

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0620, Matrix Technologies Corporation v. Gary E. Nelson & a., the court on September 6, 2007, issued the following order:

The plaintiff, Matrix Technologies Corporation (Matrix), appeals an order of the trial court denying its request for an award of attorney's fees incurred when it obtained a preliminary injunction against the defendants, Gary E. Nelson, R. Laurence Keene and George Kalmakis. Matrix also argues that the superior court erred in confirming an arbitrator's award of attorney's fees to the defendants because the award included fees incurred by the defendants during the preliminary injunction phase. The defendants have filed a cross-appeal in which they argue that the superior court erred in denying their request for attorney's fees incurred following the arbitration proceeding. We affirm in part, reverse in part and remand.

An arbitration decision may be corrected or modified upon a showing that the arbitrator committed "plain mistake." RSA 542:8 (2007). A plain mistake is an error that is apparent on the face of the record and which would have been corrected had it been called to the arbitrator's attention. John A. Cookson Co. v. N.H. Ball Bearings, 147 N.H. 352, 356 (2001) (quotations omitted). When undertaking a plain mistake analysis, we afford great deference to the arbitrator's decision. Id. at 356-57.

In this case, the defendants notified Matrix that they were resigning their employment with Matrix. Matrix then filed a petition for declaratory and injunctive relief and damages in superior court. The court issued a preliminary injunction, ordering the defendants to comply with the non-compete clause of the parties' contracts pending completion of an expedited arbitration hearing. See RSA 542:1. The arbitrator found that Matrix had failed to extend the defendants' non-compete clause in the time permitted under the parties' contracts and that as prevailing parties under the contracts, the defendants were entitled to attorney's fees incurred in both the superior court and in arbitration.

Because the agreements are contracts, we apply general rules of contract interpretation in our review of the disputed provision. Sherman v. Graciano, 152 N.H. 119, 121 (2005). The interpretation of a contract is a question of law; we therefore review the provision de novo. Id.

The employment agreements between the parties provided:

If any legal proceeding is necessary to enforce or interpret the terms of this Agreement, or to recover damages for breach hereof, the prevailing party shall be entitled to receive from the other party reasonable attorneys' fees and necessary costs and disbursements incurred in such litigation, in addition to any other relief to which such prevailing party may be entitled.

Matrix does not challenge the fee amount which the defendants represent they incurred during the injunction phase. Rather, Matrix argues that because it obtained a preliminary injunction against the defendants, it was the prevailing party in the superior court and entitled to the attorney's fees it incurred in that forum. Matrix argues that because it was able to extend the parties' non-compete clauses for a period of time, no matter how limited, it prevailed.

Webster's Third New International Dictionary 1797 (unabridged ed. 2002) defines "prevail" as "to gain victory by virtue of strength or superiority: win mastery: triumph." Webster's also defines a "proceeding" as "a particular way of doing or accomplishing something." Webster's Third New International Dictionary 1807 (unabridged ed. 2002).

Matrix' attempt to distinguish between the superior court and arbitration has little merit. As Matrix concedes, its "overarching objective for filing suit [in the superior court] was to enjoin the defendants from violating the non-compete provisions of their Employment Agreements." However, the arbitrator found that Matrix had failed to timely extend the non-compete clauses. And as the superior court found in the order from which this appeal is taken, Matrix did not obtain a judgment in its favor on any of the original claims it asserted in the superior court against the defendants.

The proceeding in this case was initiated by Matrix in the superior court but required more than one step to accomplish its purpose. At its conclusion, Matrix did not prevail; the defendants did. Accordingly, the defendants are entitled to their reasonable attorney's fees incurred in the entire proceeding. Because the proceeding continued beyond the arbitration hearing, the defendants are also entitled to the reasonable attorney's fees they subsequently incurred.

We therefore affirm that portion of the trial court's order that denied Matrix' request for attorney's fees and confirmed the arbitrator's award of attorney's fees to the defendants. We reverse that portion of the order that denied an award to the defendants of attorney's fees incurred subsequent to the arbitration. We remand for entry of an award of reasonable fees for that portion of the proceeding.

Because this appeal is the final step in the proceeding, the defendants are entitled to an award of reasonable appellate fees. They shall submit an itemized invoice for such fees within 15 days of this order. Should Matrix object to any portion of the request, it shall file its objection and reasons therefore within 10 days thereafter.

The defendants' motion for leave to file supplemental memorandum regarding case authority is granted.

Affirmed in part; reversed in part and remanded.

BRODERICK, C.J., and DALIANIS and DUGGAN, JJ., concurred.

**Eileen Fox,
Clerk**