◆ **Practice Tip** Temperature logs, photographs, chips of peeling paint and plaster, dead mice or rats caught on the premises are all the types of evidence that can help prove a case. In addition, the testimony of credible (and financially disinterested) witnesses, such as neighbors, can be very helpful.

However, nothing can replace such items as records kept by tenants in which diary entries document inadequate heat, leaks, instances of intruders entering the building during a time period when the outside door lock was broken, inoperative elevators, and so forth. Expert testimony is not required to prove damages. Real Prop Law § 235-b(3)(a).

Once proof has been established, however, a number of legal considerations come into play regarding damage awards and remedies.

§ 12:111 Judicial interpretation and application of warranty of habitability—Damages and set-offs

The total amount of the abatement should be set off against the petitioner's claim for rent. If the abatement exceeds the amount of rent due, that excess should be awarded as a money judgment to the tenant. *McGuinness v. Jakubiak*, 106 Misc. 2d 317, 431 N.Y.S.2d 755 (Sup. 1980); *Pleasant East Associates v. Cabrera*, 125 Misc. 2d 877, 480 N.Y.S.2d 693 (N.Y. City Civ. Ct. 1984).

As a general rule, the award of an abatement is not precluded simply because the landlord has suffered some other penalty as a result of the failure to make repairs or provide services. However, the Rent Regulation Reform Act of 1997 amended section 235-b of the Real Property Law (the Warranty of Habitability law), and the rent regulation laws, to provide that any rent reduction under the rent regulation laws based on failure to maintain services and make repairs is to be offset by any abatement of rent granted by a court pursuant to a warranty of habitability defense. Similarly, any abatement awarded by the court is to be offset by any rent reduction order that relates to a matter for which relief is sought in court. This provision applies to any pending or future action, proceeding or administrative complaint as of June 20, 1997.

◆ **Example**

- The existence of a rent reduction order from DHCR *(see* Rent Control and Rent Stabilization Ch 4 §§ 4:118 et seq.), does not preclude a tenant from obtaining an abatement of rent pursuant to Real Property Law § 235-b. *Sohn v. Brennan*, 4/6/92 N.Y.L.J. 31, col. 1 (App. Term 1st Dept); *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 414 N.Y.S.2d 308, 386 N.E.2d 1328 (1979). However, under the Rent Regulation Reform Act of 1997, the abatement will be set off by the rent reduction order.

◆ **View from the Bench** Failure to file a notice of claim under New York City Administrative Code § 7-201 precludes the tenant from getting an affirmative judgment against New York City. *City of New York v. Candelario*, 156 Misc. 2d 330, 601 N.Y.S.2d 371 (App. Term 1993), aff'd in part, rev'd in part, 223 A.D.2d 617, 637 N.Y.S.2d 311 (2d Dep't 1996). *See also PBS Bldg. Systems, Inc. v. City of New York*, 1996 WL 583380 (S.D. N.Y. 1996). (*See* Particular State-regulated and City-owned Housing Ch 6 § 6:162.)

§ 12:112 Judicial interpretation and application of warranty of habitability—Damages and set-offs—Limitations on awards where tenants culpable

Tenants are not entitled to abatements for conditions that they have caused. Real Prop Law § 235-b; *111 East 88th Street Partners v. Fine*, 110 Misc. 2d 960, 443 N.Y.S.2d 195 (N.Y. City Civ. Ct. 1981); *Stahl Assocs, Co v. France*, N.Y.L.J. 11/7/97 25, col. 3 (App. Term 1st Dept).

Similarly, where tenants deny access to correct conditions, rent abatements will be denied or severely limited. *See Marz Realty, Inc. v. Reichman*, 1/30/2003 N.Y.L.J. 23, col. 4 (App. Term 2d and 11th Jud. Dists.); *Frank v. Park Summit Realty*, 10/4/89 N.Y.L.J. 22, col. 2 (Sup. Ct. N.Y. Co.).

§ 12:113 Judicial interpretation and application of warranty of habitability—Punitive damages

Punitive damages can be awarded for breach of warranty of habitability where the landlord has acted wilfully and flagrantly or in reckless disregard for the health and safety of the tenants. However, punitive damages are not awarded lightly; the court must find malice and spitefulness, or high moral culpability or recklessness or some criminal indifference to civil obligations. *K E V Realty Co, Inc v. Kelly*, 5/31/96 N.Y.L.J. 26, col. 4 (Civ. Ct. N.Y. Co.); *Brusco West 78th Street Assocs v. Brenes*, 4/25/95 N.Y.L.J. 25, col. 2 (App. Term 1st Dep't); *Martin v. Ortiz*, 1/23/90 N.Y.L.J. 26, col. 1 (Dist. Ct. Nassau Co.); *111 East 88th Street Partners v. Fine*, 110 Misc. 2d 960, 443 N.Y.S.2d 195 (Civ. Ct. N.Y. Co. 1981). The following are examples of this type of award:

- $1,000 award of punitive damages for landlord's willful misconduct and wanton disregard of tenants' rights. *Davis v. Williams*, 92 Misc. 2d 1051, 402 N.Y.S.2d 92 (N.Y. City Civ. Ct. 1977).
- $8,740 punitive damages awarded where "a more callous and brutal landlord can scarcely be imagined or found." *Leskin v. Armstrong*, 8/9/84 N.Y.L.J. 1, col. 3 (Westchester Co. Ct.).
- $1,000 punitive damage award per apartment for delay in repairing leaky terrace. *Century Apartments, Inc. v. Yalkowsky*, 106 Misc. 2d 762, 435 N.Y.S.2d 627 (N.Y. City Civ. Ct. 1980).
- $500 punitive damages awarded "to encourage defendant and other landlords to protect their tenants from known dangers to health and safety." *Benitez v. Restifo*, 167 Misc. 2d 967, 641 N.Y.S.2d 523 (City Ct. 1996).
- $50,000 punitive damages award due to the "intentional deprivation of essential services and abusive behavior toward the tenants" by a landlord who took "unlawful measures" to encourage the senior tenants to move out. *K E V Realty Co, Inc. v. Kelly*, 5/31/96 N.Y.L.J. 26, col. 4 (Civ. Ct. N.Y. Co.).

§ 12:114 "Repair and deduct" remedy

Under certain circumstances, tenants who have not been provided repairs and/or services may have the work done themselves and deduct the cost of the work from their rent. Statutory provisions allow repair and deduct remedies

where there has been a failure by the landlord to provide fuel or utilities. Several court decisions also have allowed tenants to deduct the cost of emergency repairs in the absence of a specific statutory provision. *Garcia v. Freeland Realty, Inc.*, 63 Misc. 2d 937, 314 N.Y.S.2d 215 (N.Y. City Civ. Ct. 1970); *Hauptman v. 222 East 80th Street Corp*, 100 Misc. 2d 153, 418 N.Y.S.2d 728 (N.Y. City Civ. Ct. 1979); *A & J Managing Co v. Capusette*, 2/13/92 N.Y.L.J. 24, col. 4 (App. Term 2d & 11th Jud. Dists.). *See also Adar Co., LLC v. Snyder*, 7/9/97 N.Y.L.J. 34, col. 6 (Dist. Ct. Nassau Co.).

As a general rule, courts permit set-offs against rent for the reasonable cost of necessary repairs that are made at the tenant's expense, as long as the tenant provided the landlord with notice that was reasonable under the circumstances and the landlord failed to make the repairs after being notified.

§ 12:115 "Repair and deduct" remedy—Applicable circumstances, generally

In general, a tenant can make a needed repair and then deduct the reasonable cost of the repair from the rent, if after notice to the landlord that the repair is necessary the landlord "wilfully refused" to make that repair. *Jangla Realty Co. v. Gravagna*, 112 Misc. 2d 642, 447 N.Y.S.2d 338 (N.Y. City Civ. Ct. 1981); *Jackson v. Rivera*, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (N.Y. City Civ. Ct. 1971).

Cases in which courts approved of tenants utilizing the repair and deduct remedy include the following:

- Tenant was permitted to repair habitability-impairing conditions and offset the amount expended after wilful refusal of landlord to repair. *Katurah Corp. v. Wells*, 115 Misc. 2d 16, 454 N.Y.S.2d 770 (App. Term 1982).
- Landlord's failure to repair the tenant's locks resulted in a threat to safety and security; the court accordingly allowed a $120 offset to rent for tenant's expenditure in repairing lock. *Jangla Realty Co. v. Gravagna*, 112 Misc. 2d 642, 447 N.Y.S.2d 338 (N.Y. City Civ. Ct. 1981).

◆ **Practice Tip** Before undertaking repairs, tenants should provide notice that the repair is needed. Tenants have the burden of proving the landlord's "willful refusal" to make the repair. *See Greenburger v. Leary*, 119 Misc. 2d 358, 462 N.Y.S.2d 996 (N.Y. City Civ. Ct. 1983); *Missionary Sisters of the Sacred Heart v. Meer*, 131 A.D.2d 393, 517 N.Y.S.2d 504 (1st Dep't 1987). Accordingly, the tenant ought to be instructed to document the fact that notice was given. A copy of a letter to the landlord asking that the repair be made, preferably with some acknowledgment of receipt, would be extremely helpful in resolving a factual dispute concerning notice at trial.

The tenant should be careful to spend a reasonable amount for the repair. If the cost of the repair could amount to several hundred dollars or more, it would be useful to get several estimates of the cost of the repair from different sources before having the repair made.

◆ **View from the Bench** The tenant may wish to consider bringing an HP proceeding (*See* Obtaining Repairs and Services Ch 19 §§ 19:53 et seq.) instead of using a repair and deduct remedy. By doing this, the tenant does not risk that the landlord—or the court—will not recognize the validity of the expense.

§ 12:116 "Repair and deduct" remedy—Failure to provide fuel

"Repair and deduct" is also applicable when the landlord fails to supply fuel oil. Pursuant to Multiple Dwelling Law § 302-c and Multiple Residence Law § 305-c, a tenant or group of tenants can pay for delivery of oil and then deduct the cost of oil from rent owed in a multiple dwelling that uses an oil-fired heating device, when there is lack of heat due to the landlord's failure to supply oil. The tenant or tenants must make reasonable efforts to inform the landlord or landlord's agent about the failure to provide fuel, and must make reasonable efforts to have the normal fuel supplier deliver the fuel or must secure fuel delivery from a supplier regularly engaged in the business at a reasonable price. Mult Dwell Law § 302-c; Mult Resid Law § 305-c.

§ 12:117 "Repair and deduct" remedy—Failure to provide fuel—No need to notify landlord if key information is not posted

The owner need not be notified if he/she has failed to keep a notice posted on a conspicuous place at the premises containing the name, address, and telephone number of the owner or agent and the telephone number of the fuel supplier.

§ 12:118 "Repair and deduct" remedy—Failure to provide fuel—Written statement from supplier necessary

The tenant or tenants must obtain a written statement from the supplier containing:

- name of person requesting delivery
- date and time of delivery
- premises to which delivery was made
- amount, grade, and price of fuel
- charge
- payments received
- name of person from whom payments were received

§ 12:119 "Repair and deduct" remedy—Failure to provide fuel—Tenants may set off payments against rent

Expenditures made pursuant to Multiple Dwelling Law § 302-c and Multiple Residence Law § 305-c may be set off against rent owed in a nonpayment proceeding, and the tenant is entitled to reasonable costs and attorney's fees if forced to litigate the set-off.

§ 12:120 "Repair and deduct" remedy—Failure to provide fuel—Statement is admissible as presumptive evidence

Pursuant to the statute, the fuel supplier's statement is admissible at trial as presumptive evidence of the facts that it contains.

§ 12:121 "Repair and deduct" remedy—Failure to provide fuel—Tenants may also be entitled to abatement

Repair and deduct under Multiple Dwelling Law § 302-c and Multiple

Residence Law § 305-c is not an exclusive remedy. Tenants may, for example, also be entitled to an abatement of rent for a period in which the warranty of habitability was breached.

§ 12:122 "Repair and deduct" remedy—Failure to provide utilities

Where a landlord is responsible for paying utilities and fails to pay, and a tenant pays the utility company, that payment is subject to "repair and deduct."

§ 12:123 "Repair and deduct" remedy—Failure to provide utilities—Compensatory and punitive damages also available

An owner who is responsible for and fails to pay charges for gas, electric, steam, or water service shall be liable for compensatory and punitive damages to any tenant whose utility service is discontinued as a result of the owner's failure to pay. Real Prop Law § 235-a(2).

§ 12:124 "Repair and deduct" remedy—Failure to provide utilities—Public utility must notify before terminating

In addition, public utility companies providing electric, gas, water, or steam service are prohibited from terminating services to a multiple dwelling without first properly notifying the landlord and occupants and providing the occupants an opportunity to pay. Pub Serv Law §§ 33, 34, 116.

§ 12:125 "Repair and deduct" remedy—Failure to provide utilities—Tenant may set off against rent

If a tenant pays a utility company to avoid a shut-off of services to a multiple dwelling, the tenant has a right to deduct such payments from future payment of rent. New York Public Service Law §§ 33, 34, 116; Real Prop Law § 235-a; RPAPL § 756.

§ 12:126 "Repair and deduct" remedy—Failure to provide utilities—Tenant may get stay of eviction proceeding

When utilities are discontinued in any part of a multiple dwelling because the landlord fails to pay utility bills, a tenant is entitled to a stay of any proceeding to dispossess the tenant or any action for rent until the landlord pays and utilities are restored. RPAPL § 756.

§ 12:127 Spiegel Law defense

Public assistance recipients receive a dedicated portion of their public assistance grant as a "shelter allowance," which may be used only to pay rent. (*See* Postjudgment Motions Ch 17 §§ 17:63 et seq.) Pursuant to Social Services Law § 143-b (the "Spiegel Law"), if apartment building conditions are dangerous to life, health, and safety, the Department of Social Services (DSS) has the power to withhold the shelter allowance normally paid to the landlord on behalf of a recipient of public assistance. Moreover, under the Spiegel Law, the tenant's