IN THE SUPREME COURT OF GUAM

MARK B.S. MARIANO,
Plaintiff-Appellee,

v.

REY M. SURLA,
Defendant-Appellant

Supreme Court Case No.: CVA08-018
Superior Court Case No.: CV0923-06

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on May 15, 2009
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice

MARAMAN, J.:

[1] Defendant-Appellant, Rey M. Surla, appeals from the Superior Court's denial of a Rule 60(b) motion to set aside a default judgment. Surla alleges the default judgment was void under Rule 60(b)(4) since Plaintiff-Appellee, Mark B.S. Mariano, failed to comply with Guam law in serving the summons and complaint and the Superior Court lacked jurisdiction over him. Surla also sought relief from the default judgment under Rule 60(b)(6) as an extraordinary circumstance. For the reasons below, we find that the Superior Court did not abuse its discretion in denying the motion to set aside the default judgment under Rules 60(b)(4) and (6). However, we conclude that entry of the default judgment should have only established Surla's liability and not the amount of damages. Consequently, the default judgment is affirmed as to the determination of liability. Further, we vacate the damages award and remand for an evidentiary hearing on the record as to damages.

I. FACTUAL AND PROCEDURAL BACKBROUND

[2] On July 25, 2006, Plaintiff-Appellee, Mark B.S. Mariano filed a complaint alleging fraud and conversion against Defendant-Appellant, Rey M. Surla. Mariano claims that Surla personally solicited Mariano and others to invest money in the stock market, while on Guam in June 2000. Further, that during his visit to Guam, Surla showed Mariano a presentation on stock investment on his computer at Mariano's home. Surla, however, denies providing any presentation to Mariano. The complaint alleges Mariano gave Surla $5,000.00 to invest in June 2000. Before Surla left Guam, Mariano accompanied Surla to Bank of Guam ("BOG") to open a

checking account in Surla's name. Mariano alleges the checking account was opened so Mariano and other family members, including Willy Valencia ("Valencia") could deposit money for Surla to withdraw while in California and invest in the stock market. Surla however disputes this fact claiming that the account was opened so Valencia's son, Oliver Valencia, could deposit the money to repay Surla for a car he purchased. Surla also denies requesting Mariano or Valencia to deposit money into the BOG account.

[3] The complaint also states that on or about August 21, 2000, Mariano lent Surla $50,000.00 to invest in Surla's name and on August 23, 2000, Mariano lent an additional $40,000.00, which funds were deposited into the BOG account. Valencia also deposited $80,000.00 in Surla's bank account around the same time. In 2004, Mariano discovered Surla used the money for his personal use including purchasing a BMW for his parents. Mariano then brought suit for fraud and conversion. Service of the summons and complaint on Surla was made by publication and mail as ordered by the Superior Court. Appellant's Excerpts of Record ("ER"), tab 13 at 2 (Docket Sheet, July 25, 2006). Mariano was ordered to (1) publish the summons, (2) post the summons, and (3) mail a copy of the summons and complaint by restricted delivery, certified, return receipt requested to Surla's last known address. ER, tab 2 at 1-2 (Order, Aug. 22, 2006).

[4] On August 31, 2006, a declaration[1] was filed showing that the summons and complaint were sent by registered, return receipt and restricted delivery to Surla in California. Supplemental Excerpts of Record ("SER"), tab 2 (Decl. of Posting, Aug. 31, 2006). Another

[1] The declaration was signed by Michael P. Torres, presumably an employee of the law firm representing Mariano at the time.

declaration indicated the summons was posted and published as ordered by the court. *Id.*; SER, tab 3 (Decl. of Pub., Aug. 31, 2006). On September 26, 2006, Mariano requested for an entry of default since no answer was filed. SER, tab 4 (Req. to Enter Def., Sept. 26, 2006). The request included a copy of the return receipt card dated August 26, 2006 with Surla's signature. SER, tab 4 at 3 (Req. to Enter Def). Default was subsequently entered and a default hearing was later scheduled for January 9, 2007. ER, tab 13 at 2 (Docket Sheet); ER, tab 12 (Transcript, Jan. 9, 2007). At the default hearing, the Superior Court Judge, as a condition to entering the default judgment, asked Mariano's counsel to confirm whether Surla received the summons and complaint. *Id.* at 2. After the hearing, Attorney Phillip Torres filed a declaration of mailing stating the summons and complaint were served on Surla by restricted delivery, registered, return receipt requested on August 21, 2006. ER, tab 5 at 1, (Decl. re: Mailing, Jan. 24, 2007). The return receipt, however, did not include the article number listed in the receipt for registered mail. *Id.* at 4. Default judgment was entered on February 15, 2007, which Surla did not appeal. ER, tab 3 (Def. J., Feb. 7, 2007); ER, tab 13 at 2 (Docket Sheet). A notice to enter the default judgment in the California courts was filed on April 28, 2008. ER, tab 6 (Not. of Entry of J. on Sister-State J., Apr. 28, 2008).

[5] On June 26, 2008, Surla filed a Guam Rule of Civil Procedure 60(b) motion to set aside the default judgment which was denied. ER, tab 9 at 5, (Dec. & Order, Nov. 21, 2008). Surla then timely filed this Notice of Appeal.

II. JURISDICTION

[6] This court has jurisdiction of an appeal from a final judgment. 48 USC § 1424-1(a)(2) (Westlaw through Pub. L. 111-1 (2009)); 7 GCA §§ 3107(b); 3108(a) (2005).

III. STANDARD OF REVIEW

[7] When this court reviews a denial of a motion to set aside a default judgment under Rule 60(b) it applies an abuse of discretion standard. *Midsea Indus., Inc. v. HK Eng'g Ltd.*, 1998 Guam 14 ¶ 4. An abuse of discretion occurs when the trial judge's "decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *Id.* A trial court's decision, however, will not be reversed unless we have a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." *Id.*

[8] The standard of review of a void judgment under Rule 60(b)(4) has not been fully laid out by this court.[2] In a majority of federal circuits, the standard of review is *de novo* since the question is purely one of law. *See, e.g., Burrell v. Henderson,* 434 F.3d 826, 831 (6th Cir. 2006); *Burda Media, Inc. v. Vertel,* 417 F.3d 292, 298 (2nd Cir. 2005); *M & K Welding, Inc. v. Leasing Partners, LLC,* 386 F.3d 361, 365 (1st Cir. 2004); *United States v. Buck,* 281 F.3d 1336, 1344 (10th Cir. 2002); *Burke v. Smith,* 252 F.3d 1260, 1263 (11th Cir. 2001); *Carter v. Fenner,* 136 F.3d 1000, 1005 (5th Cir. 1998); *Retail Clerks Union Joint Pension Trust v. Freedom Food Ctr.*, 938 F.2d 136, 137 (9th Cir. 1991). However, when a judgment is void for insufficient service of process and the underlying facts are disputed a few circuits have held that review of the disputed facts is for clear error. *S.E.C. v. Internet Solutions for Bus. Inc.*, 509 F.3d 1161, 1165 (9th Cir. 2007); *Goetz v. Synthesys Tech.'s, Inc.*, 415 F.3d 481, 483 (5th Cir. 2005). Because

[2] However, in *Pineda v. Pineda*, citing to Ninth Circuit case law, this court in a footnote recognized that "[a] trial court's ruling on a Rule 60(b)(4) motion to set aside a void judgment is a question of law . . . subject to *de novo* review on appeal." 2005 Guam 10, ¶ 7, n.4. In *Pineda*, however, we did not apply the *de novo* standard because the trial court did not base its ruling on Rule 60(b)(4).

determination of a void judgment is a question of law, we adopt the *de novo* standard in our analysis under Rule 60(b)(4). However, where a trial court's factual findings on service of process are disputed, we agree that the underlying facts should be reviewed for clear error.

IV. DISCUSSION

[9] On appeal, Surla argues the Superior Court erred in denying his Rule 60(b) motion to set aside the default judgment under Rules 60(b)(4) and 60(b)(6). Surla asserts several reasons why the judgment is void under Rule 60(b)(4). First, the Superior Court lacked personal jurisdiction over Surla because service of the summons and complaint were defective. Second, no minimum contact exists to confer personal jurisdiction over Surla. Third, Surla was denied due process by Mariano's failure to file the supporting affidavits in compliance with Guam Rule of Civil Procedure 55(b) and the Servicemembers Civil Relief Act. Surla also argues extraordinary circumstances exist to set aside the default judgment under Rule 60(b)(6). We address each issue below.

A. Void Judgment under Rule 60(b)(4)

1. Lack of personal jurisdiction due to improper service of process

[10] Rule 60(b)(4) allows relief where a judgment is void for improper service of process. Surla argues the Superior Court did not have personal jurisdiction because service of the summons and complaint was defective and Surla did not receive the summons and complaint as alleged by Mariano. Appellant's Br. at 17 (Mar. 16, 2009). Specifically, Surla asserts service was defective because the return receipt card did not include the article number and without the number there is no proof the envelope received and signed by Surla included the summons and complaint. Appellant's Br. at 15-16.

[11] Mariano however, contends service under former Rule 4(e)[3] was proper. Mariano argues Rule 4(e) does not require service be made by certified mail or require an article number be included on the return receipt card to establish proof of delivery. Appellee's Br. at 19 (Apr. 15, 2009). Furthermore, Mariano asserts that Surla does not allege receiving any documents or correspondence from Mariano before the Guam and California actions started and "no evidence that the hypothetical mailing which Surla argues he might have signed for, does in fact exist." *Id.* at 22.

[12] "Generally, a judgment is void under Rule 60(b)(4) if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." *Burke v. Smith,* 252 F.3d 1260, 1263 (11th Cir. 2001) (internal citations omitted). Where a judgment is deemed void, relief is mandatory. *Feore v. Feore*, No. DM0585-92, 1993 WL 128361, at *2 (D. Guam April 8, 1993). "[T]here is no time limit on an attack on a judgment as void. The one-year limit applicable to some Rule 60(b) motions is expressly inapplicable, and even the requirement that the motion be made within a 'reasonable time,' which seems literally to apply to motions under Rule 60(b)(4), cannot be enforced with regard to this class of motion." *Briley v. Hidalgo,* 981 F.2d 246, 249 (5th Cir.1993) (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2862 at 197-98 (2d ed. 1973)).

[3] When the summons and complaint were filed and served in July 2006, this court had not yet adopted and promulgated the new rules of civil procedure; therefore former Rule 4(e) was applicable at the time service was made. With the promulgation of the new rules of civil procedure on June 1, 2007, former Rule 4(e) became current Rule 4(o).

[13] A default judgment entered without proper service is void since the trial court lacks personal jurisdiction if service is defective. *Pineda v. Pineda*, 2005 Guam 10 ¶ 10. "A trial court has 'no discretion to refuse vacating a judgment if it is void.'" *Id.* at ¶ 19. Unlike other Rule 60(b) motions, where a judgment is void under Rule 60(b)(4) the only way a court may exercise its discretion is by granting relief. James W. Moore, *Moore's Fed. Practice* § 60.44[5][a]. Additionally, a judgment that is void because of improper service on the defendant is a denial of due process and does not require a showing of a meritorious defense as a precondition to relief from the void judgment. *See generally Peralta v. Heights Medical Ctr., Inc.*, 485 U.S. 80 (1988).

[14] The statutory requirements for service by mail are found in Rule 4(e) and 7 GCA § 14106.

[15] Former Rule 4(e) states in relevant part:

> Whenever a statute or order of court thereunder provides for service of a summons, or of a notice . . . upon a party not an inhabitant of, [or] found within Guam, service shall be made by publication in a newspaper of general circulation for the prescribed time and by mailing such summons [or] notice . . . to the last known residence (or post office box) of such party. . . . Publications shall be proved by affidavit of an officer or agent of the publisher, stating the dates of publication with an attached copy of the order as published. Service by mail shall be accomplished by any form of U.S. postal delivery that provides for written proof of mailing, written proof of delivery and restricted delivery to the addressee only. Mailing shall be proved by affidavit establishing that the address employed is the most current mailing address known for the party being served, that a copy of the summons (notice or order) and the complaint were deposited with the U.S. Post Office, properly addressed, and having attached thereto the Postal receipts reflecting a form of mailing prescribed above.

Guam R. Civ. P. 4(e) (1997).

[16] Title 7 GCA § 14106 reads:

> (a) Where the person on whom service is to be made has departed from Guam, and cannot, after due diligence, be found in Guam, or conceals himself to avoid the service of summons . . . and the fact appears by affidavit to the satisfaction of the court, or a judge thereof, and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made . . . such court or judge may make an order that the service be made by the publication of the summons and by mailing the complaint and summons.
>
> (b) Service by mail shall be by any kind of U.S. Postal Service delivery that provides for written proof of mailing, written proof of delivery and restricted delivery to the addressee only.

7 GCA § 14106 (2005).

[17] Rule 4(e) and 7 GCA § 14106 require written proof of mailing, written proof of delivery, and restricted delivery to the addressee only. GRCP 4(e); 7 GCA § 14106. Proof of delivery under Rule 4(e) may be established by an affidavit stating that the summons and complaint were deposited with the post office, and the envelope was properly addressed, and including postal receipts reflecting the form of mailing used.

[18] In *Pineda v. Pineda*, this court addressed the issue of service of process under former Rule 4(e) and 7 GCA § 14106. 2005 Guam 10. As proof of mailing, the appellant in *Pineda* provided a photocopy of an envelope with the certified mail label addressed to appellee. *Id.* at ¶ 16. The envelope was returned when appellee failed to pick it up. *Id.* The appellant filed a declaration stating that the appellee was served by return receipt but did not provide a copy of the return receipt. *Id.* at ¶ 16-17. This court noted it could not verify, based on the appellant's declaration alone, that return receipt was used. *Id.* at ¶ 17. The envelope also did not show whether restricted delivery service was used as required by Guam law. *Id.* As a result, this court

held that the appellant failed to comply with the service by mailing requirements and adopted a rule of strict compliance of the statutory service requirements. *Id.* at ¶ 18.

[19] The parties do not dispute that the publication requirement was satisfied. Instead the dispute lies with the mailing requirement. The order for mailing and publication in this case stated the summons and complaint be mailed by restricted delivery, certified, return receipt to Surla at his last known address. After service of the summons and complaint by publication and mailing, a declaration was filed stating the complaint and summons were sent to Surla on August 21, 2006 by registered, return receipt and restricted delivery to his address in California. A default hearing was held but the Superior Court withheld entering the judgment pending confirmation from Mariano's counsel whether the summons and complaint mailed to Surla were received or returned undeliverable. Mariano's attorney subsequently filed a declaration stating the summons and complaint were sent to Surla on August 21, 2006 by restricted delivery, registered, return receipt requested. Mariano's counsel also attached copies of the restricted delivery receipt and the return receipt showing Surla's signature dated August 26, 2006. The return receipt card however did not include an article number and the summons and complaint were not sent by certified mail as ordered by the Superior Court. Surla submits Mariano's failure to include the article number on the return receipt card precludes strict compliance with Rule 4(e).

[20] Written proof of mailing under Rule 4(e) and 7 GCA § 14106 requires service by any means used by the U.S. Postal Service and not solely certified mail. Here, Mariano's proof of mailing, although not by certified mail as ordered by the court, was satisfactory because it was sent by registered mail. "Guam law also requires proof of delivery (such as by Return Receipt

service) and restricted delivery." *Pineda,* 2005 Guam 10 at ¶ 16. Although the declaration of Attorney Torres reveals that the summons and complaint were mailed by restricted delivery with a return receipt requested, the return receipt did not include the article number, which Surla argues would show that the documents received by Surla on August 26, 2006 were the summons and complaint. Surla cites several cases concluding that proof of delivery is established when providing tracking reports which would show the date the article was delivered. Appellant's Br. at 26. These cases do not, however, lend support in this case because proof of delivery under Guam law may be established by providing copies of the postal receipts showing the form of mailing. We still must decide whether Guam law requires that postal receipts contain the article numbers if there is other supporting evidence in the record that Surla received an envelope containing documents five days after the affidavit alleges the summons and complaint were sent.

[21] Although the return receipt card did not include the article number, other evidence may establish proof of delivery by mail. *See In re Estate of Riley*, 847 N.E.2d 22, 27 (Ohio Ct. App. 2006) ("A signed return receipt constitutes evidence of delivery pursuant to Civ.R. 4.1(A), but the rule does not bar introduction of other evidence to establish certified mail delivery."). The receipt for registered mail dated August 21, 2006 clearly showed that the mailing was sent by restricted delivery and had an article number listed. Torres' declaration included a copy of the return receipt card signed by Surla on August 26, 2006 just days after both declarations stated the summons and complaint were sent. Although Surla denies receiving the summons and complaint, Surla alleged in his declaration that he did not receive "any letter, correspondence or notice from Mr. Mariano or his attorney before the Guam and California Court actions started." ER, tab 4 at 2 (Decl. of Surla, June 26, 2008). No evidence was presented before the Superior

Court that the envelope was returned. The record also does not show other documents were mailed to Surla during the time period which would controvert Mariano's argument that service was proper. The Superior Court in addressing this issue concluded that service was not defective because Mariano strictly complied with the service requirements as stated in *Pineda.* ER, tab 9 at 3. It is true that the better practice when service is made by mail would be to fully complete the receipt for registered mail and the return receipt card. However, under the facts and circumstances in this case, the failure to include the article number in the return receipt card is not a fatal defect because there is other supporting evidence in the record to establish that Surla received the summons and complaint. The summons and complaint were also sent by restricted delivery to Surla at his California address. We therefore find that service was proper under Guam law and the judgment was not void on these grounds.

2. Whether minimum contacts exist to confer personal jurisdiction over Surla

[22] Surla also argues the judgment was void because the Superior Court did not have general or specific personal jurisdiction over him. Simply maintaining a bank account on Guam does not constitute doing business on Guam because Surla could not have anticipated that having a bank account in Guam could be the basis for being hailed into court on Guam. Appellant's Br. at 33-34.

[23] Title 7 GCA § 14109 confers upon the trial court the statutory authority to exercise jurisdiction "up to and including all that is constitutionally permissible" and the Due Process Clause requires a defendant to have "'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *PCI Commc'ns, Inc. v. GST Pacwest Telecom Haw., Inc.*, 1999 Guam 17 ¶ 17 (citing *Int'l Shoe*

Co. v. Washington, 66 S. Ct. 154, 158 (1945)). Assuming minimum contacts are established, a court may exercise personal jurisdiction in two ways: (1) general jurisdiction "where a defendant's activities in a state are either 'substantial,' or 'continuous and systematic[]'"; or (2) limited or specific jurisdiction "where the defendant's contacts with the forum, though limited, are sufficiently related to the cause of action." *Id.* at 18 (citation omitted).

[24] We first examine the Superior Court's general jurisdiction over Surla. "[I]f the nonresident defendant's activities within a state are 'substantial' or 'continuous and systematic,' there is a sufficient relationship between the defendant and the [forum] to support [general] jurisdiction even if the cause of action is unrelated to the defendant's forum activities." *Id.* at 19. Here, the Superior Court did not address whether it had general jurisdiction. The facts establish that while on Guam in June 2000, Surla opened a BOG account in his name and Mariano and other Guam residents deposited money in the account. Surla conducted activity using the account because he withdrew deposited funds which are the subject of this dispute. From these facts alone, it appears that the only activity Surla conducted was maintaining the bank account which is insufficient to confer general jurisdiction.

[25] Even if the Superior Court does not have general jurisdiction over Surla the court may alternatively assert limited or specific jurisdiction "where the defendant's contacts with the forum, though limited, are sufficiently related to the cause of action." *Id.* at ¶ 23. In *PCI Communications, Inc.*, we applied a three-part test followed in the Ninth Circuit to determine whether limited or specific jurisdiction was appropriate. Under the three-part test:

1. The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself

of the privilege of conducting activities in the forum, thereby invoking the benefits and protection of its laws.

2. The claim must be one which arises out of or results from the defendant's forum-related activities.

3. Exercise of jurisdiction must be reasonable.

Id. (citing *Data Disc Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1287 (9th Cir.1977).

[26] The first part, whether a defendant has purposefully availed himself of the laws of Guam, is satisfied when a defendant "takes deliberate actions within the forum state or creates continuing obligations to forum residents." *Id.* at ¶ 24. A defendant need not be physically present or have physical contacts with the forum state if his efforts are purposefully directed toward forum residents. *Id.* The Superior Court correctly found that Surla's opening of the BOG account was an act by which he purposefully availed himself of the privilege of conducting activities in the forum. Further, Surla used the bank account "to withdraw the funds which [are] the subject of this dispute." ER, tab 9 at 3 (Dec. & Order). Surla himself on appeal concedes that he accepted a check for $5,000.00 from Mariano for the purposes of "investment in the stock market in California." Appellant's Br. at 9. Surla's activities were also purposefully directed toward forum residents, here Mariano and Valencia. The Superior Court did not err when it found that Mariano's claim against Surla "is also directly related to his contact with Guam, and therefore the Court has specific jurisdiction over his person in this matter." ER, tab 9 at 4 (Dec. & Order).

[27] Nevertheless, we still must determine whether the claim of action arose out of or from Surla's forum related activities. Although no written agreement between Surla and Mariano or Valencia exists, the claim for fraud and conversion is based on an alleged agreement to invest

funds in the stock market. In depositing the funds into the BOG account, Mariano entrusted Surla to appropriately handle the funds. Therefore, it is evident that Mariano's claim arises out of Surla's forum-related activities involving the BOG account. Accordingly, the second prong of the three-part test enunciated in *PCI Comm., Inc.*, is also satisfied.

[28] Finally, this court must address whether the exercise of jurisdiction is reasonable. Surla argues that, the exercise of specific jurisdiction by the courts of Guam would be "unfair and unreasonable" because "all the evidence pertaining to the issue of fraud was located in California," and similarly "[a]ll the evidence relating to the issue of conversion was likewise in California or on the mainland U.S." Appellant's Br. at 35. Among the factors considered in making this determination are: (1) "the extent of the defendant's interjection into the forum state;" (2) "the burden on the defendant;" (3) "the forum State's interest in adjudicating the dispute;" (4) "the plaintiff's interest in obtaining convenient and effective relief;" (5) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies;" and (6) "the shared interest of the several States in furthering fundamental substantive social policies." *PCI Commc'ns, Inc.*, 1999 Guam 17 at ¶ 32 (citing *Burger King Corp. v. Rudzeqicz*, 471 U.S. 462, 476 (1985)). These factors, however, are not rigid parts of a mechanical test but rather are part of a balancing test applied in accordance with the facts and circumstances of a particular case. *Id.* Nevertheless, a finding of purposeful availment presumes the reasonableness of asserting jurisdiction. *Id.* Consequently, Surla now bears the burden of rebutting the presumption that the Superior Court's assertion of specific jurisdiction was reasonable.

[29] Surla's blanket statement that "all the evidence is in California" alone does not meet Surla's burden of rebutting the presumption of reasonableness. Appellant's Br. at 35. We

observe that Bank of Guam records, Mariano's testimony, and that of several of Surla's family members with whom Mariano allegedly spoke to investigate Surla's background, are all likely relevant evidence that is located here on Guam, not in California. Moreover, the burden on Surla of defending in Guam is not great since a "non-resident defendant that derives economic benefit from activity in a forum has very little basis for complaining of inconvenience when required to defend itself in the forum." *PCI Commc'ns, Inc.*, 1999 Guam 17 at ¶ 35. Furthermore, the burden on a defendant is only one factor. *Id.* Guam as the forum State has a strong interest in adjudicating a dispute involving a tort claim involving one of its residents and involving funds transmitted through a Guam bank. In addition, local adjudication of the case would avoid the necessity of subjecting Guam residents, such as Mariano, to travel from Guam in order to bring suit. The interest of Mariano as a plaintiff residing in Guam in obtaining convenient and effective relief weighs in favor of the Superior Court's assertion of jurisdiction. Finally, in considering the shared interest of the several States in furthering fundamental substantive social policies, "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines. . . ." *Id.* at 38. (quoting *Burger King Corp. v. Rudzeqicz,* 471 U.S. 462, 476 (1985)). Investment and financial transactions involving email communications and distant bank accounts are increasingly the norm rather than the exception. "Accountability, in the instance such transactions go awry, should not be made to turn upon archaic notions of physical presence." *Id.* We conclude that specific or limited jurisdiction is satisfied, therefore, the Superior Court did not abuse its discretion in denying the motion to set aside the default judgment on these grounds.

3. Error under Rule 55(b)

[30] Relief under Rule 60(b)(4) is also proper where the court acts in a manner inconsistent with the due process of law. Surla argues for the first time on appeal that the default judgment is void because the Superior Court entered judgment and Mariano failed to file affidavits showing Surla was not an infant or incompetent, pursuant to Rule 55(b) and an affidavit stating Surla is not a servicemember as required by the Servicemembers Civil Relief Act.

[31] Generally, this court will not address issues raised for the first time on appeal but has the "discretion to do so in the following circumstances: '(1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law.'" *Sinlao v. Sinlao*, 2005 Guam 24 ¶ 30 (citation omitted).

[32] Determining whether to exercise our discretion in this case requires that we review the default judgment, because Surla argues it was error for the Superior Court to enter the judgment. Surla, however, did not appeal the default judgment. Instead, he filed a Rule 60(b) motion to set aside the default judgment. A judgment is void if the court which rendered it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process of law. *In re Four Seasons Secs. Laws Litig.*, 502 F.2d 834, 842 (10th Cir. 1974). Surla's argument that the default judgment is void under Rule 60(b)(4) because of the absence of the affidavits required under Rule 55(b) and the Servicemembers Civil Relief Act. is misplaced. Furthermore, Surla does not cite any authority which would support his argument that he was denied due process from the failure of Mariano to file the supporting affidavits.

[33] Surla complains the judgment was entered erroneously because it was entered without the supporting affidavits. A judgment that is erroneously entered by a court having jurisdiction is voidable and can only be challenged on direct appeal. *In re Paternity of P.E.M.*, 818 N.E.2d 32, 36 (Ind. Ct. App. 2004). Thus, because Surla did not appeal the default judgment, our review is limited and Surla cannot collaterally attack the judgment in this appeal of the denial of the Rule 60(b) motion.

B. Relief under Rule 60(b)(6)

[34] Surla further seeks relief from the default judgment under Rule 60(b)(6). Rule 60(b)(6) provides relief from a judgment for "any other reason justifying relief from the operation of the judgment." GRCP 60(b)(6). The provisions of Rule 60(b) are mutually exclusive and relief under subsection (6) applies only in exceptional or extraordinary circumstances which are not addressed by the other subsections of the Rule. *Brown v. Eastman Kodak Co.*, 2000 Guam 30 ¶ 14. A motion under this subsection must be brought within a reasonable time. *Id.* at ¶ 15. To justify relief, the movant, in addition to showing an extraordinary set of facts, must also show that it "has a meritorious case, that substantial injustice would otherwise result, and that it would be appropriate to set aside default so that the case can proceed to the merits." *Id.* at ¶ 25. A party "must show extraordinary circumstances suggesting that a party is faultless in the delay." *Id.* at ¶ 32 (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 393 (1993). If a party is partially at fault, relief must be made within one year and the party's neglect must be excusable. *Id.* On the other hand, a party who is completely at fault may not seek relief under subsection (6). *Id.*

[35] A default judgment will generally not be vacated "if it is shown that (1) a defendant's culpable conduct led to the default, (2) the defendant has no meritorious defense, or (3) the plaintiff would be prejudiced if the judgment is set aside." *Midsea*, 1998 Guam 14 ¶ 5. While the Superior Court has the discretion to grant or deny a Rule 60(b) motion, that discretion is limited by two policy considerations. *Id.* at ¶ 6. First, since Rule 60(b) is remedial in nature, it must be liberally applied. Second, default judgments are generally disfavored and whenever possible, cases should be decided on their merits. *Id.*

[36] Surla denies receiving the summons and complaint and contends that failure of Mariano to include the article number on the return receipt card shows service was not proper. The Superior Court, however, found that under former Rule 4(e) and 7 GCA § 14106, Surla was properly served the summons and complaint once he signed the return receipt card on August 26, 2006. ER, tab 9 at 39 (Dec. & Order). Surla does not dispute or offer any evidence to show he received other documents from Mariano on August 26, 2006. Surla also offers no other evidence to show he was faultless in not answering the complaint. Nonetheless, Surla argues Mariano intentionally waited more than one year to enforce the judgment in California in order to bar relief under 60(b)(1), but Surla provided the court no explanation for waiting almost two years to respond. *Id.* Further the court stated, "[w]ithout an explanation to the contrary, it appears that Surla did not believe this civil action would affect him and chose to ignore it at his own peril." *Id.* The court ultimately concluded Surla's actions were culpable and denied relief under 60(b)(6). *Id.* We agree and conclude that Surla's culpable conduct led to the entry of the default judgment establishing liability. Surla has failed to show extraordinary circumstances which

suggest he was faultless in his failure to file an answer, therefore, he cannot seek relief from the default judgment which established his liability under 60(b)(6).

[37] "Due to the disjunctive nature of the *Midsea* test", *Duenas v. Brady*, 2008 Guam 27 ¶ 27, and because we find Surla's culpable conduct led to the entry of the default judgment establishing his liability, we need not examine the remaining *Midsea* factors. *See id.* at ¶ 17 ("Once a court determines that a party's culpable conduct led to the default, the ruling may be upheld without inquiring into any meritorious defenses or possible prejudices to the plaintiff"). Even if Surla was only partially at fault relief must be sought within one year. The motion to set aside the default judgment was filed more than a year after entry of the judgment. Therefore, we cannot say that the Superior Court abused its discretion in denying the motion to set aside the default judgment establishing his liability under Rule 60(b)(6).

1. Determination as to Damages

[38] Notwithstanding our conclusion that extraordinary circumstances do not exist to warrant relief under Rule 60(b)(6), to set aside the default judgment establishing Surla's liability, we still must examine the manner in which the damages were determined and awarded to decide if extraordinary circumstances exist to vacate the damage award.[4]

[39] As a general rule, when a party fails to file an answer and a default judgment is entered, only the factual allegations of the complaint as to liability are deemed admitted and not the

[4] We recognize our holding in *Brown* that a party must be faultless to seek relief under Rule 60(b)(6). *Brown v. Eastman Kodak Co.*, 2000 Guam 30. However, we note that the issue of fault in *Brown* was a challenge to the default judgment as to liability and was grounded on actions by *Brown's* attorney. As we will discuss, a defendant's actions in failing to meet a deadline only admits the allegations in a complaint as to liability. The issue of fault as it relates to a damage award on the other hand is premised on different facts and circumstances which were not addressed in *Brown*. We take this opportunity to address the issue here.

allegations relating to damages. *Pope v. United States*, 323 U.S. 1, 12 (1944). A plaintiff is still required to prove all damages sought in a complaint. Further support for this general rule exists in Rules 8(d) and 55(b) of the Guam Rules of Civil Procedure.

[40] Rule 8(d) states "[a]verments in a pleading to which a responsive pleading is required, *other than those as to the amount of damage*, are admitted when not denied in the responsive pleading." Guam R. Civ. P. 8(d) (emphasis added). Rule 55(b)(2) which governs the entry of default by the court reads in part:

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by statute.

Guam R. Civ. P. 55(b)(2)[5].

[41] The language of Rule 55(b) expressly authorizes a court to conduct a hearing on the issue of damages before entering a judgment by default when the plaintiff seeks unliquidated damages. "Therefore, even upon default, a court may not rubber-stamp the non-defaulting party's damages calculation, but rather must ensure that there is a basis for the damages that are sought." *Overcash v. United Abstract Group, Inc.*, 549 F. Supp. 2d 193, 196 (N.D.N.Y. 2008) (citing *Credit Lyonnais Sec. (USA), Inc. v. Alcantara,* 183 F.3d 151, 155 (2d Cir. 1999)).

[42] A trial court has the discretion to hold a hearing but "the scope of discretion afforded the trial court under the rule, however, does not extend to the entry of a default judgment where the

[5] Current Rules 8(d) and 55(b) of the Guam Rules of Civil Procedure were not in effect at the time the default judgment was entered. However, because the language of former Rules 8(d) and 55(b)(2) and current Rules 8(d) and 55(b)(2) are identical as to the provisions relevant here, our analysis is unaffected by this change.

damages are not liquidated or articulated with certainty." *Multiple Resort Ownership Plan, Inc. v. Design-Build-Manage, Inc.* 45 P.3d 647, 655 (Wyo. 2002). To prove damages, a party must show more than mere nominal damages *Id.* "The requirement of Rule 55(b)(2) . . . of a hearing with respect to damages which are not liquidated is consistent with the rule of those cases. The default permitted by a defendant does not concede the amount demanded for unliquidated damages." *Id.* "[D]amages are not liquidated if the ascertainment of their exact sum requires the taking of testimony to ascertain facts upon which to base a value judgment." *Id.* "Unliquidated claims include damages for personal injuries, lost profits, consequential damages, exemplary or punitive damages, and reasonable attorney's fees." *First Nat'l Bank of Irving v. Shockley*, 663 S.W.2d 685, 689 (Ct. App. Tex. 1983).

[43] Courts in other jurisdictions when reviewing Rule 60(b) motions have vacated damage awards from the default judgment. In *Carr v. Charter Nat'l Life Ins. Co.*, the Ohio Supreme Court vacated the damages awarded in the default judgment[6] after finding the evidence supporting the damage award was insufficient. 488 N.E.2d 199, 202 (Ohio 1986). The court stated "[w]hen the evidence presented at a default judgment hearing is insufficient to support the damages awarded, the trial court abuses its discretion when it denies a Civ.R. 60(B) motion to the extent that the motion challenges the amount of the award." *Id.* The court did not find adequate evidence in the record to excuse defendant's culpable conduct but held that the awards of damages and attorney fees were an abuse of discretion. *Id*; *see also Capital-Plus, Inc. v. Conso. Ambulance Serv. Corp.*, No. 02AP-772, 2003 WL 361013, at *3 (Ohio App. Feb. 20,

[6] In *Carr*, default judgment was entered after the defendant failed to file an answer regarding interrogatories. As a result, the defendant moved to set aside the judgment under Rule 60(b).

2003) (applying the holding in *Carr* to set aside a default judgment under Rule 60(b)(6) ("[W]hile defendant has not demonstrated grounds for failing to appear or answer plaintiff's complaint, we deem it significant that defendant's Civ.R. 60(B)(5) motion contests the *amount* awarded by the trial court in granting default judgment.")).

[44] The Sixth Circuit in *Vesligaj v. Peterson* also vacated a damage award from a default judgment on its review of the denial of a Rule 60(b) motion, recognizing the general rule that a default admits only the defaulting party's liability where the damages are unliquidated and the amount of damages must be proved. *See generally Vesligaj v. Peterson,* 2009 WL 1286446 (6th Cir. May 11, 2009). The court found no abuse of discretion however in finding that the defendant's culpable conduct led to the default, but still vacated the judgment as to the damages. *Vesligaj,* 2009 WL 1286446 at *5.

[45] The Supreme Court of Mississippi in *Capital One Serv., Inc. v. Rawls* also affirmed a trial court's denial of a Rule 60(b) motion as to liability but vacated the judgment as to damages when no hearing was held. 904 So. 2d 1010, 1013 (Miss. 2004). Relying also on the general rule, the court held that the trial court committed error in failing to conduct a hearing on damages, stating that "[b]ecause a default judgment is not an admission as to damages, trial courts are obligated to hold a hearing on damages." *Id.* at 1019. *See also Greater Canton Ford Mercury, Inc. v. Lane*, 997 So. 2d 198, 200 (Miss. 2008) (Court affirmed default judgment as to liability but vacated the judgment as to damages on appeal of denial of 60(b)(6) motion.).

[46] Likewise, in *Stewart v. Hicks*, the court examined the question of whether the trial court could grant defendant relief under Rule 60(b)(8) for "any other reason justifying relief from the operation of the judgment." 395 N.E.2d 308, 313 (Ind. Ct. App. 1979). The court noted the

default entered was proper since defendant failed to answer or appear at the default hearing. *Id.* In considering the issue of setting aside the damage award as an extraordinary relief, the *Stewart* court was mindful of the language in *Green v. Karol*, 344 N.E.2d 106 (Ind. Ct. App. 1976) wherein the court stated:

> The trial court's discretion is considerable. On the one hand, a default judgment plays an important role in the maintenance of an orderly, efficient judicial system as a weapon for enforcing compliance with the rules of procedure and for facilitating the speedy determination of litigation. On the other hand, there is a marked judicial preference for deciding disputes on their merits and for giving parties their day in court, especially in cases involving material issues of fact, *substantial amounts of money*, or weighty policy determinations. The trial court, in its discretion, must balance these factors in light of the circumstances of each case.

Id. (quoting *Green*, 344 N.E.2d 106, 110 (emphasis added)).

[47] The court also recognized the necessity of proof in default proceedings citing the Supreme Court case of *Klapprott v. United States*, 335 U.S. 601 (1949). In that case, the Supreme Court in granting relief under Rule 60(b) explained that, "[p]ersons charged with [a] crime in United States courts cannot be convicted on default judgments unsupported by proof. Even decrees of divorce or *default judgments for money damages where there is any uncertainty as to the amount must ordinarily be supported by actual proof*." *Id.* at 611-12 (emphasis added). Ultimately the court in *Stewart* set aside the damage portion of the default judgment while allowing the initial default on liability to stand.

[48] We are persuaded by the reasoning from the cases above and conclude that in a default context, where the damages claimed by the plaintiff are unliquidated, the trial court must hold a hearing on damages. A challenge to a default judgment as to damages is justified as an extraordinary relief because it is premised on different facts and circumstances--those

surrounding the hearing on damages. Therefore, a defendant may not be precluded from relief under Rule 60(b)(6) as to damages, even if one's culpable conduct led to entry of the default judgment establishing liability.

[49] We also find instructive the cases which have reviewed a punitive damage award under the due process clause to determine if they are grossly excessive. "Procedurally, the Due Process Clause . . . requires that adequate standards and controls be in place to prevent a punitive damage award from becoming an arbitrary deprivation of property." *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 662 (Mo. Ct. App. 1997). The Due Process clause "imposes a substantive limit on the size of punitive damages awards." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420 (1994); *see also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

[50] The Eighth Circuit in *Watkins v. Lundell*, vacated a punitive damage award from a default judgment in light of U.S. Supreme Court pronouncements that the denial of judicial review of punitive damages violates the Due Process Clause. 169 F.3d 540, 545 (8th Cir. 1999) (citing *Honda Motor Co., Ltd. v. Oberg,* 512 U.S. 415, 432 (1994)). The court cited Supreme Court case law which stated:

> The Supreme Court has expressed a profound concern for "unlimited judicial discretion" in fixing punitive damages. To avoid unlimited judicial discretion, the Supreme Court has scrutinized the procedures for reviewing punitive damages as well as the substantive considerations. Procedural and substantive strictures are necessary to ensure that punitive damage awards, which are proxy for punishment and deterrence, comply with constitutional requirements.

Id. at 545 (citations omitted).

[51] In reviewing the punitive damage award, the court applied the factors set forth by the Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and ultimately concluded that exceptional circumstances existed justifying operation of Rule 60(b)(6)[7]. *Id.* at 547.

[52] Even an award entered as a result of a default does not eliminate the need for effective appellate review of punitive damages to ensure it comports with constitutional standards. *Hilgeman v. American Mortgage Sec., Inc.*, 994 P.2d 1030, 1038 (Ariz. Ct. App. 2000). "[S]imply giving the plaintiff what he asks for may not attain that level of judicial discretion which will pass appellate muster." *Id.* (citing *Mayhew v. McDougall,* 491 P.2d 848, 853 (Ariz. Ct. App. 1971). A "hearing on damages must be more than a 'one-sided presentation by the party seeking the default judgment.'" *Id.* (citing *Dungan v. Super. Ct. In and For Pinal County*, 512 P.2d 52, 53 (1973)). Where the record is "inadequate for meaningful evaluation of the constitutionality of a punitive damage award, the award should be set aside." *Id.* (citing *Watkins*, 169 F.3d at 545). "It is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly." *Pope*, 323 U.S. at 12 (1944) (citations omitted).

[7] The dissent did not agree that relief was available under subsection (6) because it believed the district court before entering a default judgment performed an analysis that "comported with due process before it awarded damages." *Id.* at 547. Unlike the court in *Watkins*, the Superior Court did not conduct a hearing on damages. The only evidence in the record was the allegations in Mariano's complaint. The amount of damages however cannot be upheld absent anything in the record to support it. *Hilgeman v. American Mortgage Sec., Inc.*, 994 P.2d 1030, 1037 (Ariz. Ct. App. 2000).

[53] Here, Surla's default did not necessitate awarding the full amount of damages claimed. Rather, Surla's default established his liability to Mariano, and not the extent of the damages. As a result, relief as to damages is warranted under subsection (6). A motion under this subsection must be brought within a reasonable time. A defaulting defendant's motion is brought within a reasonable time when he acts "promptly in seeking relief from the entry of default." *Hilgeman*, 994 P.2d at 1035 (quoting *Richas v. Super. Ct. of Arizona In and For Maricopa County*, 652 P.2d 1035, 1037 (1982). Surla filed his Rule 60(b) motion soon after receiving notice that the default judgment was being enforced in California. There is nothing in the record to establish that the default judgment was mailed to Surla after it was filed. Consequently, the Rule 60(b) motion was filed within a reasonable time.

[54] Surla must also show that he has a meritorious case. Although Surla cannot challenge the liability as it is deemed admitted, Surla's challenge to the damage award has merit because the Superior Court failed to comply with the standards set out in Rule 55(b)(2). Finally, reversal of the damage award is required where substantial injustice would result to the movant. The Superior Court in awarding unliquidated damages should not have merely accepted the allegations in Mariano's unsworn complaint to support the damage award. Failure to conduct an inquiry did not satisfy the Superior Court's obligation to ensure that the damages were appropriate. Substantial injustice would result to Surla because affirming the damage award would confer a punitive damage award three times the amount of the claim and interest in excess of that allowed under the statute when Mariano did not provide any evidence to prove the amount of damages claimed.

[55] A "default judgment must be supported by specific allegations as to the amount of damages asked for in the complaint." *Philip Morris USA Inc. v. Banh*, No. CV 03-4043 GAF (PJWx), 2005 WL 5758392, at *3 (C.D. Cal. Jan. 14, 2005). "A punitive damage claim is not admitted by a default. Neither is punitive damages provided for in Rule 55(b)." *Gallegos v. Franklin,* 547 P.2d 1160, 1167 (N.M. App. 1976) (citations omitted). "[A] plaintiff cannot satisfy the certainty requirement simply by requesting a specific amount." *Applied Capital, Inc. v. Gibson*, No. CIV 05-0098 JB/ACT, 2008 WL 4821336, at *6 (D.N.M. May 28, 2008). Rather, the plaintiff "must also establish that the amount requested is reasonable under the circumstances." *Id.* (quoting *Beck v. Atl. Contracting Co.,* 157 F.R.D. 61, 65 (D. Kan. 1994).

[56] The Superior Court entered a default judgment for $95,000.00, together with punitive damages of $285,000.00 and reasonable attorney fees. The default judgment did not provide a sum certain for the award of attorney fees. The Superior Court did not hold a hearing on damages and the record is void of any affidavits or testimony to support the award. When the default judgment was entered, the court only had the allegations in the unverified complaint which sought an amount of damages sustained by Mariano as a result of Surla's fraud and conversion of funds.

[57] Under Guam law, in an action not arising from a contract, a plaintiff may recover actual damages as well as punitive damages where fraud has been found in order to deter defendant's conduct. 20 GCA § 2120 (2005). In addition, the Superior Court has "the inherent discretionary power to award attorney's fees in accordance with equitable principles in specified circumstances." *Fleming v. Quigley*, 2003 Guam 4 ¶ 32 (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 259 (1975)). Damages however, "must, in all cases, be

reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." 20 GCA § 2281 (2005). Title 20 GCA § 2110 also provides that "[e]very person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him, upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt." 20 GCA § 2110 (2005). The Superior Court also erred in awarding interest from the date of the claim alleged in the complaint, August 2000, not from the date of the judgment as required under the statute. Moreover, there is no evidence upon which to establish a damage award, punitive damages of $285,000,00 three times the amount of the claim, statutory interest, and attorney's fees.

[58] The Superior Court's failure to conduct an inquiry to determine the amount of unliquidated damages with reasonable certainty constitutes reversible error. Mariano was still required to prove up the damages sought in the complaint and extraordinary circumstances exist under Rule 60(b)(6) to justify relief on damages in this case. Vacating the damage award in this case to allow the court to hold a damages hearing will not undermine the validity of the default judgment on the issue of liability. We conclude the Superior Court abused its discretion in awarding damages without conducting an evidence based inquiry to determine the amount of unliquidated damages. Accordingly, we affirm the default judgment as to liability and reverse the damage award.

VI. CONCLUSION

[59] In sum, we find no abuse of discretion in denying the motion under Rule 60(b)(4) because service of the summons and complaint on Surla was adequate and the Superior Court had jurisdiction over Surla. As a result, the default judgment is not void under Rule 60(b)(4). We also find that Surla's culpable conduct led to the entry of the default judgment establishing his liability and therefore, relief under Rule 60(b)(6) as to liability is not appropriate. However, Surla's failure to answer only admitted the allegations of the complaint as to liability and not the entire damage award. The record is void of any evidence to judge whether the damages awarded are reasonable and supported by the evidence. Accordingly, the Superior Court's denial of the Rule 60(b)(6) motion to set aside the default judgment as to liability is **AFFIRMED** in part and **REVERSED** in part, the judgment is **VACATED** only with respect to damages, and the matter is **REMANDED** for an evidentiary hearing to determine damages.

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Chief Justice