); see Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (explaining that Rule 8(a)(2)s -defendant-unlawfully-harmed-me ual Iqbal, 556 U.S. at 678 (quoting Twombly Id. (quoting Twombly, 550 U.S. at 570).

When reviewing a motion to dismiss, a court, as a general rule, must accept the plaintiffs factual allegations as true and evaluate all plausible inferences derived from those facts in favor of the plaintiff. See Chaparro v. Carnival Corp., 693 F.3d 1333, 1337 (11th Cir. 2012); Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration All., 304 F.3d 1076, 1084 (11th Cir. 2002). A facially plausible claim must allege facts that are more than merely possible. . . . The plausibility standard calls for enough fact to raise a reasonable expectation that discovery will

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4 reveal evidence of the defendants liability. Chaparro, 693 F.3d at 1337 (citations omitted) (citing Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 556).

Further, while the Court is required to accept all of the factual allegations contained in the complaint and exhibits attached to the pleadings as true, this tenet is inapplicable to legal conclusions. Iqbal, 556 U.S. at 678; Thaeter v. Palm Beach Cty. Sheriff s Office, 449 F.3d 1342, 1352 (11th Cir. . . the court limits its consideration . allegations that are merely consistent with a defendants liability fall short of being facially Chaparro, 693 F.3d at 1337 Similarly, unwarranted deductions of fact in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiffs allegations. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009), abrogated on other grounds by Mohamad v. Palestinian Auth., 566 U.S. 449 (2012) (quoting Aldana v. Del Monte Fresh Produce, N.A., Inc., 416

F.3d 1242, 1248 (11th Cir. 2005)); see also Iqbal, 556 U.S. at 681 ; Chaparro, 693 F.3d at 1337 Mamani v. Berzain, 654 F.3d 1148, 1153-54 (11th Cir. 2011))).

III. APPLICABLE LAW

applicable substantive law is general maritime law, the rules of which are developed by the federal

courts. Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1320 (11th Cir. 1989) (citing Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628 (1959)). 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. Aronson v.

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5 Celebrity Cruises, Inc., 30 F. Supp. 3d 1379, 1392 (S.D. Fla. 2014) (citing Smolnikar v. Royal Caribbean Cruises Ltd., 787 F. Supp. 2d 1308, 1315 (S.D. Fla. 2011)); see also Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 901 (11th Cir. 2004). In the absence of well-developed maritime law, courts may supplement the maritime law with general common law and state law principles. See Smolnikar, 787 F. Supp. 2d at 1315. The parties in the instant action do not dispute that maritime law governs. IV. DISCUSSION

it relates to Defendant because (1) Plaintiff has misstated the law on the duty of care that Defendant

owed Plaintiff, and (2) Plaintiff has failed to plead sufficient facts to state a valid cause of action for negligence under an apparent agency theory. ECF No. [10] at 3-12. Additionally, Defendant has not identified any statutory or contractual basis authorizin No. [10] at 13. Plaintiff care in the Amended Complaint is not a heightened duty of care; rather, it is the duty of care that

is well-established under maritime law. ECF No. [17] at 5-8. Plaintiff further asserts that the Amended Complaint has sufficiently pled the facts necessary to support a claim of apparent agency. Id. at 9-14.

A. Negligence

should be dismissed because Plaintiff incorrectly attempts to heighten the duty of care that cruise lines owe passengers on shore excursions. ECF No. [10] at 3-4. In her Response, Plaintiff notes that Defendant is not moving to dismiss Count I on the basis Case No. 19-cv-22241-BLOOM/Louis

6 the Motion challenges the allegation that Defendant had duty, under a claim for negligence, exercise reasonable care in selecting, vetting, screening, or hiring trained and competent tour operators, which Plaintiff argues is clearly established under the law. Id. at 6, 8 negligence claim

stemming from a cruise passenger incident that

To state a claim for negligence in a maritime tort case, a plaintiff must allege that 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 plaintiffs injury; and (4) the plaintiff Chaparro, 693 F.3d at 1336.

the vessel. Id. (quoting Kermarec, 358 U.S. at 630). This duty of care is examined through the

lens of ordinary reasonable care under the circumstances. Keefe, 867 F.2d at 1322. Moreover, a Chaparro,

693 F.3d at 1336 (citing Carlisle v. Ulysses Line Ltd., S.A., 475 So. 2d 248, 251 (Fla. 3d DCA 1985)). This duty to warn passengers of certain encompasses only dangers of which the carrier knows, or reasonably should have known. Carlisle, 475 So. 2d at 251. Accordingly, as a prerequisite to imposing liability, a carrier must have had actual or constructive notice of the risk- creating condition. Wolf v. Celebrity Cruises, Inc., 683 F. Appx 786, 794 (11th Cir. 2017) (quoting Keefe, 867 F.2d at 1322). Moreover, this duty extends only to specific, known dangers that are otherwise not apparent and obvious to the passenger, Smolnikar, 787 F. Supp. 2d at

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7 1323, and that are particular to the places where passengers are invited or reasonably expected to visit, not to general hazards. Aronson, 30 F. Supp. 3d at 1392-93 (footnote omitted).

With regard to the duty requirement under a cause of action for negligence, e reasonable care in ECF No. [7] reasonable care in selecting and/or vetting and/or screening and/or hiring trained and competent

id. ¶ 30. Defendant argues that these allegations misstate and heighten the duty owed by a cruise line to its passengers on shore excursions. ECF No. [10] at 4. Instead, Defendant

known dangers beyond the point of debarkation in places where passengers are invited or Chaparro, 693 F.3d at 1336 (citing Carlisle, 475 So. 2d at 251).

As an initial matter, some of our sister courts have noted that district courts in the Southern District of Florida have reached different conclusions when faced with the question of whether cruise operators owe passengers on shore excursions additional duties beyond just the duty to warn. See Lienemann v. Cruise Ship Excursions, Inc., No. 18-21713-CIV, 2018 WL 6039993, at *7 (S.D. Fla. Nov. 15, 2018); Ferretti v. NCL (Bahamas) Ltd., No. 17-cv-20202, 2018 WL 1449201, at *2 (S.D. Fla. Mar. 22,

2018); Thompson v. Carnival Corporation, 174 F. Supp. 3d 1327, 1342 (S.D. Fla. 2016). Defendant care. As the Court explains below, Count I of allege the

correct duty of care under a general negligence claim. As such, the Court need not address this issue at present.

The duty of care a cruise line owes its passengers under a negligence claim brought pursuant to maritime law is ordinary reasonable care under the circumstances,

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8 Keefe, 867 F.2d at 1322, which includes Wolf, 683 F.

Chaparro, 693 F.3d at 1336). It is unclear to the Court whether Plaintiff is asserting any specific theory (or theories) of negligence beyond a general negligence claim in Count I of her Amended Complaint. 1

See ECF No. [7] ¶¶ 29-33; ECF No. [17] at 7. Yet, as a general rule, cruise operators owe passengers a duty to exercise ordinary, reasonable care under the circumstances, including a duty to warn passengers of known dangers in areas beyond the cruise ship itself where passengers are invited or are reasonably expected to visit. See Wolf, 683 F. Chaparro, 693 F.3d at 1336). While the duty of care allegations set forth in Count I may be relevant to certain specific theories of negligence, they do not state the correct duty of care applicable to the general negligence claim that is pled. 2

As such ecause Plaintiff has not alleged the proper standard of care [under a general cause of action for negligence], the count should be dismissed without prejudice. White v. NCL Am., Inc. & Norwegian Cruise Line Ltd., No. 05-22030-CIV, 2007 WL 414331, at *2 (S.D. Fla. Feb. 6, 2007).

1 . Yet, see ECF No. [7] ¶¶ 29-33.

Notably, however, Def on the basis that Plaintiff misstated the proper duty of care for a general negligence claim. As such, the Court limits its review of Count I to the duty of care under a general claim of negligence. The Court will not assess whether the remaining elements of negligence are sufficiently pled because Defendant has not raised the issue. Nor will the Court examine whether Plaintiff has sufficiently pled the facts necessary to establish any other causes of action for specific theories of negligence. Cf. Gayou v. Celebrity Cruises, Inc., No. 11-23359-Civ, 2012 WL 2049431, at *5 n.2, *6 (S.D. Fla. June 5, 2012). 2 To the extent that Plaintiff intended to assert specific claims under different theories of negligence, she has the opportunity to more clearly assert these separate claims upon re-pleading because the Court is dismissing Count I with leave to amend. Gayou, 2012 WL 2049431, at *5 n.2, *6.

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9 B. Negligence Apparent Agency

Next, Defendant contends that Plaintiff has not sufficiently pled the necessary elements to state a valid cause of action for negl conclusory allegations do not establish that Defendant made any representation that the tour operator was its agent; (2) Plaintiff has not sufficiently plead facts to support a reasonable reliance, even if any representations were made by Defendant, because Plaintiff received the Passage Contract, which indicated that all excursions were operated by independent contractors; and (3) Plaintiff has not alleged any reasonable belief upon which justifiable reliance can be established. ECF No. [10] at 5-12. Plaintiff, however, argues that Count II alleges numerous facts sufficient to support her cause of action for negligence under a theory of apparent agency. ECF No. [17] at 9- 14. Moreover, Plaintiff notes that the Passage Contract that Defendant attaches to its Motion cannot properly be considered on a motion to dismiss because it is not a document that is central ms. Id. at 12-13. Plaintiff contends that, absent the representation that the tour Id. at 14. sh how she was induced to change her position based upon the apparent agency relationship. ECF No. [20] at 5-6.

[T]he doctrine of apparent agency allows a plaintiff to sue a principal for the misconduct of an independent contractor who only reasonably ap Franza v. Royal Caribbean Cruises, Ltd., 772 F.3d 1225, 1249 (11th Cir. 2014). To prevail on a cause of action for negligence based upon a theory of apparent agency, three essential elements must be alleged: a representation by the principal to the plaintiff, (2) causes the plaintiff reasonably to believe that the alleged agent is authorized to act for the principals benefit, and (3) which induces the plaintiffs detrimental, justifiable reliance upon the appearance of agency. Id.

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10 at 1252. However, to hold a principal liable for the negligence of an apparent agent, a plaintiff must sufficiently allege the elements of apparent agency in addition to the elements of the underlying negligent act of the a Rojas v. Carnival Corp., 93 F. Supp. 3d 1305, 1311 (S.D. Fla. 2015); Ferretti, 2018 WL 1449201,

at *4; Thompson, 174 F. Supp. 3d at 1342; Zapata v. Royal Caribbean Cruises, Ltd., No. 12- 21897-CIV, 2013 WL 1296298, at *1 (S.D. Fla. Mar. 27, 2013).

As explained above, the Court concludes that Count I fails to sufficiently allege an underlying negligence claim against Defendant because it does not set forth the proper duty of care owed under such a cause of action. Thus, as Plaintiffs agency claims are due to be dismissed irrespective of whether [s]he has adequately alleged . . . apparent agency, the Court will not address the substantive allegations of these claims. Ferretti, 2018 WL 1449201, at *4 (citing Rojas, 93 F. Supp. 3d at 1311;

Zapata, 2013 WL 1296298, at *5 (stating that because warranted the dismissal without prejudice of Plaintiffs agency claim must also be dismissed); Brown v. Carnival Corp., et al., 202 F. Supp. 3d 1332, 1340 (S.D.

Plaintiff). Accordingly, Count II of Plain Complaint is also dismissed without prejudice.

C.

Lastly, Defendant argues that the Court should dismiss the under Counts I and II because Plaintiff has not identified any statutory or contractual basis allowing

such an award. ECF No. [10] at 13. Plaintiff does not address this argument.

The Court of Appeals for the Eleventh Circuit has clearly set forth the law regarding the Case No. 19-cv-22241-BLOOM/Louis

11 entitled to recover its attorneys Misener Marine Constr., Inc. v. Norfolk Dredging Co., 594 F.3d 832, 838 (11th Cir. 2010) (quoting Natco Ltd. P ship v. Moran Towing of Fla., Inc., 267 F.3d 1190, 1193 (11th Cir. 2001) fees under certain, limited exceptions to the general rule if: governing the claim, (2) the nonprevailing party acted in bad faith in the course of the litigation,

or (3) there is a contract providing for the indemnification of attorneys Natco, 267 F.3d at 1193. Absent one of these exceptions, this Court will not award the prevailing party attorneys fees. Misener Marine Const., Inc., 594 F.3d at 838.

justified. Nor has Plaintiff addressed this argument in h . Absent some clear statutory or contractual

See id. V. CONCLUSION

Accordingly, it is ORDERED AND ADJUDGED ECF No. [10], is GRANTED in part and DENIED in part.

Plaintiff is permitted to amend her Complaint on or before October 18, 2019.

DONE AND ORDERED in Chambers at Miami, Florida, on October 11, 2019.

_____ BETH BLOOM UNITED STATES DISTRICT JUDGE Copies to: Counsel of Record