

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Daniel Patrick Moynihan
3 United States Courthouse, 500 Pearl Street, in the City of
4 New York, on the 22nd day of October, two thousand nine.

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6 **PRESENT:**

7 Dennis Jacobs,
8 *Chief Judge,*
9 Rosemary S. Pooler,
10 Barrington D. Parker,
11 *Circuit Judges.*

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14 International Business Machines
15 Corporation,

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17 Plaintiff-Appellant,

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19 v.

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21 David L. Johnson,

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23 Defendant-Appellee.
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09-2749-cv (L),
09-3372-op (Con),
09-3426-cv (Con)

1 **FOR PLAINTIFF-APPELLANT:** Evan R. Chesler, Stephen S.
2 Madsen, Cravath Swaine & Moore
3 LLP, New York, New York.
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5 **FOR DEFENDANT-APPELLEE:** Ronald E. Richman, Holly H.
6 Weiss, Schulte Roth & Zabel LLP,
7 New York, New York; Michael L.
8 Banks, Morgan, Lewis & Bockius
9 LLP, Philadelphia, Pennsylvania.
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11 UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED,
12 AND DECREED that the appeal in No. 09-3426-cv is
13 consolidated with Nos. 09-2749-cv (L) and 09-3372-op (Con),
14 the order of the district court on appeal in No. 09-2749-cv
15 is AFFIRMED, the mandamus petition in No. 09-3372-op is
16 DENIED, and the appeal in No. 09-3426-cv is DISMISSED.

17 In No. 09-2749-cv, Plaintiff-Appellant International
18 Business Machines Corporation ("IBM") appeals from a June
19 26, 2009 order of the United States District Court for the
20 Southern District of New York (Robinson, J.) denying IBM's
21 motion for a preliminary injunction. In No. 09-3372-op, IBM
22 seeks a writ of mandamus to vacate a July 30, 2009 order of
23 the same district court denying IBM leave to file a second
24 preliminary injunction motion. In No. 09-3426-cv, IBM
25 appeals from the same July 30, 2009 order that it seeks to
26 vacate in its mandamus petition. We assume the parties'
27 familiarity with the underlying facts, the procedural

1 history of the case, and the issues on appeal.

2 The district court has "wide discretion in determining
3 whether to grant a preliminary injunction," and we review
4 the district court's determination only for abuse of
5 discretion. See Moore v. Consol. Edison Co. of N.Y., Inc.,
6 409 F.3d 506, 511 (2d Cir. 2005). To obtain a preliminary
7 injunction in the district court, the movant must show: (1)
8 irreparable injury; and (2) either: (a) a "likelihood of
9 success on the merits;" or (b) "sufficiently serious
10 questions going to the merits and a balance of the hardships
11 decidedly tipped in the movant's favor." Green Party of
12 N.Y. State v. N.Y. State Bd. of Elections, 389 F.3d 411, 418
13 (2d Cir. 2004). The district court did not abuse its
14 discretion in denying IBM's motion for a preliminary
15 injunction. The parties dispute whether Winter v. Nat'l
16 Res. Def. Council, __ U.S. __, 129 S. Ct. 365, 374-75
17 (2008), overruled this Court's alternate preliminary
18 injunction standard. We do not reach the question because
19 IBM failed to make sufficient showings that it had a
20 likelihood of success on the merits or that a balance of the
21 hardships tipped decidedly in its favor. The district
22 court's conclusions on these issues were well-supported by

1 the court's finding that Johnson was extremely credible, and
2 that IBM's designated witness was much less credible chiefly
3 because IBM's witness lacked familiarity with documents
4 bearing on the controversy. We have considered all of IBM's
5 arguments and find them to be without merit. Accordingly,
6 the June 26, 2009 order of the district court is affirmed.

7 With respect to IBM's mandamus petition in No.
8 09-3372-op, no exceptional circumstances warrant the
9 requested relief. See In re von Bulow, 828 F.2d 94, 96 (2d
10 Cir. 1987). Here, as IBM filed an interlocutory appeal in
11 the preliminary injunction matter described above, the
12 district court correctly noted that "allowing IBM to file
13 this second motion for a preliminary injunction might well
14 encroach upon the Second Circuit's review of IBM's appeal."
15 IBM Corp. v. Johnson, 2009 U.S. Dist. LEXIS 66851, *9
16 (S.D.N.Y. 2009) (citing Marine Eng'rs Beneficial Assoc. v.
17 Falcon Carriers, 374 F. Supp. 1342, 1345 (S.D.N.Y. 1974)).
18 As IBM argued at length in its initial preliminary
19 injunction motion that Johnson's possession of and tendency
20 to misuse IBM's trade secrets threatened it with irreparable
21 harm, the appeal at issue in that motion temporarily
22 divested the district court of jurisdiction to consider a

1 second motion arising from the same facts even if IBM
2 asserted a nominally different cause of action. New York v.
3 Nuclear Regulatory Com., 550 F.2d 745, 758-59 (2d Cir.
4 1977); see also Marine Eng'rs Beneficial Assoc., 374 F.
5 Supp. at 1345 (S.D.N.Y. 1974) ("[I]t is settled that an
6 interlocutory appeal from the denial of preliminary
7 injunctive relief divests the court only of jurisdiction
8 with regard to questions raised and decided upon the
9 interlocutory order appealed from."). As the relevant
10 issues were on appeal before this Court, the district court
11 was correct in not allowing a second preliminary injunction
12 motion that would have reargued those issues before the
13 district court as well. Accordingly, the mandamus petition
14 is denied.

15 Finally, with respect to the appeal in No. 09-3426-cv,
16 this Court has determined sua sponte that the appeal
17 presents no arguably meritorious issue for our
18 consideration. See Pillay v. INS, 45 F.3d 14, 17 (2d Cir.
19 1995) (holding that this Court has "inherent authority
20 . . . to dismiss an appeal or petition for review as
21 frivolous when the appeal or petition presents no arguably
22 meritorious issue for our consideration"). Any conceivable

1 challenge to the appealed-from order would essentially
2 duplicate the arguments we have already rejected with
3 respect to the mandamus petition. Therefore, further
4 proceeding in this appeal would be a waste of judicial
5 resources. Accordingly, the appeal in No. 09-3426-cv is
6 dismissed.

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9 FOR THE COURT:
10 Catherine O'Hagan Wolfe, Clerk

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12 By: _____