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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0856**

Diana M. Kutzler,
Appellant,

vs.

Blue Sky Real Estate, LLC,
Respondent,

Jesse Mausser,
Respondent,

Thomas Peter Wolf,
Respondent,

John Elfelt,
Respondent,

Palladium Holdings, LLC,
Respondent,

Blackberry Creek Holding Group, LLC,
Respondent,

Wholesale Properties, LLC,
Respondent,

Kenwood Hills Owners Association, Inc.,
Respondent,

CitiMortgage, Inc.,
Respondent.

**Filed January 22, 2013
Affirmed**

Collins, Judge*

Hennepin County District Court
File No. 27-CV-11-4135

Diana Kutzler, Minneapolis, Minnesota (pro se appellant)

John G. Westrick, Westrick & McDowall-Nix, PLLP, St. Paul, Minnesota (for respondent Blue Sky Real Estate)

Jesse Mausser, Golden Valley, Minnesota (respondent)

Thomas Wolf, Minneapolis, Minnesota (respondent)

John Elfelt, Anoka, Minnesota (respondent)

Thomas P. Carlson, Carlson & Associates Ltd., Vadnais Heights, Minnesota (for respondent Kenwood Hills Owners Association)

Kendall L. Bader, Barnes & Thornburg LLP, Minneapolis, Minnesota (for respondent CityMortgage, Inc.)

Considered and decided by Halbrooks, Presiding Judge; Stauber, Judge; and Collins, Judge.

UNPUBLISHED OPINION

COLLINS, Judge

Arguing that service of process was deficient because it was not literally face-to-face, appellant challenges the district court's grant of summary judgment against her in this nonjudicial foreclosure proceeding. We affirm.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

FACTS

In 1989 appellant Diana Kutzler executed a promissory note in favor of Norwest Mortgage Inc. for the purchase of a condominium apartment. To secure the note, Kutzler granted Norwest a mortgage lien on the property. Through a series of assignments, respondent CitiMortgage Inc. obtained the mortgage.

After Kutzler defaulted under the terms of the mortgage in December 2009, CitiMortgage initiated nonjudicial foreclosure proceedings and published a mortgage foreclosure sale notice for six consecutive weeks. Rick Sinner, a private process server employed by Metro Legal Services, was assigned to personally serve Kutzler with the requisite (1) notice of mortgage foreclosure sale, (2) homestead designation notice, (3) help for homeowners in foreclosure notice, and (4) foreclosure advice to tenants notice. On each of four attempts over February 17-19, 2010, Sinner was not admitted into Kutzler's building, although he saw her vehicle parked there. On February 22, Sinner was allowed to enter the building by a person unrelated to this matter. Kutzler responded to Sinner's knock on her apartment door but did not open it. She identified herself as Diana Kutzler, said she does not open the door for strangers, and directed Sinner to slide the documents under the door, which he did.

The property was sold at a June 2010 foreclosure sale. Kutzler did not exercise her redemption rights.

In January 2011 Kutzler commenced this action to dispute the validity of the mortgage foreclosure, asserting ineffective service of process. CitiMortgage moved for summary judgment. The record before the district court included the affidavits of Sinner

and Kutzler, Sinner’s “detailed notes” written immediately after serving Kutzler, and Kutzler’s handwritten notes. Kutzler argued that Sinner admitted that he did not personally serve Kutzler because he did not actually see her. The district court granted summary judgment to CitiMortgage, concluding that Kutzler “failed to submit clear and convincing evidence that she was not properly served with the foreclosure notices as noted by the affidavit of service.” This appeal followed.

D E C I S I O N

The sole issue presented is whether the district court properly granted summary judgment despite Kutzler’s assertion that a genuine issue of material fact exists as to effective service of process. In essence, Kutzler argues that service of process was fatally deficient in that she was “never personally, face-to-face served” the foreclosure notices. Kutzler simply contends that Sinner’s affidavit “description of slipped-under-the-door ‘service’ . . . corroborates [her] allegation” that service of process was ineffective. In response, CitiMortgage contends that Sinner’s affidavit describes effective service of the foreclosure notices. We first consider whether the district court erroneously concluded that CitiMortgage satisfied the service of process requirement, and then review whether summary judgment was proper.

I.

Service of process for mortgage foreclosure proceedings is required by Minnesota law. Minnesota Statutes section 580.03 provides in relevant part:

Six weeks’ published notice shall be given that such mortgage will be foreclosed by sale of the mortgaged premises or some part thereof, and at least four weeks before the appointed time

of sale a copy of such notice shall be served in like manner as a summons in a civil action in the district court upon the person in possession of the mortgaged premises The notice required by sections 580.041 and 580.042 must be served simultaneously with the notice of foreclosure required by this section.

Minn. Stat. § 580.03 (2008). Service of process in a civil action requires only that the plaintiff attempt to serve the defendant and that the defendant be aware that the documents are being served. *Blaeser & Johnson, P.A. v. Kjellberg*, 483 N.W.2d 98, 102 (Minn. App. 1992), *review denied* (Minn. June 10, 1992). If the process server and the party are within speaking distance of each other and such action is taken as to convince a reasonable person that personal service is being attempted, service cannot be avoided by physically refusing to accept the documents. *Nielsen v. Braland*, 264 Minn. 481, 484, 119 N.W.2d 737, 739 (1963); *see Kmart Corp. v. Cnty. of Clay*, 711 N.W.2d 485, 489 (Minn. 2006) (“*Nielsen* stands for the proposition that a defendant could not physically refuse to accept service when the defendant was in close proximity to the processor server, was touched with summons, and the summons was laid in a place easily accessible to him.”). To overcome an affidavit of service, the party challenging must produce clear and convincing evidence. *Imperial Premium Fin., Inc. v. GK Cab Co.*, 603 N.W.2d 853, 858 (Minn. App. 2000).

Kutzler’s assertion that Sinner’s service of process was ineffective because it was not literally face-to-face is not supported by Minnesota law. As the district court noted, Kutzler does not deny that she received the documents, does not assert they came from a person other than Sinner, and is unable to say when she received the documents, other

than that it was sometime after Sinner claims it was. In her affidavit, Kutzler revealed the apparent genesis of this dispute: “[An advisor] noticed my handwritten notes which state ‘put under my door’ . . . [the advisor] asked whether I was personally served with the documents, I stated, no as I indicated in my notes.” Kutzler makes no claim that the documents “put under [her] door” were something other than the foreclosure documents. CitiMortgage and Sinner agree that Sinner did not have literal “face-to-face contact” with Kutzler. But that was only because Kutzler preferred to have the documents delivered under the door rather than to open her door to a stranger. On this record, we conclude that Kutzler could not avoid service of process by physically refusing to accept the documents. She and Sinner were within speaking distance of each other and Sinner took such action that would convince a reasonable person that personal service was being attempted. *See Nielsen*, 264 Minn. at 484, 119 N.W.2d at 739. Accordingly, Kutzler’s claim that the district court erred in determining effective service of process is without merit.

II.

We now review whether the district court erred when it ruled that Kutzler’s service of process claim did not raise a genuine issue of material fact. We review a district court’s summary judgment decision de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). Summary judgment is proper when the nonmoving party fails to provide the court with specific indications that there is a genuine issue of material fact. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988). There is no genuine issue of material fact when the nonmoving party presents

evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). A self-serving affidavit generally does not, of itself, create a genuine issue of material fact. *Mountain Peaks Fin. Servs., Inc. v. Roth-Steffen*, 778 N.W.2d 380, 388 (Minn. App. 2010), *review denied* (Apr. 28, 2010). We view all facts in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Kutzler's assertion that she did not receive service of process alone does not create a material fact sufficient to preclude summary judgment. *See Roth-Steffen*, 778 N.W.2d at 388. Accepting Kutzler's argument for reversal would lead to the conclusion that a dispute over service of process always implicates a material fact; summary judgment would never be available in the face of a party's bald denial of service of process. Although on summary judgment the facts are viewed in the light most favorable to the party against whom judgment was granted, "the party resisting summary judgment must do more than rest on mere averments." *DLH*, 566 N.W.2d at 71. Kutzler fails to do so. Kutzler acknowledges that the requisite notices were slid under her apartment door and implicitly admits receiving them.

On the sole issue of service of process, Kutzler failed to demonstrate that a genuine issue of material fact existed so as to preclude summary judgment. On this record, the district court did not err by granting summary judgment to CitiMortgage.

Affirmed.