

SYSCO FOOD SERVS. V. RMT ENTERS

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**SYSCO FOOD SERVICES OF
NEW MEXICO, LLC, a Delaware
limited liability company,**
Plaintiff-Appellee,

v.

**RMT ENTERPRISES, INC.,
a New Mexico corporation d/b/a
Balloon Fiesta - Chili Willie's
and TOM CONTRERAS,**
Defendants-Appellants.

NO. 29,626

COURT OF APPEALS OF NEW MEXICO

December 2, 2009

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Valerie A.
Huling, District Judge

COUNSEL

Spann, Hyer, Hollowwa & Artley, James A. Artley, Albuquerque, NM, for Appellee

Tom Contreras, Albuquerque, NM, Pro Se Appellant

JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: MICHAEL D. BUSTAMANTE, Judge,
RODERICK T. KENNEDY, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

Defendants are appealing from a district court default judgment. The default judgment was entered on May 27, 2009. [RP 31] Defendants did not file a motion to set aside the default judgment pursuant to Rule 1-055(C) NMRA. Instead, Defendants filed a notice of appeal on June 1, 2009. [RP 34] However, motions to set aside a default judgment must be made in the first instance with the district court, and rulings on these motions are thereafter reviewed by the appellate courts for an abuse of discretion. See generally *Springer Corp. v. Herrera*, 85 N.M. 201, 202, 510 P.2d 1072, 1073 (1973), *overruled on other grounds by Sunwest Bank of Albuquerque v. Roderiguez*, 108 N.M. 211, 214, 770 P.2d 533, 536 (1989). Because Defendants did not file a motion in the district court to set aside the default judgment, we have no factual basis to reach their claim. Matters not of record cannot be reviewed on appeal. See *State v. Martin*, 101 N.M. 595, 603, 686 P.2d 937, 945 (1984). Accordingly, our calendar notice proposed to remand to the district court to consider the merits of Defendants' attempt to set aside the default judgment and to dismiss the appeal. No memorandum in opposition has been filed, and the time for doing so has expired. See Rule 12-210(D)(3) NMRA. Accordingly, we dismiss the appeal and remand this matter to the district court.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

RODERICK T. KENNEDY, Judge