



**IT IS ORDERED as set forth below:**

**Date: September 22, 2007**

*James E. Massey*

James E. Massey  
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

\_\_\_\_\_| |  
IN RE:

CASE NO. 04-97890

Shady Green Inc.,

CHAPTER 7

Debtor.  
\_\_\_\_\_| |

JUDGE MASSEY

ORDER DENYING APPLICATION TO EMPLOY

Robert Chambers filed and signed an application to employ himself as attorney for “the debtor in possession in this case.” The debtor is not in possession of this estate. This case is pending under Chapter 7, having been converted from Chapter 11 on June 1, 2005. To the extent that the application was intended to cover the period from the filing of the case on November 2, 2004 to June 1, 2005, it comes too late. Although there is no formal deadline in the Bankruptcy Code and Rules concerning when an application to employ a professional must be filed, a bankruptcy court has discretion to deny an application to employ a professional filed months or

years after the case was filed. Retroactive applications to employ professionals should not be routinely granted. *In re Crook*, 79 B.R. 475, 477 (9th Cir.BAP 1987).

For the professional seeking an order approving employment nunc pro tunc, “exceptional circumstances” exist when the professional (1) satisfactorily explains his failure to receive prior judicial approval; and (2) demonstrates that his services benefitted the bankrupt estate in a significant manner. *Id.* These two requirements must be satisfied, in addition to the criteria for employment under § 327, before the Court may approve the fees of a professional whose employment has not already been approved. *Id.* at 976 (noting also that a court may, but need not, consider the factors listed in *In re Twinton Props. P'ship*, 27 B.R. 817, 819-20 (Bankr.M.D.Tenn.1983)). However, a professional's inexcusable or unexplained negligence, or his inadvertence, in seeking prior approval of employment is an insufficient justification for retroactive relief, particularly when professionals may be charged with knowledge of the law. *See Andrew v. Coopersmith ( In re Downtown Inv. Club III )*, 89 B.R. 59, 63-64 (B.A.P. 9 Cir.1988) (discussing an attorney's request for employment nunc pro tunc ).

*In re Ball*, 2004 WL 4960388, \*2 (Bankr. D.Idaho 2004). Here, counsel misstated that the debtor was in possession and gave no reason for the late filing of the application.

Moreover, the application must be signed by the debtor in possession and not by the professional purporting to act for the debtor in possession. The attorney for the debtor cannot act on behalf of the debtor in possession prior to being approved as the fiduciary's counsel. Because there is no longer a debtor in possession, the fiduciary who might have filed the application in 2004 no longer exists, making it too late to file such an application. For these reasons, the application by Mr. Chambers to employ himself is DENIED.

The Clerk is directed to serve a copy of this Order on Applicant, Debtor and the Chapter 7 Trustee.

\*\*\*END OF ORDER\*\*\*