

**Rule 1035.3. Response. Judgment For Failure to Respond**

(a) Except as provided in subdivision (e), [T]the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying

(1) \*\*\*

(2) \*\*\*

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(e)(1) Nothing in this rule is intended to prohibit a court, at any time prior to trial, from ruling upon a motion for summary judgment without written responses or briefs if no party is prejudiced. A party is prejudiced if he or she is not given a full and fair opportunity to supplement the record and to oppose the motion.

(2) A court granting a motion under subdivision (e)(1) shall state the reasons for its decision in a written opinion or on the record.

NOTE: Subdivision (e) does not abrogate the requirement that a motion for summary judgment be timely filed pursuant to Rule 1035.2 or case management order.

If a motion is not timely filed, subdivision (e) provides the court with the discretion as to the manner of proceeding, including whether to consider the motion at all. The court should not consider the motion except in the interests of justice.

## **Explanatory Comment**

As a result of a ruling on a motion in limine or another development in a case, shortly prior to trial a defendant may seek dismissal of the case on the ground that the plaintiff is without evidence to make out a prima facie case. While this ground may be raised through a motion for summary judgment, the rules governing summary judgment provide for the filing of a response within thirty days after the filing of a motion for summary judgment. The only other remedy for inability to make out a prima facie case is a compulsory nonsuit which may be entered pursuant to Rule 230.1(a)(1) only “at the close of the plaintiff’s case on liability.” These rules leave a gap between the motion for summary judgment with the thirty-day response period and the nonsuit at the end of the plaintiff’s case in chief.

New subdivision (e) added to Rule 1035.3 eliminates the gap by providing that a court has the discretion to rule on a motion for summary judgment “at any time prior to trial.” However, the rule places two conditions upon the exercise of this discretion. First, each party must be given a full and fair opportunity to supplement the record and to oppose the motion so that “no party is prejudiced.” Second, if the motion is granted, the court must state the reasons for its decision in a written opinion or on the record.

By the Civil Procedural  
Rules Committee

R. Stanton Wettick, Jr.  
Chair