IT IS SO ORDERED.

Dated: 12:30 PM April 11 2011

MARILYN SHEA-STONUM LN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 10-53451
	)	
ANTONIO WESTBROOKS	)	CHAPTER 7
EQUANNA F. WESTBROOKS,	)	
	)	JUDGE MARILYN SHEA-STONUM
DEBTOR(S)	)	
	)	**ORDER DECLINING TO RULE ON**
	)	**"MOTION [TO] APPROVE LOAN**
	)	**MODIFICATION AGREEMENT"**
	)	**[DOCKET #28]**

This matter is before the Court on a "Motion [to] Approve Loan Modification Agreement" [docket #28] (the "Motion") filed by BAC Home Loans Servicing, LP, FKA Countrywide Home Loans Servicing, LP ("BAC"). For the reasons set forth below, the Court declines any ruling on the Motion.

I. BACKGROUND

On July 21, 2010 debtors, through counsel, filed a voluntary chapter 7 bankruptcy petition. On Schedule D - Creditors Holding Secured Claims, debtors list BAC as holding a $241,070.00 claim related to their primary residence (the "Property"). Debtors list the value of the Property as

$279,000.00. On September 15, 2010 the chapter 7 trustee filed a report of no distribution and on September 24, 2010 the trustee filed a notice of abandonment as to the Property.

On January 17, 2011 BAC filed the Motion which states, in pertinent part, the following:

> Now comes BAC . . . and seeks this honorable Court's approval of the terms of the Note and Mortgage secured by the Debtors' residence . . . . The original terms of the loan were a principal balance of $245,900.00 to be paid over 30 years at 6.875% per annum.
>
> The terms of the loan modification, a copy of which is attached hereto as Exhibit "A" and made a part hereof, provides for principal balance $245,400.11 to be paid at a fixed 3.875% per annum for the first five (5) years commencing with the payment due December 1, 2010. Beginning in the sixth (6th) year commencing December 1, 2015, the mortgage will be paid at 4.375% per annum of the remaining life of the loan to mature in October 2037. All other terms and conditions of the original Note and Mortgage remain unchanged and in full force and effect.
>
> The Movant believes this modification is in the best interests of the Debtors and the Creditor and it does not prejudice any other creditors in this case. The Debtor[s] shall receive no cash payment from the modification and the interest rate reduction will significantly help the Debtors in maintaining their monthly mortgage obligation and allow them to remain in their residence.
>
> Wherefore, BAC . . . requests the Court approve this modification of the mortgage loan.

Attached to the Motion were a "Loan Modification Agreement" that was signed by debtors on November 30, 2010 and a "Modification Bankruptcy Disclosure Rider" (together with the "Loan Modification Agreement," the "Modification Documents") also signed by debtors on November 30, 2010. The "Loan Modification Agreement" appears to reflect the new principal balance and interest rates and indicates that "'[e]xcept as otherwise specifically provided in this Agreement, the Note and Security Instrument will remain unchanged, and the Borrower and Lender will be bound by, and comply with, all terms and provisions thereof, as amended in this Agreement." The "Modification Bankruptcy Disclosure Rider" provides that

> In addition to the covenants and agreements made in the Loan Modification Agreement, the Borrower and Lender covenant and agree as follows:
>
> 1. Borrower was discharged in a Chapter 7 bankruptcy proceeding after the execution of the Note and Security Instruments:
>
> 2. Borrower has or reasonably expects to have the ability to make the payments specified in the Loan Modification Agreement; and
>
> 3. The Loan Modification Agreement was entered into consensually and it does not affect the discharge of Borrower's personal liability on the Note[.]

The certificate of service attached to the Motion indicates that it was served upon only the chapter 7 trustee, the United States Trustee - Region 9, counsel for debtors and debtors. Although no responses to the Motion were filed, the Court set the matter for a hearing because it was not clear, based upon the Motion alone, what relief was being sought and whether the Court has any basis for acting on the Motion.

The hearing on the Motion was held on March 23, 2011 and appearing was counsel for BAC. When asked why the Motion was filed, counsel stated that it was done out of an abundance of caution. As to the basis for the relief sought, counsel referenced 11 U.S.C. § 105. The Court then took the matter under advisement. On April 4, 2011, the Order granting debtors their discharge was entered.

II. DISCUSSION

As noted, the Motion fails to indicate why Court approval of the loan modification is needed nor does it set forth any legal authority for the relief sought therein. Pursuant to the hearing, BAC is relying upon § 105 of the Bankruptcy Code which provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Accordingly, to be entitled to relief under § 105(a), BAC must show that an Order approving the loan modification is "necessary or appropriate" to carry out the provisions of the

Bankruptcy Code. *U.S. v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986) ("While the bankruptcy courts have fashioned relief under Section 105(a) in a variety of situations, the powers granted by that statute may be exercised only in a manner consistent with the provisions of the Bankruptcy Code. That statute does not . . . constitute a roving commission to do equity.")

The Modification Documents were executed on November 1, 2010 and there is nothing in those documents requiring Court approval prior to their effectiveness. Debtors' payment obligations under the "Loan Modification Agreement" took effect on December 1, 2010 and there was no indication by BAC's counsel at the hearing that debtors were not performing. Because the Motion was not filed until more than two months after the Modification Documents were executed and more than one month after debtors began performing thereunder, the filing of the Motion appears to be an afterthought by BAC.

As noted, the chapter 7 trustee abandoned the Property on September 24, 2010. Accordingly, the automatic stay as to the Property was no longer in effect when the Modification Documents were executed. *See* 11 U.S.C. § 362(c)(1). Had BAC become concerned that it had somehow run afoul of the automatic stay as it still related to the debtors, it could have stated as such in the Motion. Because debtors have received their discharge, any such potential issue would now appear to be moot. *See* 11 U.S.C. 362(c)(2)(C).

Given the specific language in the "Modification Bankruptcy Disclosure Rider" acknowledging debtors' discharge and the specific mandates of 11 U.S.C. § 524, it would not appear that the Modification Documents could be construed as a reaffirmation agreement. However, to the extent that, by filing the Motion, BAC is somehow attempting to obtain the Court's imprimatur as to the Modification Documents constituting a reaffirmation agreement, such attempt is misguided and inappropriate. *Cf.* 11 U.S.C. § 524(c)(6)(B).

III. CONCLUSION

The Court should not have to guess as to why BAC filed the Motion and it is unclear as to what, if anything, would be accomplished by either granting or denying that pleading. The Court will not exercise its rights under § 105 to rule on the Motion because there has been no showing that such an Order is "necessary or appropriate" to carry out the provisions of the Bankruptcy Code.

# # #

cc (*via* electronic mail):
Amy Blythe, Counsel for Movant
Adam Baker, counsel for Debtor(s)
Dan McDermott, U.S. Trustee - Region 9

cc (*via* regular US mail):
Debtor(s)