

Ball Engineering Co. Vs. J. G. White and Co.

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Decided On : May-19-1919

Appeal No. : 250 U.S. 46

Appellant : Ball Engineering Co.

Respondent : J. G. White and Co.

Judgement :

Ball Engineering Co. v. J. G. White & Co. - 250 U.S. 46 (1919)

U.S. Supreme Court Ball Engineering Co. v. J. G. White & Co., 250 U.S. 46 (1919)

Ball Engineering Company v. J. G. White & Company

No. 227

Argued March 13, 1919

Decided May 19, 1919

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CERTIORARI TO THE CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

SYLLABUS

A provision in a construction contract that, in case of annulment,

"the United States all have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, . . . under purchase at a valuation to be determined by the Engineer Officer in charge"

held not applicable, *in invitum*, to property belonging to, and which had been used in the construction by, a third party. P. [250 U. S. 54](#) .

Upon annulment of a construction contract, the government retained certain property on the site which belonged to a third party who had been doing the work, and, with knowledge of his claim and without his consent, valued it, credited the defaulting contractor accordingly, and leased or disposed of it to a new contractor at the latter's request for the completion of the work upon the understanding that the United States did not undertake to transfer title, nor guarantee peaceable possession, etc., and would not be responsible for the expense or cost of any action against the new contractor, nor subject itself to any claim on account of the seizure. *Held* that no contractual liability could be implied against the United

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States, and that the new contractor, having so taken and used the property, was liable to its owner for the conversion. *Id.* *United States v. Buffalo Pitts Co.*, [234 U. S. 228](#) , distinguished.

241 F. 989 reversed.

The case is stated in the opinion.

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MR. JUSTICE DAY delivered the opinion of the Court.

The Ball Engineering Company, a Missouri corporation, brought this action against J. G. White & Co., Inc., a Connecticut corporation, in the United States District Court for the District of Connecticut, for damages for

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the alleged conversion of a contractor's plant and equipment which was prepared for use in prosecuting the work of constructing lock and dam No. 6, on the Trinity River in the State of Texas, and all of which, including buildings, were located upon the site of the lock and dam at the time of the alleged conversion. The action was tried before a referee, designated under the Connecticut practice a committee. Two trials were had, the first resulting in a judgment in favor of the plaintiff for the value of the converted property. 212 F. 1009. That judgment was reversed by the circuit court of appeals (223 F. 618), and a new trial ordered which took place before the same committee and upon the same evidence and the same findings of fact, in order to conform to the decision of the circuit court of appeals, judgment was rendered in favor of the defendant, and this was affirmed by the circuit court of appeals on the authority of its prior decision. 241 F. 989. The case is here upon writ of certiorari.

The United States filed its brief *amicus curiae*, contending that the decision of the circuit court of appeals to the effect that the United States is liable under the Tucker Act when property of a third person is taken by one of its agents, under the circumstances disclosed, was erroneous.

The material facts are:

On July 10, 1906, the United States entered into a contract with the Hubbard Building & Realty Company to construct lock and dam No. 6 on the Trinity River, Texas.

A partnership composed of George A. Carden and P. D. C. Ball, known as the Ball-Carden Company, in the year 1908 placed a considerable amount of property, consisting of materials, machinery, and tools, on the site of the lock and dam No. 6, and used them in constructing the lock and dam until the month of May, 1909.

This partnership was dissolved in April or May, 1909,

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and discontinued the work theretofore carried on by it in the construction of the lock and dam. Carden transferred all his interest to Ball, who, under the name of the Ball Engineering Company, continued the work until on or about September 8, 1909.

It does not appear under what circumstances the Ball-Carden Company or Ball operating as the Ball Engineering Company undertook the performance of the work.

On September 9, 1909, work upon said lock and dam was abandoned; on October 22, 1909, the government annulled the contract with the Hubbard Company pursuant to its provisions.

On April 2, 1910, the Ball Engineering Company was organized under the laws of Missouri, and P. D. C. Ball transferred to it all of the property mentioned in the complaint.

The United States entered into a contract with the defendant J. G. White & Co. on June 6, 1910, to complete the construction of the lock and dam. Prior to the making of the contract, the defendant attempted, without success, to agree with the Ball Company for the purchase or rental of the personal property, etc., specified in the complaint. On June 22, 1910, the government notified the defendant that the Hubbard Company had been directed to move all property at lock and dam No. 6, except certain specified items, and determined the valuation of the same at \$11,578, and fixed a monthly rental of \$380 therefor from the government to the defendant, and also fixed a valuation upon the material, etc. at the lock site and notified the defendant to take such of it as it deemed proper at such valuations respectively. The Ball Company refused to assent to either valuation. On July 18, 1910, the defendant receipted to the United States for the articles constituting the construction plant, and for such of the materials as it was willing to and did receive. The property which the government took from the

Ball Engineering Company was valued by it at \$11,578, which amount was credited on account of the Hubbard Company, but the United States neither paid nor credited the purchase price or rental of the property to the Ball Company.

The United States professed to act under 33 of the contract with the Hubbard Company, which reads:

"Annulment. -- In case of the annulment of this contract as conditionally provided for in the form of contract adopted and used by the engineering department of the army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same, prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase at a valuation to be determined by the engineer officer in charge."

The government would not allow the Ball Company to take possession of any of the property used in the construction of the lock and dam. This property the United States leased to the defendant, who used the same in completing the work, and thereafter returned all of it to the government, except, of course, such material as had been used in construction.

The government inserted the following stipulation in its contract with the J. G. White & Co., Inc.:

"If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the engineer officer in charge, and the contractor for the completion of the work will be permitted to use such plant and material in the

prosecution of the work, for which he will be charged a fair rental or purchase value, to be determined by the engineer officer in charge. It must, however, be clearly understood that, since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same, nor be responsible for nor assume any expenses or cost in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents."

The circuit court of appeals, under the circumstances here disclosed, rightly held that the government had no authority to take the property of the Ball Engineering Company by virtue of anything contained in its contract with the Hubbard Company, and further held that, inasmuch as the government took the property with the knowledge that it was claimed by the Ball Company and used it in the construction of public work, it was obliged to make just compensation to the Ball Company by reason of the Fifth Amendment of the Constitution. "It," says the court of appeals,

"made no proprietary claim, and therefore was bound to pay the real owner for the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbard Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto."

The findings show that the government took possession by virtue of its contract with the Hubbard Company; that it definitely advised White & Co. that it would

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not be responsible for the seizure of the property, and that anything which might result therefrom could not be the basis for any claim against the United States, its

officers, or agents. Under the circumstances disclosed, the circuit court of appeals held the White Company not liable to the Ball Engineering Company -- upon the theory that the government had appropriated the property under circumstances giving rise to an implied contract to pay the Ball Engineering Company for it. This ruling was made upon the authority of *United States v. Buffalo Pitts Co.*, 193 F. 905, *aff'd*, [234 U. S. 234](#) U.S. 228. In that case, a suit was brought under the Tucker Act by the Buffalo Pitts Company against the United States to recover for the value of the use of a certain engine for which, it was alleged, the United States was under an implied contract to pay. The findings of fact showed that the Buffalo Pitts Company sold a traction engine to the Taylor-Moore Construction Company, and took a chattel mortgage to secure the payment of the purchase money. The mortgage was duly recorded, and no part of the purchase money was paid. The engine was put into service by the Taylor-Moore Company upon a reclamation project undertaken by the Interior Department, the work being prosecuted under a contract between the United States and the Taylor-Moore Construction Company. The Construction Company defaulted in its work, and assigned all of its interest in the contract to the United States, and it took possession of all material, supplies, and equipment belonging to the Construction Company, including the engine in question. The Buffalo Pitts Company made demand upon the district engineer of the reclamation service for the possession of the engine and appurtenances. But the demand was refused, and the engine retained for use in the government work. The Buffalo Pitts Company notified the representative of the United States of the execution and filing of its mortgage,

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and claimed the property. It was expressly found that the government had at all times known of the existence of the mortgage, and did not dispute the validity thereof, but represented to the Buffalo Pitts Company that it was using and would continue to use the engine in its work, that any legal proceedings to recover possession would be resisted, and that, if the property were left in the government's possession, its attorney would recommend payment therefor. It was further found that the Buffalo Pitts Company relied upon these facts, and

consented to the government retaining possession of its property in the expectation of receiving compensation from it therefor. The claim was made that the United States was not liable for tortious acts. This Court reviewed former cases, and said:

"In the present case, as we have said, there is nothing to show that the government expected to use the engine and appurtenances without compensation. It did not dispute the mortgage, and the findings of fact clearly show that, if the government had the right to take the property notwithstanding the mortgage interest which the plaintiff had in it, it made no claim of right to take and use it without compensation as against the prior outstanding mortgage, which distinctly reserved the right to take and sell the property under the circumstances shown and which after the breach of condition vested the right of possession and the right to convert the property in the mortgagee."

It was further pointed out that the government had authority under an act of Congress to acquire any property necessary for the purpose stated, and, if need be, to appropriate it. We held that the facts found brought the case within the principles decided in former cases, and made the United States liable not for a tortious act, but upon implied contract.

The subject was again reviewed by this Court in a case decided at this term, [*Temple v. United States*](#), 248 U.S.

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121, in which a suit was brought to recover the value of submerged lands in the Chicago River appropriated by the government without the owner's consent. Former decisions of this Court were reviewed, and we said:

"If the plaintiff can recover, it must be upon an implied contract. For, under the Tucker Act, the consent of the United States to be sued is (so far as here material) limited to claims founded 'upon any contract, express or implied,' and a remedy for claims sounding in tort is expressly denied. *Bigby v. United States*, [188 U. S. 400](#) . *Hijo v. United States*, [194 U. S. 315](#) , [194 U. S. 323](#) . As stated in *United*

States v. Lynah, [188 U. S. 445](#) , [188 U. S. 462](#) , [188 U. S. 465](#) .:"

"The law will imply a promise to make the required compensation, where property to which the government asserts no title is taken, pursuant to an act of Congress, as private property to be applied for public uses;"

"or, in other words:"

"Whenever, in the exercise of its governmental rights, it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor."

"But, in the case at bar, both the pleadings and the facts found preclude the implication of a promise to pay. For the property applied to the public use is not, and was not conceded to be, in the plaintiff."

In the case under consideration, the United States did not concede title in the Ball Engineering Company, but took the property knowing of the claim of that company to its ownership, and credited its value upon the government contract with the Hubbard Company. The government took this action upon request of the White Company, and advised that it would not under any circumstances be held liable for the seizure of the property. Under these circumstances, the implication of a contract that the United States would pay, which must be the basis of its liability under the Fifth Amendment, is clearly rebutted. The liability of the government, if any, is in tort, for which it has not consented to be sued. As the findings show that

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the White Company, with knowledge of the facts, procured and used the property of the Ball Company, it ought to have been held liable to that company. It follows that the judgment of the circuit court of appeals must be

Reversed.