IN THE SUPREME COURT OF GUAM

MANU P. MELWANI and
PACIFIC TRI STAR, INC.,
Plaintiffs-Appellees,

v.

RICHARD T. ARNOLD dba
PACIFIC SUPERIOR ENTERPRISES CORP.,
Defendant-Appellant.

Supreme Court Case No.: CVA08-001
(Consolidated with CVA09-007)
Superior Court Case No.: SP0057-07

OPINION

Cite as: 2010 Guam 7

Appeal from the Superior Court of Guam
Argued and submitted on February 10, 2009, and March 11, 2010
Hagåtña, Guam

Appearing for Defendant-Appellant:
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Appearing for Plaintiffs-Appellees:
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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, J.:

[1] This is a consolidated appeal arising out of two actions of the trial court: (1) the judgment confirming an arbitration award, and (2) the denial of a Rule 60(b) motion for relief from default judgment. Plaintiffs-Appellees, Manu P. Melwani and Pacific Tri Star, Inc., (collectively "Melwani"), and Defendant-Appellant, Richard T. Arnold dba Pacific Superior Enterprises Corp. ("Arnold"), entered into a business agreement, which provided that they would arbitrate disputes regarding the terms of their agreement. After disputes had arisen, the parties entered into arbitration proceedings, with the arbitrator finding in favor of Melwani. Melwani thereafter applied to the trial court for an order confirming the arbitrator's award. Arnold failed to appear at the hearing on Melwani's motion to confirm the arbitration award. After inquiring into whether there had been notice of the hearing, and being satisfied that notice had been given, the trial court granted the motion and issued its judgment confirming the arbitrator's award in its entirety. Arnold timely appealed this judgment. Nearly one year after the judgment had been entered, Arnold filed with the trial court a motion for relief from that judgment, which the trial court denied. Arnold timely appealed that denial. This court consolidated the two appeals. For the reasons discussed herein, we hold that the trial court did not err in confirming the arbitration award and did not err in denying Arnold's motion for relief. We therefore affirm the judgments of the trial court.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Arnold and Melwani had a history of business relations with each other, whereby Melwani would "put up personal funds as bond money" for various construction projects on

which Arnold would bid. *See* 1994 Agreement ("Agreement"), Appellant's Excerpts of Record ("ER") at 18 (June 10, 1994). Arnold's ability to bid on certain construction projects was dependent on Melwani's willingness to provide financial assistance. *Id.* In an attempt to document their respective roles in this relationship, Arnold and Melwani reduced their understanding to writing, resulting in the Agreement dated June 10, 1994. *Id.* As part of this Agreement, the parties were to arbitrate any disputes arising from the Agreement, except for disputes regarding mathematical computation of any profits. *Id.* at 18(A). Arnold and Melwani further agreed that, in any potential arbitration, the rules and regulations of the American Arbitration Association shall apply, and that both parties would be bound by an award rendered pursuant to such arbitration. *Id.* at 20.

[3] At some point after the parties entered into this Agreement, there was a dispute between Arnold and Melwani regarding the terms of the Agreement and what monies were due to Melwani.[1] Eventually, Arnold and Melwani submitted their dispute to arbitration. At an arbitration proceeding that took place in February 2007, Melwani was represented by Attorney Robert Kutz and Arnold appeared *pro se*. ER at 29 (Arbitrator's Award, Mar. 28, 2007). The arbitrator issued his decision, the Reasoned Award of the Arbitrator, finding for Melwani. *Id.* at 29-33. The arbitrator awarded Melwani $416,098.00 (including interest). *Id.* at 29.

[4] On April 20, 2007, Melwani filed a notice of motion and motion for order confirming the arbitrator's award, along with a memorandum of points and authorities. Certified Docket Sheet ("CDS") at 1-2 (Jan. 26, 2009); Appellee's Supplemental Excerpts of Record ("SER") at 1-3

[1] The events that unfolded subsequent to the execution of the Agreement were the subject of other court cases, both in the Superior Court and in the Supreme Court. The details of those disputes and case matters are not pertinent to the issues presently before this court. The only case relevant to the instant appeal is Superior Court Case No. SP0057-07 concerning Melwani's application to confirm the arbitrator's award and motion for relief from default judgment.

(Not. of Mot. & Mot. to Confirm, Apr. 20, 2007). A copy of this notice and motion was mailed to Arnold via United States Postal Service (USPS) certified mail to a post office box in Inarajan, Guam, known to be Arnold's address. A return receipt indicates that Arnold received and signed for the documents on April 27, 2007. SER at 5-6 (Supp. Decl. of Serv., Dec. 5, 2007). The space for the hearing date and time was left blank on this particular filing. SER at 1 (Not. of Mot. & Mot. to Confirm).

[5] On May 16, 2007, Arnold filed *pro se* a request for trial de novo. CDS at 2. On June 13, 2007, Melwani re-filed the same notice originally filed on April 20, 2007, this time bearing the assigned hearing date and time – December 5, 2007, at 1:30 p.m.. SER at 4 (Not. of Application). On June 22, 2007, Natalie Scribner, an assistant to Attorney Kutz, mailed a copy of this notice, with the date and time of hearing, to the same Inarajan, Guam, post office box at which Arnold had signed for the previously-sent documents on April 27, 2007. SER at 7-10 (Amended Decl. of Serv., Dec. 5, 2007). Unlike the April documents, the June documents were sent via regular mail and not certified mail. As such, there is no return receipt indicating that Arnold actually received this mailing. However, according to Scribner's declaration, the June documents were not returned by USPS as undeliverable. *Id.*

[6] On June 29, 2007, Attorney Wilson Quinley filed a motion to vacate the arbitrator's award. This motion, however, was not filed under Superior Court Case SP0057-07, which is the relevant case concerning the arbitration award, but was filed under a separate civil case number, CV0887-96, and only listed SP0057-07 as a related case. Although we might assume that this was filed on behalf of Arnold, this motion is not a part of the record on appeal, as the original and all copies were returned to Attorney Quinley for being non-compliant with the civil

procedure rules. CDS at 3. The docket entries do not indicate that Attorney Quinley ever attempted to re-file the motion or that he filed a notice of entry of appearance in SP0057-07.

[7] At the December 5, 2007, hearing, Arnold did not appear, nor did any attorney appear on his behalf. The trial court inquired into whether Arnold had been duly noticed of the hearing. Transcripts ("Tr.") at 3-8 (Plaintiff's Mot. to Affirm Arbitrator[']s Award, Apr. 24, 2008). Being satisfied that Arnold had received notice, the trial court granted the motion to confirm the arbitrator's award. Tr. at 6; SER at 11-12 (Dec. & Order, Dec. 11, 2007). Judgment confirming the arbitration award was entered on the docket, and Arnold timely filed a notice of appeal.

[8] After the filing of the notice of appeal, Arnold, through Attorney Quinley, filed a motion in the trial court to set aside the default judgment pursuant to Rule 60(b) of the Guam Rules of Civil Procedure (GRCP) on December 10, 2008 – just prior to the expiration of time to seek Rule 60(b) relief. *See* Guam R. Civ. P. 60(b) ("The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."). The trial court denied the Rule 60(b) motion. *See* Dec. & Order (Mar. 2, 2009). Arnold then filed a new notice of appeal under Supreme Court Case No. CVA09-007, appealing the trial court's denial of his Rule 60(b) motion. The appellate cases of CVA08-001 and CVA09-007 were eventually consolidated under CVA08-001. *See* Order (Sept. 15, 2009). This court also ordered a limited remand of the matter to the trial court in order to give the trial court an opportunity to clarify its reasons for denying Arnold's motion for Rule 60(b) relief, as it was unclear whether the initial decision and order denying the Rule 60(b) motion was based on the trial court's belief that the motion was meritless or its belief that it lacked jurisdiction to entertain the motion. *See* Order, CVA08-001, July 16, 2009.

[9] The trial court thereafter issued another decision and order clarifying that its denial of Arnold's Rule 60(b) motion was based on its finding that the motion was "insufficient and without merit," whereupon the appellate proceedings resumed. *See* Dec. & Order re July 16, 2009 Remand Order (Aug. 3, 2009). Arnold, in the same motion wherein he sought Rule 60(b) relief, also sought the return of interpleader monies taken from a separate Superior Court case (CV0887-96), which was denied by the trial court for being insufficiently pled and not in compliance with the GRCP. However, Arnold only appeals the denial of Rule 60(b) relief. *See* Not. of Appeal (Apr. 1, 2009) ("This appeal only covers the 60(b) portion of the decision and order. The motion for return of monies will be renewed in the Superior Court and is not part of this appeal.").

II. JURISDICTION

[10] This court has jurisdiction over an appeal from a final judgment of the Superior Court pursuant to 48 U.S.C. § 1424-1(a)(2) (Westlaw through Pub. L. 110-207 (2008)); 7 GCA §§ 3107 (b), 3108 (a) (2005).

III. STANDARD OF REVIEW

[11] This court previously stated in *Government of Guam v. Pacificare Health Ins. Co. of Micronesia* that "[in] light of the strong federal policy favoring arbitration, '[j]udicial review of an arbitration award is extraordinarily narrow.'" 2004 Guam 17 ¶ 16 (quotation omitted). Clarifying the standards of review, the court stated:

> In *Sumitomo Construction Co. v. Zhong Ye, Inc.*, 1997 Guam 8, this court stated that "[w]hen reviewing the decision of a lower court confirming an arbitration award, questions of law are reviewed de novo while questions of fact are reviewed under the clearly erroneous standard." *Id.* at ¶ 9 (citing *First Option of Chicago, Inc., v. Kaplan*, 514 U.S. 938 (1995)). The Sumitomo court further held that "[t]hese same standards apply to the trial court's review of the arbitrator's award." *Id.* (citing *Carpenters Pension Trust v. Underground Construction Co.*,

> 31 F.3d 776 (9th Cir.1994)). This latter pronouncement relates to the question of the standards applicable to the lower court in reviewing the arbitrators' award. We do not interpret this pronouncement in *Sumitomo* as indicating that arbitration awards may be reviewed freely under the *de novo* and clearly erroneous standards without regard to the well- established policy considerations favoring arbitration.

Pacificare, 2004 Guam 17 ¶ 16. Therefore, this court will review questions of law in the trial court's judgment *de novo*, and questions of fact for clear error. "A finding of fact is 'clearly erroneous' if 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Macris v. Swavely*, 2008 Guam 18 ¶ 9 (quoting *Fargo Pac., Inc. v. Korando Corp.,* 2006 Guam 22 ¶ 22). Under this standard, the reviewing court must give the successful party the benefit of all reasonable inferences to be drawn from the evidence, and must not simply substitute its own judgment for that of the trial court. *Macris*, 2008 Guam 18 ¶ 9. To be clear, however, an appellate court reviewing a trial court's judgment confirming an arbitration award does not conduct an independent review of the arbitration award itself. *See Pacificare*, 2004 Guam 17 ¶ 16 (citing *Automated Tracking Sys., Inc. v. Great Am. Ins. Co.*, 719 N.E.2d 1036, 1041 n.2 (Ohio Ct. App. 1998) ("While we will review the trial court's order vacating the arbitrators' award *de novo,* . . . we decline to review the arbitrators' award itself *de novo.*").[2]

[12] A trial court's denial of a Rule 60(b) motion is reviewed for an abuse of discretion, giving "broad latitude to trial courts." *Duenas v. Brady*, 2008 Guam 27 ¶ 9 (quoting *Midsea Indus., Inc. v. HK Eng'g Ltd.*, 1998 Guam 14 ¶ 4). A trial court's decision will not be reversed "unless we have a 'definite and firm conviction that the court below committed a clear error of

[2] The Guam Rules of Appellate procedure (GRAP) specifically state that the appellant's brief must contain "for each issue, a concise statement of the applicable standard of review." Guam R. App. P. 13(a)(9)(B). Appellee's brief need not state the standard of review for the various issues "unless the appellee is dissatisfied with the appellant's statement." GRAP 13(b)(5). In this case, neither party articulated a "standard of review" in its brief in the original case of CVA08-001 prior to consolidation.

judgment in the conclusion it reached upon weighing of the relevant factors.'" *Mariano v. Surla*, 2010 Guam 2 ¶ 7 (quoting *Midsea*, 1998 Guam 4 ¶ 4). "A trial court abuses its discretion when its 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." *Town House Dep't Stores, Inc., v. Ahn*, 2003 Guam 6 ¶ 27.

IV. DISCUSSION

A. Notice to Arnold of Hearing to Confirm Arbitrator's Award.

[13] Arnold argues on appeal that the trial court erred in issuing its judgment confirming the arbitrator's award because neither he nor his attorney, Wilson Quinley, received notice of the hearing. He further posits that, based on the motion to vacate the arbitrator's award in the underlying case, which Attorney Quinley filed on June 29, 2007 (though under a different case number), and which the Superior Court clerk's office later returned to Attorney Quinley, the trial court should have known that Arnold opposed Melwani's motion and that he or his attorney would have appeared at the December 5, 2007 hearing to oppose the motion had they received notice of the hearing. Appellant's Br. at 10 (Sept. 30, 2008).

[14] The trial court's finding that Melwani complied with the notice requirements of the GRCP is a question of fact, and thus reviewed under the clearly erroneous standard. *See Guam Pac. Ent., Inc., v. Guam Poresia Corp.*, 2007 Guam 22 ¶ 18 ("Whether the notice requirement has been satisfied under the lien statute is a question of fact for the court to determine from the evidence before it.") (citing *English v. Olympic Auditorium Inc.*, 20 P.2d 946, 948-49 (Cal. 1933)); *McComb v. Aboelessad*, 535 N.W.2d 744, 747 (N.D. 1995) ("Sufficiency of service is a fact question that will not be reversed on appeal unless clearly erroneous."); *compare Guam Hous. & Urban Renewal Auth. v. Dongbu Ins. Co., Ltd.*, 2001 Guam 24 ¶ 22 ("[S]ufficiency of

compliance with the notice provision, justification for non-compliance, and diligence are questions of fact . . . ."); *King v. C.I.R.*, 857 F.2d 676, 679 (9th Cir. 1988) ("Here, the 'last known address' inquiry requires an examination of the totality of the circumstances and a balancing of many relevant factual elements, factors which indicate that the inquiry is 'essentially factual.' We therefore conclude that clearly erroneous review is appropriate.").

[15] The record before this court indicates that a copy of the notice of motion and motion to confirm the arbitrator's award filed on April 20, 2007, with no hearing date indicated, was mailed to Arnold via USPS certified mail to a post office box in Inarajan, Guam. The return receipt (green card) bearing Arnold's signature indicates that Arnold personally received and signed for the documents on April 27, 2007. SER 5-6 (Supp. Decl. of Serv., Dec. 5, 2007). On June 13, 2007, presumably after the Superior Court set the hearing date and time for the motion filed in April, the notice was re-filed, this time bearing the date on which the motion would be heard. Natalie Scribner filed an amended declaration of service, certifying that she mailed the documents filed on June 13, 2007 to Arnold at the same address in Inarajan, Guam, where Arnold had received and signed for the earlier documents on April 27, 2007, and that these documents sent in June were not returned by USPS as undeliverable. As stated previously, this mailing was not certified, so there is no return receipt indicating that Arnold actually received the June documents.

[16] The Guam International Arbitration Chapter of the code of civil procedure states that notice of applications to confirm an arbitrator's award shall be served on opposing parties pursuant to the applicable laws for service of notice of motion in an action in the same court. 7 GCA § 42702(b) (2005). Rule 5(b) of the GRCP prescribes the method for service of notice in actions in the Superior Court, and states in relevant part that: (1) service on a party *represented*

by an attorney is made on the attorney unless the court orders service on the party; and (2) service by mail is made by mailing a copy to the last know address of the person served, and is *complete upon mailing*. GRCP 5(b)(1), (2)(B) (emphases added). Nothing in the rule requires that service by mail be accomplished by certified mail.

1. Melwani was not required to serve Attorney Quinley with Notice in SP0057-07.

[17] In this case, the docket in Superior Court Case No. SP0057-07 states that Arnold was self-represented. CDS at 1. Furthermore, during the arbitration proceedings that led to the commencement of the special proceedings case to confirm the arbitrator's award, Arnold again appeared *pro se*. ER at 29 (Arbitrator's Award, Mar. 28, 2007). A review of the docket reveals that Attorney Quinley never filed a notice of entry of appearance for the special proceedings case. In fact, on May 16, 2007, after Arnold had personally received a copy of Melwani's notice of motion to confirm the arbitrator's award, Arnold filed on his own behalf a request for trial de novo. CDS at 1. While it is true that Attorney Quinley did file a motion to vacate the arbitrator's award on June 29, 2007, (albeit in a different civil case), nothing else indicates that Arnold was in fact represented by an attorney in SP0057-07. Moreover, this motion was filed *after* service by mail was already effected on Arnold on June 22, 2007. Prior to the June mailing, there was no indication that Attorney Quinley was involved in this case.[3]

[3] Counsel for Melwani, Attorney Kutz, stated to the court at oral argument on this matter that he was never served by Attorney Quinley with the motion to vacate the arbitrator's award in SP0057-07, and was therefore not aware that Attorney Quinley represented Arnold in any post-arbitration proceedings. *See* Digital Recording at 2:27:00-2:29:00 (Oral Argument, Feb. 10, 2009). Although Attorney Quinley stated to the court at oral argument that he had served Attorney Kutz with the motion (*see* Digital Recording at 2:06:24-2:07:17 (Oral Argument, Feb. 10, 2009)), the docket in SP0057-07 shows that Attorney Quinley's declaration of service states that he served Attorney Larry Teker with the motion. CDS at 2. Attorney Teker was counsel for Melwani in a different Superior Court case (CV0887-96). Therefore, Attorney Quinley's representation to the court that opposing counsel was served in the underlying case was, at best, disingenuous.

[18] Because it does not appear that Arnold was represented by an attorney at the time service was effected, pursuant to GRCP 5(b)(1), service in that case did not need to be made on Attorney Quinley or any other attorney. All indications were that Arnold was self-represented in that matter, and therefore, service on Arnold himself was proper.

2. The trial court did not err in finding that Arnold received notice of the hearing.

[19] Per GRCP 5(b)(2)(B), service on Arnold by mail was complete on mailing. The trial court spent time at the December 5, 2007 hearing discussing the service and notice issue. Based on the fact that the Inarajan, Guam, post office box was known to be a good address, as Arnold had signed for mail to that address as recently as April 27, 2007, and further based on the declarations filed by Attorney Kutz and Natalie Scribner certifying that they sent copies of the notice of hearing date to that same Inarajan, Guam, address, the trial court was satisfied that Arnold had been duly noticed of the hearing before entering judgment against him. Tr. at 3-8 (Plaintiff's Mot. to Affirm Arbitrator[']s Award, Apr. 24, 2008); *Compare Joshi v. Ashcroft*, 389 F.3d 732 (7th Cir. 2004), in which the court held that proof of attempted delivery to an alien's last known address was sufficient to prove service by mail and notice in deportation proceedings. *Id.* at 736.

[20] GRCP 5(b) is modeled after the Federal Rules of Civil Procedure (FRCP). *See Seaview Terrace v. Diaz*, 1992 WL 365805, at *2 (D. Guam App. Div. Apr. 16, 1992) ("The Guam Rules of Civil Procedure have been adapted from the Federal Rules of Civil Procedure."). Discussing what has been termed the "mailbox rule," federal courts have stated that proper mailing of a document raises a rebuttable presumption that the document was timely received by the addressee. *See Lewis v. United States*, 144 F.3d 1220, 1222 (9th Cir. 1998); *see also Automated Facilities, Inc., v. Am. Auto-Matrix, Inc.*, No. 93 C 3322, 1995 WL 584330, at *1 (N.D. Ill. Oct.

2, 1995) ("The certificate of service indicates that plaintiff mailed a copy of the Motion for Reconsideration to defendant on December 21, 1994, which is accordingly the date of service of the motion, see FRCP 5(b) . . . ."); *Agravante v. Japan Airlines Int'l Co., Ltd.*, No. CIV 04-00036, 2006 WL 3329689, at *4 (D. Guam Nov. 15, 2006). Moreover, Arnold's claim that he did not receive notice is alone insufficient to rebut the presumption. *Compare In re Bucknum*, 951 F.2d 204, 205-07 (9th Cir. 1991) (finding in the context of bankruptcy proceedings that "[i]f a party were permitted to defeat the presumption of receipt of notice resulting from the certificate of mailing by a simple affidavit to the contrary, the scheme of deadlines and bar dates under the Bankruptcy Code would come unraveled."). Without more, Arnold failed to rebut the presumption.

[21] Based on the presumption that mail properly sent to an address known to be correct, and not returned to the sender as undeliverable, we are not "left with the definite and firm conviction that a mistake has been committed." *Macris v. Swavely*, 2008 Guam 18 ¶ 9 (citation and internal quotations marks omitted). Therefore, the trial court's finding that service of the notice of hearing had been completed was not clearly erroneous.

B. Issues Raised for the First Time on Appeal.

[22] Arnold further urges this court to reverse the trial court's judgment confirming the arbitrator's award based in part on Melwani's purported failure to follow the Superior Court's civil rules by not contacting Arnold to agree on a hearing date.[4] Arnold never sought relief in the Superior Court prior to filing the original notice of appeal in the instant case, and thus, never

[4] Arnold refers to the current Local Rules of the Superior Court of Guam, Civil Rules ("CVR"), regarding oral argument on motions, which provides that: "It shall be the responsibility of the moving party or his attorney to contact the attorney for each party who has entered an appearance, or if the party(ies) are pro se, it is the moving party's responsibility to contact the pro se party and propose a date for oral argument. Once the parties have agreed on a date for oral argument, the moving party shall clear the date with the chambers clerk." CVR 7.1(e)(2) (promulgated in PRM06-006-02 and effective June 1, 2007).

raised this issue prior to this appeal. Moreover, this issue was similarly not raised by Arnold in the Rule 60(b) motion that he eventually did file. Thus, this issue is raised for the first time on appeal.

[23] In addition, Arnold argues that the trial court erred in issuing the judgment confirming the arbitration award because the provisions of 11 GCA § 70130(d) (1994)[5] and/or the doctrines of judicial estoppel and law of the case preclude Melwani from seeking judicial enforcement of his rights under the Agreement because he did not possess an appropriate business license at the time of the Agreement. This argument was also not raised in the trial court in SP0057-007 within the context of the motion to confirm the arbitration award. Arnold, through Attorney Quinley, tried to raise the lack of a business license argument in a motion to vacate the arbitrator's award. As stated earlier, the pleadings were rejected by the Superior Court clerk's office for non-conformance with certain court rules. Attorney Quinley never re-filed the motion to vacate. The argument was therefore only brought before the trial court within the context of Arnold's eventual Rule 60(b) motion. Because, prior to bringing it before this court in the original appeal, this argument was not put before the trial court relative to Melwani's motion to confirm the arbitration award, it is considered raised for the first time on appeal within the context of the judgment confirming the arbitration award.

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[5] Guam's business license law, Title 11 GCA Chapter 70 (1994), states in relevant part:

> (d) no commercial activity (including operating or leasing of real property) doing business on Guam without a business license may file suit in Guam courts until such time that a business license is obtained. No person engaged in commercial activity without a business license may use the courts to enforce, directly or indirectly, any obligation, lien, or contract incurred during the period of such commercial activity without a business license;

11 GCA § 70130(d) (1994). Arnold argues that Melwani did not have a business license to lend money at the time of the Agreement, and thus cannot use the courts to enforce his rights under the Agreement.

[24] "As a general rule, this court will not address arguments raised for the first time on appeal." *Dumaliang v. Silan*, 2000 Guam 24 ¶ 12 (citation omitted). However, departing from this rule is within the court's discretion. *Id.* at n.1. Instances where this court might opt to exercise its discretion and address an argument raised for the first time on appeal are: "(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." *Id.* We find none of these exceptions applies in this case and thus decline to deviate from our general rule. We will therefore not entertain these arguments.[6]

[6] In support of his original appeal of the judgment confirming the arbitration award, Arnold included as part of his excerpts of record a Certified Letter from Revenue and Taxation re Melwani Licenses, purporting to establish that Melwani did not possess an appropriate business license. This document was not previously part of the Superior Court record in the underlying case, but was only raised in the Superior Court as an exhibit or attachment to Arnold's Rule 60(b) motion. Therefore, within the context of the appeal of the judgment confirming the arbitration award, it is not part of the record on appeal.

Rule 7 of the Guam Rules of Appellate Procedure ("GRAP") states that the following shall constitute the record on appeal: (1) original papers and exhibits filed in the Superior Court; (2) transcript of proceedings, if any; (3) a certified copy of the docket entries prepared by the Superior Court. Guam R. App. P. 7(a). Generally, an appellate court will not consider facts that are not part of the record on appeal.

Rule 10 of the Federal Rules of Civil Procedure, defining what constitutes the record on appeal, is substantially similar to GRAP 7. Federal courts interpreting that rule have held that appellate courts would not consider material on appeal that is not part of the district court's record. *See, e.g*, *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts,* 913 F.2d 89, 96 (3rd Cir. 1990); *Landy v. Federal Deposit Ins. Corp.*, 486 F.2d 139, 150 (3rd Cir. 1973) ("Normally, the court of appeals will consider only the record and facts considered in the district court."), *cert. denied*, 416 U.S. 960 (1973); *Kemlon Prods. & Dev. Co. v. United States*, 646 F.2d 223, 224 (5th Cir. 1981) ("A court of appeals will not ordinarily enlarge the record on appeal to include material not before the district court.") (citing *Salama v. Va.*, 605 F.2d 1329 (4th Cir.1979)); *Drexel v. Union Prescription Ctrs, Inc.*, 582 F.2d 781, 784 n.4 (3rd Cir. 1978). Consequently, "[p]apers not filed with the district court or admitted into evidence by that court are not part of the record on appeal." *Barcamerica Int'l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 594 (9th Cir. 2002) (quoting *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988)); *cf. Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291,296 (5th Cir. 1987) (acknowledging that when evidence sought to be introduced on appeal "was presented to the district court, although not properly filed, this court may, in its discretion, consider the evidence.").

In accordance with GRAP 7(a), as well as the case law surrounding the interpretation of its federal counterpart, this court cannot, in the context in which the business license argument was raised in the appeal of the judgment confirming the arbitration award, consider the Certified Letter from the Department of Revenue and Taxation ("DRT"). The DRT letter was not part of the record in the Superior Court relative to the motion to confirm the arbitration award and is thus not properly before this court in the context in which it was originally submitted.

C. Rule 60(b) Relief.

[25] In his motion seeking relief from default judgment confirming the arbitration award, Arnold asserts much of the same arguments that he proffered in the original appellate case of CVA08-001 prior to consolidation – *i.e.*, that there was inadequate notice to Arnold and/or Attorney Quinley of the hearing to confirm the arbitration award, that Arnold's motion to vacate the arbitration award filed by Attorney Quinley prior to the hearing to confirm the award should have been treated by the trial court as an opposition to the motion to confirm the award, and that Melwani lacked a proper business license, thus preventing him from using the court to enforce the Agreement.

[26] Arnold seeks relief specifically pursuant to GRCP Rule 60(b)(1), which states:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]

GRCP Rule 60(b)(1).

[27] This court has previously set out the factors for determining whether a party is entitled to relief from default judgment. "A court will deny a motion to set aside a default judgment if it is shown that (1) the 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 (citations omitted). "A finding of *but one* of the three elements is sufficient to deny vacation of a default judgment." *Id.* (citation omitted) (emphasis added).

[28] In his brief regarding this issue on appeal – whether the trial court erred in denying the Rule 60(b) motion – Arnold essentially presents the same arguments as he did in his original

brief.[7] Arnold asserts that he had no culpable conduct leading to the default, which is the first of the *Midsea* factors, because neither he nor Attorney Quinley had notice of the hearing. Arnold argues on appeal that the trial court *should have known* that Arnold would have appeared and objected to confirming the arbitration award because of the protracted litigation between the parties in other Superior Court and Supreme Court cases, and therefore should have ordered Melwani to reissue a second notice or should have rescheduled the hearing on the matter when neither Arnold nor Attorney Quinley appeared at the hearing. *See* Appellant's Br. (Consol. Appeal) at 5-6 (Oct. 29, 2009). Generally, an appeal from the denial of a Rule 60(b) motion does not reach the merits of the underlying judgment for review. *Browder v. Director, Dep't of Corr. of Ill.*, 434 U.S. 257, 263 n.7 (1978); *accord Parkland Dev. Inc. v. Anderson*, 2000 Guam 8 ¶ 5; *Harman v. Harper*, 7 F.3d 1455, 1458 (9th Cir. 1993); *Kerrigan v. Gill*, No. CV95-00072A, 1996 WL 104517, at *4 (D. Guam App. Div. Mar. 6, 1996).

[29] In this case, because Arnold previously appealed the underlying judgment, which was the subject of the original proceedings in CVA08-001, this court has had the opportunity to review and address the judgment confirming the arbitration award. However, that evaluation does not alter the scope of the court's review of the denial of the Rule 60(b) motion, which is whether the trial court abused its discretion in denying Arnold relief from default judgment.

[30] There was adequate notice to Arnold of the hearing, and there was no requirement that Attorney Quinley be served with notice as he never participated in the arbitration proceedings and never entered an appearance in SP0057-07. Moreover, during the hearing on Arnold's Rule

[7] Although Arnold filed a new Excerpts of Record to accompany his brief on the Rule 60(b) issue, the "new" excerpts are identical to the excerpts originally filed, containing the very same documents. *Compare* Excerpts filed Sept. 30, 2008, and Excerpts filed Oct. 29, 2009. In fact, Arnold did not include as part of the "new" Excerpts of Record his Rule 60(b) motion or the trial court's orders of denial – the very documents that form the basis of this issue on appeal. Access to the motion and to the trial court's decision and order come to us by way of the certified Superior Court docket, which constitutes the record on appeal.

60(b) motion, the trial court questioned Attorney Quinley specifically about why he should have been given notice when he was not counsel in the arbitration. Tr. at 3, 5 (Mot. for Relief from J., May 12, 2009). Furthermore, in its March 2, 2009, decision and order, the trial court reiterated its basis for finding adequate notice of the hearing to confirm the arbitration award. The trial court stated:

> The Defendant was not present at the hearing and had not filed a memorandum in opposition to the application. The court inquired about the sufficiency of Plaintiffs' notice to the Defendant and ordered Plaintiffs provide the court with a supplemental declaration, indicating the manner of service made upon Defendant. On December 5, 2007, Plaintiffs provided through supplemental declaration, the original certified mail receipt, of the Notice of Application for Order Confirming Arbitrator's Award, signed by Defendant Richard T. Arnold on April 27, 2007. After reviewing the receipt of notice and the pleadings of the Plaintiff, the court, on December 11, 2007, confirmed the Arbitrator's award.

See Dec. & Order (Mar. 2, 2009).

[31] The trial court therefore made the appropriate inquiry and ultimately found Arnold was adequately noticed of the proceedings and that he failed to appear or to file an objection. "A defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and failed to answer." *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992). Because the trial court was within its discretion in finding that Arnold was adequately noticed, Arnold's failure to appear or to oppose Melwani's motion does not constitute mistake, inadvertence, or excusable neglect as contemplated in Rule 60(b)(1).

[32] Arnold further asserts that the trial court erred in denying his Rule 60(b) motion because Arnold has "numerous meritorious defenses," going to the second of the *Midsea* factors. *See* Appellant's Br. at 13. Arnold presents as an example of these "numerous meritorious defenses" his claim that Melwani lacked a proper business license to lend money, thus precluding him from enforcing the Agreement in court. *Id.* at 13, 17. Again, when reviewing the trial court's denial

of the Rule 60(b) motion, this court reviews the denial solely for an abuse of discretion, with broad latitude given to trial courts in ruling on Rule 60(b) matters. *Duenas v. Brady*, 2008 Guam 27 ¶ 9 (quoting *Midsea*, 1998 Guam 14 ¶ 4).

[33] At the hearing on the Rule 60(b) motion and in its subsequent decisions and orders, the trial court did not specifically address the business license issue, focusing primarily on the adequacy of notice for the hearing at which Arnold failed to appear, resulting in the default judgment confirming the arbitration award. Therefore, there is little for this court to review relative to the business license argument. However, this court's pronouncement in *Midsea* that "[a] finding of but one of the three elements is sufficient to deny vacation of a default judgment," *Midsea*, 1998 Guam 14 ¶ 5, supports the conclusion that the trial court did not abuse its discretion in denying Rule 60(b) relief based only upon a finding of culpable conduct on the part of Arnold – *i.e.*, failing to appear or oppose Melwani's motion to confirm the arbitration award when he had been properly and adequately noticed of the motion and the hearing.

[34] "A finding that the defendant's culpable conduct prompted the default is sufficient to uphold the ruling and whether the defendant had a meritorious defense or whether the plaintiff would be prejudiced need not be considered." *Polymer Plastics Co. v. AME Matex Corp.*, No. CIV 96-00042A, 1996 WL 875783, at *1 (D. Guam Oct. 7, 1996) (emphasis added); *accord Meadows v. Dominican Republic*, 817 F.2d 517, 522 (9th Cir. 1987). We find that the trial court did not abuse its discretion in finding Arnold culpable in the default on grounds of notice and failure to appear or to object. Because the *Midsea* test is disjunctive in nature, a finding that Arnold's culpable conduct led to the entry of the default judgment is sufficient to deny vacation without the need for this court to reach the remaining *Midsea* factors of meritorious defense or

prejudice to the plaintiff. *See Mariano*, 2010 Guam 2 ¶ 37 (citing *Duenas*, 2008 Guam 27 ¶ 17, 27).

V. CONCLUSION

[35] We hold that the trial court did not err in finding that Arnold was properly noticed of the hearing on Melwani's motion to confirm the arbitrator's award, to which motion he failed to object and at which hearing he failed to appear. We further hold that the trial court did not abuse its discretion in denying Arnold's motion to set aside the default judgment. We need not reach the remaining arguments Arnold raises.

[36] Accordingly, the decisions of the trial court confirming the arbitrator's award and denying Arnold Rule 60(b) relief are hereby **AFFIRMED**.

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