Hagerstown, Maryland to be closer to his children and parents. Upon moving to Hagerstown, he was unable to secure a position in the field of electronics. The record does indicate that Lloyd did use reasonable efforts when searching for employment. However, no job openings existed in the Hagerstown area in his field. Therefore, he had to take a job paying $200 a week as a press operator. Granted, Lloyd is not working up to his earning capacity, but he did make reasonable efforts to find employment commmensurate with his abilities. Natural economic factors dictate that Lloyd will continue searching for employment in the field of electronics since this area of employment offers a greater salary. The amount of child support is simply a percentage of the party's earnings. If Lloyd earns a greater income, he, as well as the children, would benefit.

Furthermore, there is no indication in the evidence before the court that Lloyd left his job in California so as to effect his children's right to support. Therefore, Lloyd should be granted a reduction in his child support obligation. If the court was to hold otherwise it would effectuate an involuntary servitude on Lloyd. Lloyd's freedom to move closer to his children would be limited by his financial obligations owed to his children. This court refuses to support this policy. Instead, the court feels the children would benefit more by their fathers presence.

Considering all the evidence, the court holds that Lloyd Coffman is entitled to a modification in his support order. However, if in the future, Lloyd obtains employment in the field of electronics and earns a greater income, the support order may be modified once again.

ORDER OF COURT

July 2, 1991, the petition to modify the support order is granted, and the Franklin County Domestic Relations' Office is directed to schedule a support conference. The hearing officer shall determine the support order on the basis of the defendant's present earnings.

MARYLAND NATIONAL BANK V. GIBBLE, C.P. Franklin County Branch, No. DSB 1988-734

Motion to Strike - Petition to Open Judgment

1. A motion to strike a judgment is filed when the judgment is entered for items not included in the contract.
2. A petition to open a judgment is filed when an alleged defect in a confessed judgment is based on a matter outside the record.
3. Where a defendant waits thirteen months to petition to open judgment, he has not acted promptly and may not have his judgment opened.
4. Ongoing negotiations after the entry of judgment is not an excuse for delay of petition to open.

Anthony Stefanon, Esq., Attorney for Plaintiff
Eric L. Brossman, Esq., Attorney for Defendant

OPINION AND ORDER

Keller, P.J., June 25, 1991:

The inception of this litigation was the filing of a complaint for confession of judgment by Maryland National Bank, plaintiff, against Darrel R. Gibble, defendant, on November 23, 1988. Judgment was entered in the amount of $445,600 which included the principal amount of $380,000, accrued and unpaid interest to November 22, 1988 of $8,600, and attorney fees of $57,000. The required notice of entry of judgment was sent by plaintiff to defendant on November 23, 1988.

Subsequent to the entry of judgment the parties and their representatives entered into negotiations concerning an underlying obligation of Nibble with Gibbles, Inc. The defendant was president of the corporation and had guaranteed its obligation with the plaintiff. The judgment here under considerations was entered on defendant's note of August 11, 1988 captioned "Unconditional Guaranty of Payment". Inter alia payments were made on account of the underlying corporate obligations after entry of the judgment. The defendant took no action with regard to the judgment.

Pursuant to plaintiff's praecipe filed November 22, 1989, a writ of execution was issued to the Sheriff of Franklin County. A levy was made, and the Sheriff posted and advertised property of the defendant for sale. On January 5, 1990, the defendant filed a petition for rule to strike off or alternatively to open judgment, and a rule to show cause was issued upon the plaintiff. All proceedings were stayed pending disposition of the petition. The plaintiff's answer to defendant's petition was filed on January 26, 1990. On motion of the plaintiff, the defendant was deposed on September 12, 1990. No action was taken by the defendant in support of his petition. On March 21, 1991 counsel for the plaintiff filed a pracecipe to list the matter for argument, and it was scheduled for the May 2, 1991 Argument Court. Apparently by agreement or consent of various attorneys, some of whom were not counsel of record for either party, argument was continued. Again on praecipe of counsel for the plaintiff this matter was placed on the June 6, 1991 Argument Court list and counsel of record were so notified by the Court Administrator.

Eric L. Brossman, Esq., of the firm of McNees, Wallace & Nurick was at all times here relevant, and to this date, counsel of record for the defendant. Indeed, the defendant testified that McNees, Wallace & Nurick had represented him and the corporation since 1965 or 1966, and Mr. Brossman had been representing him and the corporation in these matters. (Deposition of Darrel Ray Gibble N.T. p. 18-19). Pursuant to Local rule of Court 39-211.7 the defendant's brief was due on May 27, 1991.

Late in the afternoon of June 5, 1991, Attorney Brossman's petition for rule to show cause why leave to withdraw as counsel of record should not be granted was delivered to the undersigned judge in chambers, and at the same time we learned no brief had been filed in support of the defendant's petition to strike or open judgment, which was scheduled for argument at 9:30 a.m. the next day. Mr. Brossman was immediately notified by telephone that the stay of all proceedings requested in his petition would not be granted, and that as counsel of record he was responsible for the submission of a brief on behalf of the defendant and representing him at the scheduled argument.

No brief was filed on behalf of the defendant. Neither counsel

of record or any other attorney appeared on behalf of the defendant. Oral argument by counsel for plaintiff was heard. The matter will be disposed of on the basis of plaintiff's brief and oral argument. It would appear either the defendant abandoned his claim that the judgment be stricken or opened, or in the alternative the defendant was abandoned by counsel of record.

Parenthetically we feel it appropriate to note that counsel's petition for a rule for leave to withdraw was signed June 6, 1991 with the rule returnable twenty (20) days after service after we had time to review the petition and numerous exhibits attached. The praecipe to withdraw referred to in the petition was apparently never filed. Attorney Brossman followed the procedure mandated by Local Rule 39-1012.2, but we find no justification for the delay.

With regard to the defendant's petition to strike off or alternatively to open judgment, the law is well-settled.

> [i]f the alleged defect in the confessed judgment is based on a matter *dehors* the record, the proper approach is to petition the court to open judgment. On the other hand a motion to strike is proper only when the defect in the original judgment appears on the face of the record. *Triangle Building Supplies and Lumber Co. v. Zerman,* 242 Pa. Super 315, 320, 363 A.2d 1287, 1289 (1976) (citations omitted).

J.F. Realty Co. v. Yerkes, 263 Pa. Super. 436, 440, 398 A.2d 215, (1979) (emphasis in original). Generally, a motion to strike is filed when the judgment is entered for items that were not included in the confession of judgment contract or for a grossly excessive amount. *J.F. Realty Co. V. Yerkes, supra.*

It is clear that the judgment is correct on its face. The note matured on October 1, 1988; judgment was entered by the plaintiff in accordance with the express terms and conditions contained in the guaranty and the note. The principal amount of the judgment, plus interest and attorney's fees were all specifically authorized by the guaranty and the note. Thus, any arguments of the defendant could not properly be made or heard by the Court under a motion to strike.

Since it is not apparent on the face of the guaranty and the note

that the judgment was entered for items not included in the confession of judgment contract or for a grossly excessive amount, any challenge to the validity of this amount must be remedied by a petition to open judgment. *Davis v. Woxall Hotel, Inc.*, 395, Pa. Super. 465, 577 A.2d 636 (1990).

The procedures by which the defendant can challenge the judgment are set forth in Pa. R.C.P. 2959. Moreover,

> "a judgment taken by confession will be opened in only a limited number of circumstances, and only when the person seeking to have it opened acts promptly, alleges a meritorious defense and presents sufficient evidence of that defense to require submission of the issues to the jury".

First Seneca Bank v. Laurel Mt. Devel., 506 Pa. 439, 443, 485 A.2d 1086, , (1984). Additionally, the party against whom the confession of judgment was entered, in this case the defendant, bears the burden of disproving the assertions it challenges. *Davis v. Woxall Hotel, Inc., supra.*

Initially, we find that the defendant has failed to act promptly. The confession of judgment was entered on November 23, 1988; it was not until January 5, 1990 when the defendant filed a motion to strike and/or to open judgment. This period of over 13 months wherein the defendant failed to take any action in this matter hardly reflects the requisite diligence.

However, it has been held that the critical factor in deciding whether the defendant's petition was timely filed is "not the specific time which has elapsed but rather the reasonableness of the explanation given for the delay". *First Seneca Bank v, Laurel Mt. Devel., supra. See also, Tony Palermo Const. v. Brown,* 326 Pa. Super. 566, 474 A2d 635 (1984).

The defendant explains the delay by stating that certain negotiations were entered into between the plaintiff and the defendant and it was not until those efforts failed that the defendant filed his petition. The identical explanation was utilized by the defendant in *First Seneca Bank v. Laurel Mt. Devel., supra.* The excuse failed to pursuade the Supreme Court of Pennsylvania in that case and

it fails to persuade this Court today. We find that the defendant filed an untimely petition to open judgment.

Moreover, the defendant has presented no meritorious defense to the Court. This case is similar to *Hamilton Bank v. Rulnick,* 327 Pa. Super. 133, 475 A.2d 134 (1984) where a debtor sought to open judgment where judgment was confessed on a personal guaranty for a corporate debt. The debtor's asserted meritorious defense was the existence of a subsequent oral agreement by the bank not to collect on the judgment. The court stated:

> The alleged oral agreement not to 'proceed to collection' had effect only on the Bank's collection or enforcement of the judgment. It did not alter or purport to alter the warrant of attorney to confess judgment contained in the written contract ....The alleged oral agreement, therefore, did not prevent the entry of judgment against [the debtors] and did not give rise to a meritorious defense to the judgment confessed against them.

Hamilton Bank v. Rulnick, supra., at 138.

In the case at bar, the defendant's meritorious defense also relates to the existence of subsequent agreements which extended the maturity date of the note. Although in the aforementioned case, the subsequent agreements were oral and in the case at bar, they are written, neither of the modification agreements purports to alter the warrant of attorney to confess judgment.

Further, the defendant acknowledges that the note was in default at the time the judgment by confession was entered (N.T. September 12, 1990, p. 13, 1. 5-8), and at the time the note modification agreement was signed (N.T. September 12, 1990, p. 23, 1. 1-4). The defendant's testimony also establishes that the note modification agreements were entered into in contemplation of the fact that the confessed judgment would remain on the record as additional security for the plaintiff (N.T. September 1990, p. 15, 1.3 to p. 20, 1. 1 and Exhibit 3).

As previously stated, the burden of proof is on the party against whom the confession of judgment was entered. In this case, it is on the defendant. This Court is of the opinion that the judgment taken by confession should not be opened because the defendant has not alleged a meritorious defense which would

require the issues to be submitted to a jury.

ORDER OF COURT

NOW, this 25th day of June, 1991, the petition of Darrel R. Gibble for rule to strike off or alternatively to open judgment is denied: the rule issued thereon is vacated and the stay of all proceedings lifted.

The plaintiff shall file an affidavit setting forth the principal amount presently due and owning, the accrued and non-paid interest thereon to the date of the affidavit, and correct attorneys' fees. The Sheriff of Franklin County shall proceed by execution, levy and sale for the collection of the judgment as modified by the said affidavit.

MCCREA VS. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, BUREAU OF DRIVER'S LICENSING, C.P. Franklin County Branch, Misc. Doc., Vol. AA, Page 235

Motor Vehicle - Liability Insurance - Lapse of Coverage Revocation of Registration Privilege and Operating Privilege

1. If two inconsistent interpretations of statutory language are both reasonable, the benefit of the doubt must inure to the defendant's position.
2. Sec 1786(d) of the motor vehicle code allows the DOT to suspend an operator's driving privileges for three months if he does not supply proof of insurance, but does not provide for a similar suspension of registration privileges.
3. Where car insurance lapses, owners' registration privileges may be reinstated immediately upon submission of proof of insurance.

Donald J. Smith, Assistant Attorney General, Counsel for the Commonwealth
Carolyn L. Carter, Esq., Counsel For Appellant

OPINION AND ORDER

KELLER, P.J., January 24, 1992:

FINDINGS OF FACT

1. McCrea permitted his liability insurance coverage provided by General Accident Insurance Company to lapse on May 21, 1991 because he could not afford to pay the premium.

2. McCrea on or before May 21, 1991 parked his vehicle and did not thereafter operate it on any public roads or allow anyone else to operate it during the period of time the vehicle was not covered by liability insurance. He did move it from place to place in his own yard, and he did make various repairs to the vehicle during that time period.

3. McCrea secured liability insurance coverage for the vehicle with Erie Insurance Company on June 28, 1991, and since that date has operated the vehicle. To the best of his knowledge Erie Insurance Company did send proof of insurance coverage to DOT.