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Be Careful What You Admit

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When a defendant enters into a deferred prosecution agreement (DPA) or other agreement with the government, the government often insists on the inclusion of factual admissions. Such factual admissions can include seemingly innocuous language like admitting that the government itself determined certain facts to be true. When the admissions are coupled with other "boilerplate" language in the agreement, however—such as the commonplace provision in which the defendant agrees not to make any future statement "contradicting" the "facts" admitted—the defendant may face challenges in subsequent civil litigation. In particular, the defendant may find itself having to fend off claims that it admitted more than it (or even the government) may have intended.

Southern District Judge Colleen McMahon recently addressed such a situation in *BDG Gotham Residential v. Western Waterproofing Company*, 2022 WL 4482310 (S.D.N.Y. Sept. 27, 2022). In a prior DPA with the government, the defendant in *BDG Gotham*, Western Waterproofing Company (Western), admitted that the New York County District Attorney's Office's (DANY) "investigation ha[d] determined" various enumerated facts, and Western further agreed that it would not make any statement, in litigation or otherwise, "contradicting" the "facts" in the DPA. The central issue in *BDG Gotham* was whether Western's foregoing admission and agreement in the DPA meant that it had adoptively admitted the truth of DANY's findings. A decision to that effect would have rendered *BDG Gotham* indefensible.

Characterizing the issue as "not an easy [one] to answer," Judge McMahon found, based on a textual analysis of the DPA, that Western "admitted no more than that DANY made the … findings." The decision reinforces the importance of being careful what you admit.

'BDG Gotham'

DANY's DPA with Western arose out of a construction accident that occurred in June 2018 in Manhattan, in which two ironworkers were seriously injured (the incident). Prior to the incident, BDG Gotham Residential (Gotham) contracted with ZDG to build a building on the plot of land where the incident occurred. ZDG, in turn, subcontracted with Western to install a curtainwall façade for the building.

While performing under the subcontract, Western used a Jekko MPK20 mini crane to lift the panels for the façade into place. On the day of the incident, the mini crane tipped over, damaging the property and seriously injuring the two ironworkers.

In November 2018, a grand jury in New York County indicted two Western employees, Timothy Braico and Terrence Edwards, for assault and reckless endangerment in connection with the incident. Also in November 2018, DANY entered into the DPA with Western. In paragraph 4 of the DPA, Western agreed to acknowledge and accept "responsibility

for the conduct of its former senior branch manager, Timothy Braico and curtainwall superintendent Terrence Edwards, with regard to the untethered, overloaded use of a Jekko MPK20W+ mini crane, by an uncertified operator, … in violation of DOB [Department of Buildings] and applicable safety rules, and the matters set forth in the [attached] Statement of Facts."

The DPA also contains language expressly prohibiting Western from making any statement that contradicts any fact set forth in the Statement of Facts (SOF). Specifically, the DPA states, "[Western] agrees that it shall not, through its attorneys, agents, officers or employees, make any public statement, in litigation or otherwise, contradicting the facts set forth in the Statement of Facts."

The SOF, in turn, contains two sets of factual admissions: First, the SOF recites certain facts that are identified as facts that Western has agreed to admit. Second, the SOF recites certain additional facts that are identified as facts that "DANY's investigation has determined." Id. at *9.

After Western entered into the DPA, in June 2019, Gotham and ZDG filed the *BDG Gotham* civil case against Western. In *BDG Gotham*, Gotham and ZDG allege, inter alia, that Western, through "negligent, grossly negligent, or reckless acts and omissions, set into motion a chain of events that resulted in the [incident]" and caused financial harm to Gotham and ZDG. Gotham and ZDG seek more than $37 million in damages from Western.

During the litigation, a dispute arose between the parties regarding the extent to which portions of the DPA and SOF are admissible at trial against Western. Gotham and ZDG asserted that the following portions of the DPA and SOF are admissible against Western: (i) Western's acknowledgment and acceptance of responsibility for the conduct of its former employees, Timothy Braico and Terrence Edwards, in connection with the incident, in paragraph 4 of the DPA, (ii) the facts in the SOF that Western expressly agreed to admit, and (iii) the facts in the SOF that Western admitted "DANY's investigation has determined." Western agreed that the facts in category (ii) are admissible against it, but it challenged the admissibility of (i) and (iii).

Western's Factual Admission in the DPA Is Admissible

With respect to the challenged factual admission in the DPA—namely, Western's acknowledgment and acceptance of responsibility for the conduct of its former employees in connection with the incident (the DPA admission)—Western argued that it is inadmissible for two, independent reasons: (i) the DPA qualifies as a settlement agreement under Rule 408 of the Federal Rules of Evidence (FRE), and (ii) its DPA admission would be unduly prejudicial under FRE 403. *BDG Gotham*, 2022 WL 4482310, at *3-5.

Judge McMahon first rejected Western's Rule 408 argument. Id. at *4-5. Citing *United States v. Gilbert*, 668 F.2d 94 (2d Cir. 1981), Judge McMahon observed that "[t]he Second Circuit has indicated that FRE 408 only bars the admission of evidence about the 'settlement of a civil suit.'" Id. at *4 (quoting *Gilbert*, 668 F.2d at 97). Because a DPA "is simply not the same thing as the settlement of a civil action," Judge McMahon concluded that Rule 408 does not render Western's DPA admission inadmissible. Id.

Judge McMahon next concluded that Rule 403 also is no impediment to the admissibility of Western's DPA admission. Id. at *5-6. In reaching this conclusion, Judge McMahon relied on the fact that plaintiffs were not seeking to admit the DPA as a whole, but instead only one sentence from the DPA "shorn of any reference to the nature of the document or the fact that it was part of a criminal proceeding." Id. at *6.

Specifically, plaintiffs were seeking to admit the following as a

standalone statement: "Western Specialty Contractors has acknowledged and accepted responsibility for the conduct of its former senior branch manager, Timothy Braico and curtainwall superintendent Terrence Edwards, with regard to the untethered overloaded use of a Jekko MPK20W+ mini crane, by an uncertified operator, at the Gotham Residential Project construction site, in violation of DOB and applicable safety rules." Id. at *3. Judge McMahon reasoned that in this form, the DPA admission was not unduly prejudicial, because "[t]he jury would simply be told that Western has acknowledged and accepted responsibility for the actions of its employees/agents." Id. at *6. Judge McMahon found that no Rule 403 issue exists "[a]s long as [the DPA admission] is admitted separate and apart from the rest of the DPA." Id.

DANY'S Factual Determinations Are Not Admissible

Judge McMahon then turned to Western's objection to the admissibility of all the statements in the SOF beginning with the phrase "DANY's investigation has determined." Id. at *7. Western argued that it never admitted the truth of what "DANY's investigation has determined," but only that DANY so found, and "what DANY's investigation determined is inadmissible hearsay under FRE 801 and 802." Id. Plaintiffs countered that the statements are admissible as opposing party adoptive admissions under FRE 801(d)(2)(B), because Western (i) admitted in the SOF that DANY had determined the facts, and (ii) agreed in the DPA not to contest the truth of the statements "in litigation" or otherwise. Id.

In resolving the dispute, Judge McMahon first observed that an "adoptive admission under FRE 801(d)(2)(B) is a 'statement … offered against an opposing party and … is one the party manifested that it adopted or believed to be true.'" Id. (quoting FRE 801(d)(2)(B)). "[T]he rule does not require that the party believe the statement to be true—only that it adopt the statement as an admission." Id.

Judge McMahon then conducted a textual analysis of the SOF and determined that the statements at issue are not adoptive admissions because "the drafting about what Western agreed not to contradict is either ambiguous (in which case, it must be interpreted against the likely drafter, which I do not know but I suspect was the DANY) or it favors Western's interpretation that it was not required to admit the truth of DANY's findings—only the fact that they were made." Id. at *9. Accordingly, based on an analysis of the specific language used in the SOF, Judge McMahon concluded that "Western admitted no more than that DANY made the extensive findings that are set forth in the SOF." Id.

Conclusion

Although Judge McMahon found that the facts following the phrase "DANY's investigation has determined" are not admissible against Western, she characterized the question as "not an easy [one] to answer" and her conclusion was grounded in the text of the SOF. Accordingly, a party entering into an agreement with the government must be mindful of the precise phrasing of any factual admissions and any agreements regarding what the party thereafter will not contradict.

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