

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 **SUMMARY ORDER**

4 **THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER**  
5 **AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER**  
6 **COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER**  
7 **COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN**  
8 **ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.**

9 At a stated term of the United States Court of Appeals for the  
10 Second Circuit, held at the Thurgood Marshall United States  
11 Courthouse, Foley Square, in the City of New York, on the 23<sup>rd</sup> day  
12 of September, two thousand and four.

13 PRESENT:

14 HON. ROBERT D. SACK,  
15 HON. REENA RAGGI,  
16 HON. PETER W. HALL,

17 Circuit Judges,  
18  
19 -----

20 ST. PAUL FIRE and MARINE INSURANCE COMPANY,

21 Plaintiff-Appellant,

22 - v -

No. 04-0922-cv

23 LAWRENCE RIVKIN,

24 Defendant,

25 MADISON PLAZA ASSOCIATES, LP.  
26 and ROSE ASSOCIATES, INC.,

27 Defendants-Appellees,  
28 -----

29 Appearing for Appellant: ERICK KIRKER (Peter G. Rossi,  
30 Vincent R. McGuinness, of counsel),  
31 Cozen O'Connor, New York, NY.

1 Appearing for Appellees: HARRY STEINBERG (Steven Prystowsky,  
2 of counsel), Lester Schwab Katz &  
3 Dwyer, LLP, New York, NY.

4 Appeal from the United States District Court for the  
5 Southern District of New York (Barbara S. Jones, Judge).

6 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND  
7 DECREED that the judgment be, and it hereby is, AFFIRMED.

8 The plaintiff-appellant, St. Paul Fire and Marine Insurance  
9 Company, appeals from a judgment of the United States District  
10 Court for the Southern District of New York granting summary  
11 judgment to the defendants-appellees, Madison Plaza Associates,  
12 LP, and Rose Associates, Inc. St. Paul only appeals the judgment  
13 as to its claims for breach of contract and breach of the  
14 covenants of quiet enjoyment.

15 We review a district court's grant of summary judgment de  
16 novo, construing "the evidence in the light most favorable to the  
17 non-moving party and . . . draw[ing] all reasonable inferences in  
18 its favor." World Trade Ctr. Props., L.L.C. v. Hartford Fire  
19 Ins. Co., 345 F.3d 154, 165-66 (2d Cir. 2003). Summary judgment  
20 is proper "if the pleadings, depositions, answers to  
21 interrogatories, and admissions on file, together with the  
22 affidavits, if any, show that there is no genuine issue as to any  
23 material fact and that the moving party is entitled to a judgment  
24 as a matter of law." Fed. R. Civ. P. 56(c).

25 On appeal, St. Paul contends that the district court erred  
26 by finding that its claims for breach of contract and breach of  
27 the covenants of quiet enjoyment were barred by the waiver of  
28 subrogation provisions included in the lease between St. Paul's  
29 insured and its subrogor, Vanlex Stores, Inc., d/b/a Dollar  
30 Bills, and Madison Plaza Associates. St. Paul argues that its  
31 contract and covenants of quiet enjoyment claims are valid and  
32 independent from its negligence claim -- which St. Paul concedes  
33 is barred by the subrogation waiver.

34 Waiver of subrogation provisions generally do not preclude  
35 claims based on breach of contract. See St. Paul Fire & Marine  
36 Ins. Co. v. Prot. Mut. Ins. Co., 644 F. Supp. 38, 40 (S.D.N.Y.  
37 1986); Viacom Int'l, Inc. v. Midtown Realty Co., 602 N.Y.S.2d  
38 326, 330, 193 A.D.2d 45, 52 (1st Dep't 1993). However, if a  
39 contract claim is essentially a negligence claim in disguise, it  
40 is barred by a waiver of subrogation. See American Motorist Ins.  
41 Co. v. Morris Goldman Real Estate Corp., 277 F. Supp. 2d 304, 309  
42 (S.D.N.Y. 2003); Farmington Cas. Co. v. 23d St. Props. Corp., 250

1 F. Supp. 2d 293, 298 (S.D.N.Y. 1999), aff'd by summary order sub  
2 nom. Farmington Cas. Co. v. Williams Real Estate Co., 225 F.3d  
3 645 (table), 2000 U.S. App. LEXIS 21273, 2000 WL 1186006 (2d Cir.  
4 Aug. 21, 2000).

5 In this case, St. Paul's breach of contract and breach of  
6 the covenants of quiet enjoyment claims, including all the  
7 resultant damages, arise out of the identical acts that are the  
8 basis for St. Paul's precluded negligence claim: Madison Plaza  
9 Associates' alleged failure to provide heat, during the New  
10 Year's holiday immediately preceding January 2, 1999, to the  
11 premises leased by Vanlex. Thus, to the extent the contract and  
12 quiet enjoyment claims are negligence claims in disguise, they  
13 may well be barred by the subrogation waiver.

14 New York law on whether subrogation waivers can bar contract  
15 claims is not crystal clear, and we might therefore be inclined  
16 to certify the question of the viability of the breach of  
17 contract claim to the New York Court of Appeals. We decline to  
18 do so here because, in any event, a contract claim asserted to  
19 avoid preclusion by the subrogation waiver cannot succeed if it  
20 also lacks merit in contract terms, see Gap, Inc. v. Red Apple  
21 Cos., 725 N.Y.S.2d 312, 317, 282 A.D.2d 119, 125-26 (1st Dep't  
22 2001); Farmington Cas. Co., 250 F. Supp. 2d at 298, and we find  
23 St. Paul's contract claim to be meritless. St. Paul claims that  
24 Madison Plaza Associates breached its duty, under the lease, to  
25 supply steam to Vanlex's premises. But this section of the lease  
26 provides only that the landlord must supply steam to the premises  
27 when heat is furnished to the rest of the building. St. Paul's  
28 allegation that Madison Plaza Associates shut off the building-  
29 wide heating system therefore fails to state a claim for  
30 violation of the lease. St. Paul's claim of breach of the  
31 covenants of quiet enjoyment also fails on its own terms because  
32 St. Paul has not shown evidence of an actual or constructive  
33 eviction through an ouster or abandonment of the premises by  
34 Vanlex. See Dave Herstein Co. v. Columbia Pictures Corp., 149  
35 N.E.2d 328, 330, 4 N.Y.2d 117, 121, 172 N.Y.S.2d 808, 811 (1958).

