SIXTH DIVISION
May 27, 2016

No. 1-15-1209

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

JAY F. SHACHTER, Plaintiff-Appellant, v. THE CITY OF CHICAGO, a Municipal Corporation, THE DEPARTMENT OF ADMINISTRATIVE HEARINGS, and THE DEPARTMENT OF STREETS AND SANITATION, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 13 M1 450136 Honorable Joseph M. Sconza, Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

O R D E R

¶ 1 *Held:* Administrative finding that plaintiff had violated weed ordinance is confirmed, and circuit court's order denying plaintiff's requests for declaratory relief are affirmed, where: (1) administrative decision was not against the manifest weight of the evidence, argument that imprpoper notice was provided was unfounded, and administrative proceedings did not deprive plaintiff of due process, and (2) circuit court properly granted defendant's motion to file an amended answer to plaintiff's complaint.

¶ 2 Plaintiff-appellant, Jay F. Shachter, brought this action against defendants-appellees, the City of Chicago (City), the City's Department of Administrative Hearings (DOAH), and the City's Department of Streets and Sanitation (Department). Plaintiff sought administrative review of a finding by an administrative law officer (ALO) that he had violated section 7-28-120(a) of the Chicago Municipal Code (Chicago Municipal Code § 7-28-120(a) (amended Nov. 16, 2011)) (weed ordinance), for having weeds greater than 10 inches tall on his property. The circuit court

affirmed the DOAH's finding that plaintiff violated the weed ordinance, and also denied the claims in plaintiff's complaint seeking declarations that the weed ordinance and the administrative proceedings were invalid. We confirm the decision of the ALO, and affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 On September 7, 2012, at 7:40 a.m., an inspector for the Department observed uncut weeds greater than 10 inches tall on the property located at 6424 N. Whipple Street (the property) in Chicago. On January 2, 2013, the Department mailed plaintiff, as the owner of the property, an "ADMINISTRATIVE NOTICE OF ORDINANCE VIOLATION" (notice) for violation of section 7-28-120(a) of the Chicago Municipal Code (Chicago Municipal Code § 7-28-120(a) (amended Nov. 16, 2011)) (weed ordinance). The notice contained the date and time of the inspection and the inspector's signature and badge number. The notice also stated that photographs had been attached to the complaint filed with the DOAH. The inspector certified that he was an employee of the Department and that the photographs "truly and accurately [depicted] the property in question on the indicated inspection date." Plaintiff was instructed to notify the Department by phone if he was not the owner of the property. The notice stated that an administrative hearing was scheduled for January 29, 2013.

¶ 5 On January 15, 2013, plaintiff appeared before an Administrative Law Officer (ALO) of the DOAH and presented a motion for discovery and a continuance of the hearing. Plaintiff requested that the Department show him its evidence prior to the hearing. The ALO ordered the Department to provide plaintiff with copies of "all of the photos, citation, everything."

¶ 6 Plaintiff then asked the ALO to bar the admission of any evidence which was not produced. The ALO declined to do so, stating that he would not "tie the *** hands of the ALO"

who would preside over the hearing but that plaintiff could raise this objection at the hearing. Plaintiff also asked that the ALO order the Department to tell him "the name of the accusing officer." The ALO responded: "that's going to be right on the citation. His name and number are going to be right on there." The ALO set February 19, 2013, as the hearing date.

¶ 7 On February 19, 2013, prior to the start of the hearing, plaintiff asked the ALO to dismiss the matter for lack of jurisdiction because the notice did not provide the inspector's name in print, only the inspector's illegible signature and badge number. The ALO construed the motion as a challenge to the Department's *prima facie* case, and stated that, during the hearing, he would determine whether the Department "establish[ed] jurisdiction in this body." The ALO then commenced the hearing.

¶ 8 The Department presented into evidence the notice wherein the inspector, badge number 626, certified that he was an employee of the Department, and that at 7:40 a.m., on September 7, 2012, an inspection of the property showed weeds more than 10 inches tall were growing on the property in violation of the weed ordinance, and that the pictures attached to the administrative complaint "truly and accurately depict[ed]" the property at the time of the inspection. Seven photographs from the inspection of September 7 were admitted into evidence and showed the condition of the property.

¶ 9 The Department also introduced records to establish plaintiff was the owner of the property. Plaintiff objected to the admission of the ownership records as the Department had not produced them pursuant to his discovery motion. The ALO overruled the objection. Plaintiff protested and asserted that another ALO had granted his motion to "be shown all the evidence in advance of the hearing." The ALO repeatedly asked plaintiff whether he was contesting his ownership of the property. Plaintiff responded only that it was the Department's "burden to

establish" ownership. The ALO overruled plaintiff's continuing objection to the admission of the ownership records based on the Department's failure to comply with the discovery order.

¶ 10 After the Department presented its case, the ALO ruled that, based on "all the evidence presented *** the ownership records, the citation, the photographs, the [Department] has established a legally sufficient case to proceed. The [Department] has established a *prima facie* case."

¶ 11 Plaintiff began his defense by asserting that the Department had not shown what plants in the admitted photographs were weeds. Plaintiff presented as evidence a copy of the rules and regulations of the Department which defines "weeds" for the purposes of the weed ordinance as "vegetation that is not managed or maintained" by the owner or person who controls the premises and "which, on average, exceeds ten inches in height." City of Chicago Department of Streets and Sanitation & Department of Environments, Rules and Regulations for Weed Control § 2.0 (eff. May 28, 2008). Plaintiff asked the ALO to apply this definition of the term "weeds" and the ALO agreed to use that definition.

¶ 12 Plaintiff testified: "[I] maintain my land...my plants are growing exactly where I want them to grow, and you can even look at the photographs yourself, and you can see places where branches have been tied to other branches in order to make the plants grow where I want them to grow." The ALO asked plaintiff what he does to maintain the plants depicted in one of the admitted photographs which showed vegetation growing along the gangway. Plaintiff responded: "I regularly look at those plants. I make sure that they're growing where I want them to grow. If they are encroaching on my [neighbors'] property, I trim them and see to it that they do not harbor – that they do not harbor deadwood 'cause that would be a fire hazard." He admitted that some of the plants that were depicted in the photographs were "saplings" or "trees"

and "are higher than a man." Plaintiff asserted that "if this property had not been maintained, it would have trash on it." Plaintiff referring to the photographs also testified that "you can also see a string that ties together branches over here indicating that someone had taken care of the property to the extent of controlling the growth of the saplings." He finished his testimony by stating that he manages the property.

¶ 13 Anthony Evans testified that he has lived on the property for three years. He and Bob Lee are tenants of the property. Plaintiff is their landlord and also lives on the property. Mr. Evans offered his view that "there are no weeds on the property. Everything is maintained." Mr. Evans sees plaintiff "tending to" the plants on the property "from time to time" and regularly saw plaintiff maintaining the property in late summer 2012. However, he could not recall how many times he saw plaintiff maintaining the property in August or September 2012. Mr. Evans saw plaintiff place strings on plants a "while back *** to keep the plants from overrunning the property." He never saw any trash on the property.

¶ 14 Dwayne Eslick, who has lived across the street from the property for three years, testified to having observed plaintiff taking care of the property. Specifically, Mr. Eslick recalled having seen plaintiff once "on a ladder doing his gutters." On another occasion, plaintiff showed Mr. Eslick an "elm tree, and was very proud that he was growing certain plants and that this is a garden to him." Mr. Eslick testified that he "might have a different opinion on how I keep my yard, but the vegetation on [plaintiff's] property, [plaintiff] enjoys." Mr. Eslick "very rarely [sees] any kind of garbage – never – for a long period of time," and that he feels plaintiff "does maintain his property." Mr. Eslick opined that the plants on plaintiff's property are not weeds because plaintiff "obviously wants these plants to be there."

¶ 15 When asked on cross-examination how many times he saw plaintiff caring for the plants on the property in the last three years, Mr. Eslick responded: "at least two times." Specifically, Mr. Eslick said that he had seen plaintiff "two times *** adjust[ing] the rope to pull back one tree to keep it from going on the sidewalk." He also had seen plaintiff "in the front of his home, enjoying it but not necessarily *** pulling up any plants or anything like that." Mr. Eslick explained that he is often not at home during the day. On redirect, Mr. Eslick stated that "in August and September [2012] [he] could with confidence say that [there] was no garbage and that [plaintiff] was actively involved in taking care of the property."

¶ 16 Cecelia Eslick, the wife of Mr. Eslick, testified that she had seen plaintiff tending to the property more often than her husband because she works part time. From her window, Ms. Eslick has "observed *** during the late morning hours, sometimes early afternoon, [plaintiff] tending to the plants or vegetation in that front area." As to spring through late summer of 2012, Ms. Eslick recalled having observed plaintiff, regularly and often, caring for the property. Mrs. Eslick recalled having seen plaintiff pick up trash and clippings, tie string and prune.

¶ 17 Bob Lee, a tenant at the property for eight years, testified to his belief that the plants on the property are not weeds because plaintiff "seem[s] to manage them." Mr. Lee has seen plaintiff maintaining the property. Specifically, Mr. Lee saw plaintiff "tying" and "cutting" the branches of the trees. Mr. Lee does not usually see trash on the property. He observed plaintiff "managing the *** property in late summer." However, on cross-examination, Mr. Lee admitted that he could not recall how many times he saw plaintiff maintaining the property in August 2012.

¶ 18 After the close of evidence during his closing remarks, plaintiff stated that he did not challenge the authenticity of the admitted photographs and stipulated that they had been taken on the date and time in question.

¶ 19 The ALO found, based on all of the evidence, that plaintiff had violated the weed ordinance and imposed fines of $600 and costs of $40. In making this decision, the ALO found plaintiff's witnesses to be credible but "they're not called here to make any legal decisions, legal conclusions, or legal opinions." The ALO explained that it was his responsibility to determine whether plaintiff had violated the weed ordinance based on the facts presented. It was the ALO's conclusion that although the witnesses had testified to observing plaintiff doing "some" work on the property, the photographs established that the plantings were neither managed nor maintained. Specifically, the ALO stated:

> "The sidewalk is narrowing down – the path on the sidewalk is narrowing down because of the encroachment of the green on both the parkway and the front of the property. The yard is – well overgrown in excess of – the testimony was taller – taller than a man. These weeds – the [vegetation] on the property. I find that based upon my reviewing the photographs, the majority of the [vegetation are] weeds that are not maintained.
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> I also find that as stated – required in the ordinance, that the vegetation is – is located in such an area that the area on average exceeds – the weeds exceed 10 inches in height, and the area depicted in the photographs, the weeds exceed 10 inches in height and I find the City has met its burden by a preponderance of the evidence."

¶ 20 On March 14, 2013, plaintiff filed a four count complaint in the circuit court which sought administrative review of the finding that he had violated the weed ordinance (count I), and declarations that the weed ordinance was invalid (count II) and that the administrative

proceeding was invalid because he had not been shown the evidence against him prior to the hearing (count III); and because he was not provided the name of the inspector by the notice or discovery (count IV). On November 21, 2013, defendants were granted leave to file an answer which attached a record of the DOAH proceedings.

¶ 21 On March 10, 2014, plaintiff moved for entry of default judgments on his declaratory counts, asserting that defendants had not answered these claims. After the litigation of several motions, defendants, with leave of court, filed their amended answer on October 27, 2014, as to all counts. On February 9, 2015, the circuit court denied plaintiff's default motion.

¶ 22 On April 9, 2015, the circuit court entered an order which affirmed the decision of the DOAH and denied plaintiff's claims for declaratory relief. Plaintiff has timely appealed.

¶ 23 II. ANALYSIS

¶ 24 On appeal, plaintiff raises a number of challenges to the administrative proceedings and the circuit court proceedings and asks us to reverse the ALO's decision. We address each of plaintiff's arguments in turn.

¶ 25 First, as to the administrative proceedings, we review the final decision of the ALO under the Illinois Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2014)), pursuant to the Illinois Municipal Code (65 ILCS 5/1-2.1-7 (West 2014)), and the Chicago Municipal Code (Chicago Municipal Code § 2-14-102 (added Apr. 29, 1998)). Judicial review of an administrative decision "shall extend to all questions of law and fact presented by the entire record before the court. *** The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." 735 ILCS 5/3-110 (West 2014).

¶ 26 The standard of review depends on the question which is presented. *Marconi v. Chicago*

Heights Police Pension Board, 225 Ill. 2d 497, 532-33 (2006). Determinations of questions of fact "will be reversed only if against the manifest weight of the evidence." *Id*. at 532. We review a question of law under a *de novo* standard, and a mixed question of law and fact is subjected to a clearly erroneous standard. *Id*. Under any of the standards of review, the plaintiff seeking administrative review bears the burden of proof. *Id*. at 532-33. We review the decision of the administrative agency and not the decision of the circuit court. *Id*. at 531.

¶ 27 Plaintiff was alleged to have violated the weed ordinance on September 7, 2012. That ordinance provides: "All weeds which have not been cut or otherwise controlled, and which exceed an average height of ten inches, are hereby declared to be a public nuisance." Chicago Municipal Code § 7-28-120(b) (amended Nov. 16, 2011). The weed ordinance further provides: "Any person who owns or controls property within the city must cut or otherwise control all weeds on such property so that the average height of such weeds does not exceed ten inches." Chicago Municipal Code § 7-28-120(a) (amended Nov. 16, 2011). A violation of the weed ordinance need only be established by a preponderance of the evidence (Chicago Municipal Code § 2-14-076(i) (amended Apr. 29, 1998)), and that "[t]he findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct." 735 ILCS 5/3-110 (West 2014). We review these findings to determine if they are against the manifest weight of the evidence. *Marconi*, 225 Ill. 2d at 534. A finding is against the manifest weight of the evidence "only if the opposite conclusion is clearly evident." (Internal quotation marks omitted.) *Id*.

¶ 28 In support of the assertion that plaintiff had violated the weed ordinance, the Department presented the notice, photographs of the condition of the property and evidence of plaintiff's ownership at the administrative hearing, all of which were admitted into evidence. The notice

included the inspector's certification that the condition of the property on September 7, 2012, violated the weed ordinance, there were weeds on the property, and that those weeds were "greater than 10 inches in height." The inspector also certified that the photographs accurately depicted the condition of the property at the time of the inspection. The notice was "*prima facie* evidence of the correctness of the facts specified therein." Chicago Municipal Code § 2-14-076(i) (amended Apr. 29, 1998). The photographs of plaintiff's property depicted a variety of vegetation, many of which were obviously well over 10 inches in height. The notice and the photographs presented at the hearing thus provided sufficient evidentiary to support for the ALO's finding that plaintiff had violated the weed ordinance on September 7, 2012.

¶ 29 Plaintiff's various contentions at the hearing were insufficient to undermine the Department's evidence and the ALO's finding of a violation of the weed ordinance. Plaintiff and his witnesses did not challenge the accuracy of the Department's photographs depicting weeds in excess of 10 inches on the property at the time of the inspection. Plaintiff's testimony, and that of his witnesses that plaintiff maintained the property, enjoyed the vegetation which grew on the property, and kept the sidewalks unobstructed, do not refute the notice and the photographic evidence or undermine the conclusion of the ALO that on September 7, 2012, there were weeds in excess of 10 inches on the property.

¶ 30 Plaintiff argues that the ALO's decision should be reversed because: (1) the ALO found his witnesses were credible and, therefore, he established the plants on the property were well maintained; (2) the ALO lacked jurisdiction in that the notice failed to include the printed name of the inspector, in violation of section 2-14-074(b) of the Municipal Code; and (3) his due process rights were violated because he had no opportunity to review the Department's evidence as to his ownership of the property prior to the hearing.

¶ 31 The ALO did find the witnesses credibly testified that they had observed plaintiff doing some work around the property. However, the ALO also correctly stated that, the ultimate decision as to whether the property was maintained and managed for purposes of the weed ordinance, was a decision for the ALO to make based on all the evidence. The ALO found that, despite the credible testimony as to the witnesses' observations of plaintiff caring for the property, the photographs demonstrated there was overgrown vegetation on the property in excess of 10 inches which was not maintained.

¶ 32 As to plaintiff's notice argument, section 2-14-074(a) of the Code provides that "the issuer of a notice of violation or notice of hearing shall specify on the notice his or her name and department." Chicago Municipal Code § 2-14-074(b) (amended Apr. 29, 1998). Plaintiff asserts that section 2-14-074(b) requires both the inspector's signature and printed name and complains the notice contains only the inspector's illegible signature.

¶ 33 We previously considered and rejected a similar argument made by plaintiff in *Shachter v. City of Chicago*, 2011 IL App (1st) 103582, ¶¶ 44-45 (*Shachter I*). We are not persuaded to depart from our holding in *Shachter I*, that the notice is not required to include both the printed name and the signature of the inspector, the issuer, or where the department and the badge number of the inspector are set forth in the notice.

¶ 34 Further, as in *Shachter I*, plaintiff, once again, has not shown any prejudice because the signature of the inspector may be illegible, and the notice did not include the inspector's printed name. Plaintiff asserts only that the requirements of section 2-14-074(b) have been violated (an assertion which we have rejected), and that he requested the identity of the inspector before the hearing. However, as we have stated, the notice provided the employing department, the inspector's badge number, and the signature of the inspector. Plaintiff has not contended that he

attempted to, but could not identify the inspector, or unsuccessfully sought to call the inspector as a witness. Plaintiff has not argued or shown that his defense was negatively impacted by the failure of the notice to also include the inspector's printed name.

¶ 35 With respect to the administrative proceedings, plaintiff's final argument is that his due process rights were violated by the introduction of the Department's evidence that he was the owner of the property. "Due process requires a fair trial before a fair tribunal and applies to both courts and administrative agencies performing adjudicatory functions." *Dombrowski v. City of Chicago*, 363 Ill. App. 3d 420, 426 (2005) (citing *Arvia v. Madigan*, 209 Ill. 2d 520, 540 (2004)). The question of whether an administrative hearing complied with the requirements of due process is one of law and is reviewed *de novo*. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 824 (2009). A court will find a due process violation only where there has been a showing of prejudice. *Gonzalez v. Pollution Control Board*, 2011 IL App (1st) 093021, ¶ 42.

¶ 36 Plaintiff has not shown that the ownership evidence prejudiced his defense. See 735 ILCS 5/3-111(b) (West 2014) ("Technical errors in the proceedings before the administrative agency or its failure to observe the technical rules of evidence shall not constitute grounds for the reversal of the administrative decision unless it appears to the court that such error or failure materially affected the rights of any party and resulted in substantial injustice to him or her."). The notice itself was served on plaintiff as the owner of the property and informed him of the steps to be taken if he was not the owner. Plaintiff has never contested ownership of the property and, in fact, presented evidence at the hearing, including his own testimony, confirming that he rents, controls, and maintains the property.

¶ 37 Further, the admission of evidence at the hearing was within the authority and the

discretion of the ALO. See Chicago Municipal Code § 2-14-102 (added Apr. 29, 1998)). The ALO's decision will be reversed " 'only if there is demonstrable prejudice to the complaining party.' " *Shachter I*, 2011 IL App (1st) 103582, ¶ 52 (quoting *Matos v. Cook County Sheriff's Merit Board*, 401 Ill. App. 3d 536, 541 (2010)). The ALO considered plaintiff's objection that the ownership evidence had not been produced pursuant to his motion for discovery and overruled plaintiff's objection in that plaintiff was not contesting his ownership of the property. We find no prejudice, nor due process violation, by the admission of the ownership evidence.

¶ 38 In sum, we conclude that the evidence sufficiently supported the ALO's decision finding plaintiff violated the weed ordinance, the notice was sufficient and plaintiff's due process rights were not violated during the administrative proceedings.

¶ 39 As to the circuit court proceedings, plaintiff's sole argument is that the circuit court abused its discretion by allowing defendants to file an amended answer.

¶ 40 Defendant's original answer responded only to the administrative review count. After plaintiff moved for the entry of default judgments on the declaratory counts, defendants sought and ultimately were granted leave to file an amended answer.

¶ 41 The circuit court has the discretion to allow an amendment to a pleading. 735 ILCS 5/2-616(a) (West 2012). In determining whether to allow an amendment, the court considers whether: "(1) the proposed amendment would cure a defect in the pleadings; (2) the proposed amendment would prejudice or surprise other parties; (3) the proposed amendment is timely; (4) there were previous opportunities to amend the pleading." *Krum v. Chicago National League Ball Club, Inc.*, 365 Ill. App. 3d 785, 790 (2006) (citing *Clemons v. Mechanical Devices Co.*, 202 Ill.2d 344, 355-56 (2002)). A decision as to whether an amendment should be allowed will not be disturbed absent an abuse of discretion. *Loyola Academy v. S & S Roof Maintenance, Inc.*,

146 Ill. 2d 263, 273-74 (1992).

¶ 42 As the appellant, plaintiff had the duty to provide a complete record for review of this issue. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). However, the record does not contain transcripts of any of the proceedings relating to defendants' requests to amend their answer, or an acceptable alternative from which we may ascertain the basis for allowing amendment of the answer. We presume that the amendment was properly allowed. *Id.*

¶ 43 Additionally, from the record before us, there is no reason to conclude that the circuit court abused its discretion by allowing defendants to file an amended answer which addressed all of the counts of plaintiff's complaint. The amended answer cured the defect of the original answer's failure to address the declaratory claims. There was no apparent surprise or prejudice caused by the filing of the amended answer. Defendants sought to amend the answer not long after plaintiff moved for the default judgments. Plaintiff has not shown an abuse of discretion by the circuit court in allowing defendant to file an amended answer.

¶ 44 Finally, we note that plaintiff has not presented arguments as to the invalidity of the weed ordinance or the denial of count II which sought a declaration to that effect. Plaintiff also has failed to raise any *specific* argument on appeal as to the circuit court's denial of counts III and IV of his complaint which sought, respectively, declaratory judgments that the administrative proceedings were invalid because he was shown the ownership evidence against him for the first time at the administrative hearing and because the notice did not confer jurisdiction on the DOAH. Rather than specifically seek review of the denial of these latter two claims for declaratory judgment, on appeal plaintiff makes these arguments within the context of his unsuccessful challenge to the denial of his claim for administrative review. Plaintiff has therefore forfeited any challenge to the denial of the requested relief in counts II, III and IV. Ill.

S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived.").

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we confirm the decision of the ALO finding plaintiff in violation of the weed ordinance and we affirm the judgment of the circuit court with respect to the denial of plaintiff's claims for administrative review and declaratory relief.

¶ 47 DOAH's decision confirmed; circuit court affirmed.