IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

JENNIE ALSTON-WARNER, Plaintiff, v. FAMILY DOLLAR STORES OF GEORGIA, LLC, Defendant.	CIVIL ACTION FILE NO. 3:21-cv-73-TCB

O R D E R

This case comes before the Court on Defendant Family Dollar Stores of Georgia, LLC's motion [30] for summary judgment. Plaintiff Jennie Alston-Warner has not responded to the motion, indicating that the motion is unopposed. *See* LR 7.1(B), NDGa ("Failure to file a response shall indicate that there is no opposition to the motion.").

However, the Court may not enter summary judgment based merely on the fact that the motion for summary judgment is unopposed. *See United States v. One Piece of Real Prop. Located at 5800 SW 74th*

Ave., Miami, Fla., 363 F.3d 1099, 1101 (11th Cir. 2004) ("[T]he district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed, but, rather, must consider the merits of the motion." (citation omitted)). To be sure, "[t]he court need not review all the evidentiary materials *sua sponte*, but the court must make sure that the order is supported at least by the evidentiary materials submitted in support of the order." *Hurst v. Youngelson*, 354 F. Supp. 3d 1362, 1382 (N.D. Ga. 2019) (citation omitted). Therefore, the Court will examine the merits of Family Dollar's motion alongside the relevant evidence and pleadings.

I. Background

This case is about Plaintiff Jennie Alston-Warner's slip-and-fall that occurred at a Family Dollar in Newnan, Georgia.

Family Dollar submitted a surveillance video of the slip-and-fall at issue.[1] The video shows an aisle leading past the check-out area to the freezer section. Two display boxes are on the left and right side of the

[1] Family Dollar submitted a USB Drive containing the video. The particular file that displays the best view of the incident is labeled "REG_2", and the slip-and-fall occurs roughly from minute 9:00 to minute 9:45.

aisle. A green box—which appears to have been part of a display—lays horizontally on the ground perpendicular to the aisle. The box is bright-green, and the floor is cream-colored. Family Dollar does not provide the precise size of the box, but the box is likely around three-to-four feet long, a foot wide, and a foot tall.

Next, Alston-Warner appears. She walks along the aisle running parallel to the freezer section, and she stops at a freezer door directly across from the box. She walks directly to the right of the box, turns ninety degrees to the right, and opens the freezer door. After spending a few seconds to retrieve an item from the freezer, she turns one-hundred-and-eighty degrees to the right. At this point she is now directly in front of the box.

At this point Alston-Warner is facing the camera. She is carrying an unidentifiable number of items in her hand. She takes five steps between retrieving her item from the freezer and reaching the box. On the sixth step, her right foot fits the box, resulting in her upper body falling over her equilibrium. She falls over the box and onto the ground.

She subsequently sued Family Dollar in the State Court of Coweta County alleging premises liability for general and special damages.

On October 20, 2021, Family Dollar removed the case to this Court.[2]

On May 5, 2022, after completing discovery, Family Dollar filed a motion for summary judgment.

On May 16, Alston-Warner moved for an extension of time to file a response to the motion for summary judgment. The Court granted leave for her to file the response by July 1.

On May 23, Alston-Warner's counsel moved to withdraw from the case. The Court granted leave for counsel to withdraw and extended

[2] As explained in Family Dollar's notice [1] of removal, Alston-Warner has alleged "$14,474.20 in incurred medical expenses plus $14,125.00 in prosthodontic estimates, and $21,000.00 in future dental care from Clear Choice Dental totaling $49,599.20." [1] at 3. While subject-matter jurisdiction is based on diversity and therefore the amount-in-controversy must be more than $75,000, Alston-Warner has also alleged lost wages, pain and suffering, and future medical expenses, among other non-specific damages. Using "reasonable inferences, . . . common sense and judicial experience," the Court finds that the amount-in-controversy is satisfied. *Harris v. Bloomin' Brands, Inc.*, No. 1:18-cv-5078-ELR, 2019 WL 13214046, at *2 (N.D. Ga. Apr. 16, 2019).

Alston-Warner's deadline to file a response to the motion for summary judgment to August 1. She has since proceeded pro se in this action.

On August 1, Family Dollar filed a stipulation to allow Alston-Warner an additional thirty days to file a response in order to facilitate settlement discussions.

On September 15, after Family Dollar notified the Court that settlement was unavailing and asked for the reinstatement of briefing deadlines, the Court ordered Alston-Warner to file a response to the motion for summary judgment within twenty-one days. She did not file a response, and Family Dollar's motion for summary judgment is now ripe for this Court to review.

II. Legal Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). There is a "genuine" dispute as to a material fact if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011) (quoting *Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). In making this determination, "a court may not weigh conflicting evidence or make credibility determinations of its own." *Id.* (citation omitted). Instead, the court must "view all of the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Id.* (citation omitted).

"The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the nonmoving party would have the burden of proof at trial, there are two ways for the moving party to satisfy this initial burden. *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437–38 (11th Cir. 1991). The first is to produce "affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial." *Id.* at 1438 (citing *Celotex Corp.*, 477 U.S. at 331 (Brennan, J., dissenting)). The second is to show that "there is an absence of evidence to support the nonmoving party's case." *Id.* (quoting *Celotex Corp.*, 477 U.S. at 324).

If the moving party satisfies its burden by either method, the burden shifts to the nonmoving party to show that a genuine issue remains for trial. *Id.* At this point, the nonmoving party must "'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593–94 (11th Cir. 1995) (per curiam) (quoting *Celotex Corp.*, 477 U.S. at 324).

III. Analysis

Premises liability based on a slip-and-fall claim rests on two elements under Georgia law:

> The plaintiff must plead and prove that: (1) the defendant had actual or constructive knowledge of the hazard; and (2) the plaintiff, despite exercising ordinary care for his or her own personal safety, lacked knowledge of the hazard due to the defendant's actions or to conditions under the defendant's control.

Am. Multi-Cinema, Inc. v. Brown, 679 S.E.2d 25, 28 (Ga. 2009); *see also* O.C.G.A. § 51-3-1 (statutory basis of premises liability). Family Dollar argues that (1) the hazard was an open and obvious hazard and therefore the first element is not satisfied, and (2) Alston-Warner failed

to exercise ordinary care and therefore the second element is not satisfied.

As discussed, the first element in a slip and fall case is for the plaintiff to show that the defendant had actual or constructive knowledge of the hazard. However, "[i]n cases involving allegations of a static, dangerous condition . . . , an invitee's actual knowledge of the condition relieves a proprietor of any duty to warn that invitee of that condition or hazard because 'the invitee has as much knowledge as the proprietor does.'" *Norwich v. Shrimp Factory, Inc.*, 770 S.E.2d 357, 359 (Ga. App. 2015) (quoting *Perkins v. Val D'Aosta Co.*, 699 S.E.2d 380, 383 (Ga. App. 2010)).

An invitee is imputed knowledge of a hazard when it is "an open and obvious condition." *Id.* (quotation omitted); *see also Crenshaw v. Hogan*, 416 S.E.2d 147, 148 (Ga. App. 1992) ("[W]e conclude that the asserted defect which caused [the plaintiff] to fall was so open and obvious that it could not be considered actionable even if she was an invitee."). Whether the plaintiff in the case actually saw the hazard is not dispositive. This is because "one is under a duty to look where he is

walking and to see large objects in plain view . . . .” *Stenhouse v. Winn Dixie Stores, Inc.*, 249 S.E.2d 276, 277–78 (Ga. App. 1978); *see Brown v. W.R.I. Retail Pool I, L.P.*, No. 1:13-cv-378-ELR, 2015 WL 5692157, at *6 (N.D. Ga. May 20, 2015) (“Georgia state courts have repeatedly held that summary judgment is appropriate where a condition is a static, open and obvious hazard. This is because a defendant has no duty to warn of the obvious.”). Courts must evaluate this question based on “objective knowledge of a reasonable person, not on the plaintiff’s subjective knowledge” or lack thereof. *Stone Mountain Mem’l Ass’n v. Amestoy*, 788 S.E.2d 110, 115 (Ga. App. 2016).

Historically, the root of the theory stems from merchants needing “a place to locate . . . goods, counters, and appliances . . . .” *Tinley v. F.W. Woolworth Co.*, 28 S.E.2d 322, 324 (Ga. App. 1943). Thus, if an item does not pose an “unreasonable and concealed danger” and is “clearly visible [] and could easily have been seen by anyone,” then a defendant should not be held liable. *Id.* (citations omitted). *See generally Ramirez v. Kroger Co.*, 429 S.E.2d 311, 313 (Ga. App. 1993) (explaining how merchants can place items in aisles “where they do not

threaten danger to those using the aisle and where they are in full sight and observation" (citation omitted)); *see also* § O.C.G.A. 51-11-7 (general statutory basis for plaintiff-based comparative negligence).

In sum, as explained by the Court of Appeals of Georgia, courts must ask the following with respect to an open and obvious hazard evaluated on summary judgment:

> Numerous cases are cited to the effect that, where the obstruction is in some way hidden, camouflaged, or intrinsically unsafe, the question of ordinary care in the plaintiff is for the jury, but, where it is perfectly obvious and apparent, so that one looking ahead would necessarily see it, the fact that the plaintiff merely failed to look will not relieve him from the responsibility for his misadventure.

Sears, Roebuck & Co. v. Chandler, 263 S.E.2d 171, 174 (Ga. App. 1979) (internal quotation marks and citations omitted).

Georgia state courts have applied the theory of open and obvious dangers in the context of slip-and-falls at department and grocery stores, finding that defendants cannot be held liable in circumstances similar to here. Consider the following cases: (1) in *Smith v. Wal-Mart Stores, Inc.*, 406 S.E.2d 234 (Ga. App. 1991), the court affirmed summary judgment for Wal-Mart after a plaintiff slipped on a "puddle

of clear liquid in the middle of an aisle" because "had [the plaintiff] been looking down there was nothing that would have prevented her from seeing the substance before she fell"; (2) in *Riggs v. Great Atlantic & Pacific Tea Co., Inc.*, 423 S.E.2d 8 (Ga. App. 1992), the court affirmed summary judgment for a merchant after a plaintiff fell on a box in the center of an aisle measuring "at least twelve inches wide, eighteen inches long, and five-and-one-half inches high" because of its "plain visibility"; and (3) in *Bruno's, Inc. v. West*, 481 S.E.2d 2 (Ga. App. 1997), the court reversed the denial of summary judgment for a grocery store after a plaintiff "turned to go back to her cart" and "tripped on a brown box of canned goods in the aisle" because it was "undisputed that the box was plainly visible."

Family Dollar argues that Alston-Warner's slip-and-fall occurred due to an open and obvious hazard. More specifically, Family Dollar argues that Alston-Warner tripped over a plainly visible box. The Court agrees with Family Dollar and will accordingly grant summary judgment in favor of Defendant.

To be sure, the video displays a hard fall suffered by Alston-Warner. Family Dollar does not dispute that it had constructive knowledge of the box. Nor does Family Dollar dispute that Alston-Warner did not subjectively see the box before she fell.

That being said, Alston-Warner cannot recover. The box at issue was in no way "hidden, camouflaged, or intrinsically unsafe . . . ." *Sears, Roebuck & Co.*, 263 S.E.2d at 174. The box was bright-green set against a cream-colored floor. Considering that Georgia appellate courts have found "clear liquid" on an aisle an open and obvious danger, *see Wal-Mart Stores, Inc.*, 406 S.E.2d 234, a bright-green box is enough to give notice to a store customer. In addition, the box was large, likely measuring more than the roughly foot-and-a-half long box in *Riggs*. A reasonable person objectively could have seen the box even if Alston-Warner subjectively did not. Ultimately, she had a duty to "look where [s]he [was] walking and to see large objects in plain view," *see Stenhouse*, 249 S.E.2d at 277–78. Because the box was large, brightly colored, and plainly visible to a reasonable person, the Court will grant

summary judgment for Family Dollar.[3] Alston-Warner cannot recover because the box causing the slip-and-fall was an open and obvious hazard.[4]

III. Conclusion

For the foregoing reasons, the Court grants Defendant Family Dollar's motion [30] for summary judgment. The Clerk is directed to

---

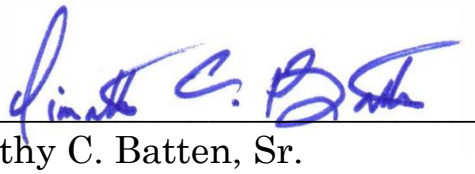
[3] On September 14, 2022, Alston-Warner filed a separate, duplicate lawsuit against Family Dollar seeking the same relief based on the same incident as here. *See Alston v. Family Dollar Store LLC*, No. 3:22-cv-156-TCB [3] (N.D. Ga. Sept. 14, 2022). Family Dollar filed a motion [6] to dismiss the case as duplicative. The Court agrees and will accordingly dismiss the second case with prejudice. *See, e.g.*, *I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1551–52 (11th Cir. 1986).

[4] The second element in a slip and fall case is whether "the plaintiff, despite exercising ordinary care for his or her own personal safety, lacked knowledge of the hazard due to the defendant's actions or to conditions under the defendant's control." *Am. Multi-Cinema, Inc.*, 679 S.E.2d at 28. "In the exercise of ordinary care, the invitee must use all senses to discovery and avoid hurtful things." *Robinson v. Kroger Co.*, 493 S.E.2d 403, 409 (Ga. 1997) (citation omitted). Thus, recovery is not permissible when an invitee "intentionally and unreasonably exposed herself to a hazard of which she knew or, in the exercise of reasonable care, should have known existed." *Benefield v. Vance*, 726 S.E.2d 531, 532 (Ga. App. 2012) (quotation omitted).

Family Dollar argues that Alston-Warner failed to exercise ordinary care by holding items in her hands and not looking around her surroundings. However, because the Court held that the box was an open and obvious danger, it need not address Family Dollar's argument on the second element. *See, e.g.*, *Houston v. Wal-Mart Stores, L.P.*, 749 S.E.2d 400, 402 (Ga. App. 2013). Relatedly, because the Court finds for Family Dollar, the Court does not need to address Family Dollar's arguments about the viability of Alston-Warner's damages.

close this case. Plaintiff Alston-Warner's duplicate suit (No. 3:22-cv-156) is dismissed with prejudice. The Clerk is directed to close the related case.

IT IS SO ORDERED this 8th day of November, 2022.



Timothy C. Batten, Sr.
Chief United States District Judge