UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-24369-CIV-ALTONAGA/O'Sullivan

ESPERANZA VILLETA,

Plaintiff,

vs.

CARNIVAL CORPORATION,

Defendant.
_____/

ORDER

On October 30, 2014, Magistrate Judge John J. O'Sullivan entered an Order . . . ("Sanctions Order") [ECF No. 104] granting in part and denying in part Plaintiff, Esperanza Villeta's ("Villeta['s]") Memorandum of Law — Sanctions ("Motion") [ECF No. 80]. Magistrate Judge O'Sullivan determined sanctions under Federal Rule of Civil Procedure 37 were appropriate in this matter, and ordered that "1) the element of notice of the existence of a dangerous condition has been established; and 2) the defendant's affirmative defenses raising an alleged lack of notice or absence of a dangerous condition are stricken." (Sanctions Order 1). On November 4, 2014, Defendant, Carnival Corporation ("Carnival") filed Written Objections to Order on Plaintiff's Memorandum of Law Seeking Sanctions . . . ("Objections") [ECF No. 108]. The Court has carefully considered the Objections, the parties' filings prior to entry of the Sanctions Order, and applicable law.[1]

[1] This Order assumes the reader is familiar with the case, and consequently contains an abbreviated discussion of the background facts.

I. LEGAL STANDARD

A district court reviews an objection to a non-dispositive order of a magistrate judge to determine whether the order was clearly erroneous or contrary to law. *See* 28 U.S.C. § 636(b)(1)(A); FED. R. CIV. P. 72(a). "Under this standard, the court will affirm the magistrate judge's order unless the court has a definite and firm conviction that error has occurred." *Smoliak v. Greyhound Lines, Inc.*, No. 5:04CV245PSPMAK, 2005 WL 3434742, at *1 (N.D. Fla. Oct. 17, 2005) (citations omitted). "In the absence of a legal error, a district court may reverse only if there was an abuse of discretion by the magistrate judge." *S.E.C. v. Merkin*, 283 F.R.D. 699, 700 (S.D. Fla. 2012) (citation and internal quotation marks omitted).

II. ANALYSIS

Carnival contends Magistrate Judge O'Sullivan erred in establishing Carnival had notice of the existence of a dangerous condition, as this fact-finding exceeds the scope of the contemplated sanction. (*See* Objections 5). It also asserts striking the affirmative defense of lack of notice or absence of a dangerous condition is unwarranted because the sanction is too severe and goes beyond the matters at issue in the discovery dispute. (*See id.*).

Villeta sought sanctions for a number of questionable responses she received from Carnival in discovery. (*See generally* Mot.). The first concerned Interrogatory 24 of Plaintiff's initial interrogatories, which read: "Please state whether the scene of Plaintiff's alleged accident or incident has changed in any way from the time Plaintiff claims . . . she was injured . . . ." (*Id.* 8 (alterations added)). Carnival responded, "None to the subject tile flooring in the Lido Marketplace." (*Id.* (citation omitted); *see also* Objections 4).

This was, to put it mildly, a misstatement. In September or October 2013, a company applied a slip-resistant treatment to the tile flooring in the area where Villeta had fallen in July

2013 — clearly a "change" in some "way" to the "scene" of the fall. (Mot. 8–9; *see also* Objections 5). "While Carnival construed the interrogatory to involve any physical changes to the tiles used and searched for dry docking information" (Objections 7), this was an unreasonably narrow view to take of the interrogatory. Indeed, the Affidavit of Donnise DeSouza ("DeSouza Affidavit") [ECF No. 89-2] suggests her review of Interrogatory 24 was insufficient, as it is her "typical practice" to contact a ship's staff captain when investigating whether changes to floor surface have been made to a particular area of a ship. (DeSouza Aff. ¶ 10). Yet she does not state whether she, in fact, contacted the captain of the ship to query him when she answered Interrogatory 24. (*See generally id.*). She merely confirmed the ship had not been put into dry dock and took an apparent logical leap the ship and the tile flooring at issue here "had not undergone any physical changes . . . ." (*Id.* ¶ 12). The DeSouza Affidavit fails to reflect Carnival undertook a genuine investigation into truthfully answering Villeta's interrogatory in a reasonable manner.

Villeta also sought sanctions for misleading answers given by Carnival's corporate representative, Guillermo Dominguez ("Dominguez"). In particular, the following exchange took place during the June 25, 2014 deposition of Dominguez:

> A. It [the floor] was inspected sometime after. I can't recall the exact date or time.
> Q. Okay. Is it your testimony that it wasn't inspected before it was treated?
> A. That's my statement, yes. That I'm aware of anyway. . . .
> Q. Okay. Do you know if the floor was tested before it was treated between September and October of 2013?
> A. Okay. That I don't know.

(Videotaped Dep. of Guillermo Dominguez ("June 25 Dep.") 159:15–160:9 [ECF No. 58-7] (alteration added)). This is belied by a report ("Emond Report") [ECF No. 59-14], which notes on July 20, 2013, Dominguez provided access to the ship and identified the location of the Lido

Restaurant where slipperiness was an issue, and an outside company then evaluated the slipperiness of the Lido Restaurant's floor. (*See* Emond Report 2). At the time of the June 25 Deposition, the Emond Report had not yet been disclosed, and even after it, Carnival responded, "None" to Villeta's request for all "records and all other documents including . . . all inspection[] reports . . . which refer or relate to the slip resistance testing of the floors inside the Lido Restaurant . . . ." (Mot. 11 (alterations added)). In fact, the Emond Report was only disclosed after Villeta's counsel noticed a reference in an email about Dominguez's participation in testing of the coefficient of friction in areas of the Lido Marketplace before the slip-resistant treatment was applied. (*See* Mot. 12 (citation omitted)).

The facts as presented to Magistrate Judge O'Sullivan support his conclusion Carnival committed discovery violations, and the Court is not left with a definite and firm conviction a mistake has been committed. *See Smoliak*, 2005 WL 3434742, at *1 (citations omitted). At best, Dominguez appears to have been unprepared for his deposition. *See QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012) ("A corporation has an affirmative duty to provide a witness who is able to provide binding answers on behalf of the corporation." (citation omitted)). Carnival's contention the questioning of Dominguez was outside the scope of the deposition misses the mark; Plaintiff's counsel provided notice the deposition would address "Evidence of Defendant's affirmative defenses" (Notice . . . 5 [ECF No. 89-4]), one of which is "Defendant avers that it had no notice, actual, constructive or otherwise of any dangerous condition which the Plaintiff alleges was the proximate cause of her damage" (Answer . . . 5 [ECF No. 10]). Further, the response to Interrogatory 24 evidences Carnival's lack of diligence in complying with its obligations in discovery; Carnival has not shown its

efforts to respond to the interrogatory were reasonable under the circumstances. (*See generally* DeSouza Aff., Objections).

The sanctions imposed also are "specifically related to the particular claim which was at issue" in this dispute and thus do not violate Carnival's due process rights. *Serra Chevrolet, Inc. v. Gen. Motors Corp.*, 446 F.3d 1137, 1151 (11th Cir. 2006) (citation and internal quotation marks omitted). Carnival contends the information at issue involves whether it knew after Villeta's fall the tile was slippery when wet. (*See* Objections 9). But Carnival's inspection of the floor a few days after Villeta's fall, and the slip-resistant treatment it ordered, relate to knowledge it possessed about the alleged dangerous condition *before* Villeta's fall. *See Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989) (defining constructive notice as "whether the shipowner ought to have known of the peril to its passengers, the hazard having been present for a period of time so lengthy as to invite corrective measures."). Similarly, the discovery violations relate to the existence of the hazardous condition itself, as the Emond Report analyzed the dangers of the floor very soon after Villeta's fall. (*See* Emond Report 1).

Carnival lastly contends the Sanctions Order amounts to entry of judgment against it and "effectively impose[s] liability on Carnival," thus requiring proof of willfulness or bad faith on its part. (Objections 10 (alteration added; citations omitted)). The Court disagrees. To prove a negligence claim, Villeta must establish four elements: "(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." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) (citation omitted). "The duty of care owed by a shipowner 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." *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1322 (S.D. Fla. 2011) (alteration in original; citation and internal quotation marks omitted). That notice of a dangerous condition has been established does not impose liability pursuant to *Chaparro*; Villeta still must prove causation — that the dangerous condition caused her injury — and damages. Further, the Sanctions Order will serve the underlying policies of Rule 37, among them "deterring others from engaging in similar conduct" and "penalizing the guilty party . . . ." *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1453 (11th Cir. 1985) (citations omitted).

In sum, after careful review of the Sanctions Order, Defendant's Objections, and the applicable law, the Court finds the Sanctions Order is neither clearly erroneous nor contrary to law.

III. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Objections **[ECF No. 108]** are **DENIED**.

DONE AND ORDERED in Miami, Florida, this 5th day of November, 2014.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record