

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

Rosa Infante, as mother and next friend of)	
Christian Cruz, a minor,)	
)	
Plaintiff,)	
)	
v.)	No. 21 L 7189
)	
Jose Santana-Garcia and Maria Del Pilar Santana,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

A failure to mitigate damages is not an act of comparative negligence, but does act as a setoff to a plaintiff's damages. Here, the defendants err by referring to the affirmative defense of failure to mitigate as a form of comparative negligence. For that reason, the plaintiff's motion to strike is granted, and the defendants are permitted to replead their affirmative defense.

Facts

On March 1, 2021, 14-year-old Christian Cruz was playing basketball in an alley when Oso, a German Shepard, owned by the defendants, charged Christian. Christian was not bitten but, in an attempt to run away from Oso, suffered left knee and leg injuries. On July 15, 2021, Christian's mother, Rosa Infante, filed a complaint on Christian's behalf.

On March 15, 2022, the defendants filed an affirmative defense. The defendants claim that Christian did not mitigate his damages by failing to: (1) keep medical appointments; (2) go to physical therapy; (3) perform physical therapy; and (4) follow medical and orthopedic advice. The affirmative defense seeks a judgment in the defendants' favor because Christian's "contributory fault was more than fifty percent of the proximate cause of the permanent and future damages for which recovery is being sought. In the alternative, if the trier of fact finds in favor of Plaintiff on the issue of liability, that any award of damages to Plaintiff be reduced by that percentage of comparative negligence attributable to the Plaintiff."

On April 13, 2022, Infante filed a motion to strike the defendants' affirmative defense. The parties fully briefed the motion.

Analysis

The current dispute is a battle over the mischaracterization of a defense rather than a substantive pleading error. It goes without saying that an injured party has a duty to mitigate damages. *Montefusco v. Cecon Constr. Co.*, 74 Ill. App. 3d 319, 324 (3d Dist. 1979). The duty requires the “injured party to “exercise reasonable diligence and ordinary care in attempting to minimize his damages after injury has been inflicted.”” *Amalgamated Bank of Chicago v. Kalmus & Associates, Inc.*, 318 Ill. App. 3d 648, 658-59 (1st Dist. 2000) (quoting *Tsoukas v. Lapid*, 315 Ill. App. 3d 372, 377 (1st Dist. 2000) (quoting, in turn, *Black’s Law Dictionary* 904 (5th ed. 1979)). The theory of mitigation of damages provides that an injured party cannot recover the damages he should have foreseen and could have avoided without undue risk, burden, or humiliation. *East St. Louis Sch. Dist. No. 189 v. Hayes*, 237 Ill. App. 3d 638, 644 (5th Dist. 1992).

There is also no question that mitigation of damages is an affirmative defense. *Rozny v. Marnul*, 43 Ill. 2d 54, 73 (1969); 735 ILCS 5/2-613(d). The party pleading the affirmative defense bears the burden of proof. *In re Marriage of Jorczak*, 315 Ill. App. 3d 954, 957 (4th Dist. 2000). The plaintiff is not required to disprove an affirmative defense. *Oh Boy Grocers v. South East Food & Liquor, Inc.*, 79 Ill. App. 3d 252, 259 (1st Dist. 1979). Without proof of the extent of non-mitigation, there is no basis to determine the set-off amount to which a defendant is entitled because of a plaintiff’s failure to mitigate. *Washington Courte Condo. Ass’n-Four v. Washington-Golf Corp.*, 267 Ill. App. 3d 790, 822 (1st Dist. 1994).

An affirmative defense based on a failure to mitigate is seen properly as a set-off or recoupment that reduces or defeats a plaintiff’s claim of damages. *General Motors Acceptance Corp. v. Vaughn*, 358 Ill. 541, 548 (1934). More recently, in *Nadhir v. Salomon*, the Illinois Appellate Court explained that “a setoff is a type of counterclaim that is designed to mitigate damages that a liable defendant owes a plaintiff.” 2011 IL App (1st) 110851, ¶ 37 (emphasis omitted). In sum, a failure-to-mitigate affirmative defense acts as a set off against a plaintiff’s damages, but does not arise out of comparative negligence to the act causing the plaintiff’s injury.

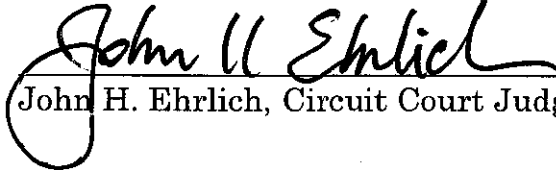
Conclusion

Based on the foregoing, it is ordered that:

4369

423,

1. The plaintiff's motion to strike is granted without prejudice as to the final "WHEREFORE" paragraph of the defendants' affirmative defense claim; and
2. The defendants have until August 24, 2022 to file an amended paragraph properly referring to the failure to mitigate as a set-off or recoupment.



John H. Ehrlich, Circuit Court Judge

ENTERED
Judge John H. Ehrlich-2075
JUL 27 2022
IRIS M. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL