

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2009

CABO RICO YACHTS, INC., a Florida corporation,
Appellant,

v.

GUY MARTINACHE, FRASER SMITH, and EDITH SMITH,
Appellees.

No. 4D08-2900

[November 4, 2009]

PER CURIAM.

Plaintiff, Guy Martinache, sued defendant, Cabo Rico Yachts, Inc., after it failed to return a deposit plaintiff paid for construction of a boat that was never delivered to plaintiff. Defendant appeals the trial court's entry of summary judgment in favor of plaintiff on plaintiff's breach of contract and fraud claims. We affirm summary judgment on the breach of contract claim. However, we reverse summary judgment on the fraud claim, as plaintiff's motion for summary judgment did not request summary judgment on that count and plaintiff did not submit any evidence of fraud. See *Williams v. Bank of America Corp.*, 927 So. 2d 1091 (Fla. 4th DCA 2006) (holding that it is reversible error to enter summary judgment on a ground not raised with particularity in the motion); *Sheridan Healthcorp, Inc. v. Amko*, 993 So. 2d 167 (Fla. 4th DCA 2008) (reversing summary judgment where movant did not submit evidence, stating that "[i]n summary judgment proceedings, the burden is not on the opponent to submit evidence until the movant tenders competent evidence in support of the motion."). Here, the record fails to establish that defendant acted fraudulently when he took the deposit. See *Wadlington v. Cont'l Med. Servs., Inc.*, 907 So. 2d 631, 632-33 (Fla. 4th DCA 2005) (noting that in fraud cases the issue of whether a defendant had the intention to perform an act at the time the promise was made is generally a jury question).

Affirmed in part, Reversed in part and Remanded.

GROSS, C.J., TAYLOR and HAZOURI, JJ., concur.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit,
Broward County; Robert B. Carney, Judge; L.T. Case No. 07-19870 04.

Jack J. Aiello and Rebecca Cavendish of Gunster, Yoakley & Stewart,
P.A., West Palm Beach, (withdrawn as counsel after filing brief), and
McLuskey & McDonald, P.A., Miami, for appellant.

Andre A. Gibson of Andre Gibson, Chartered, North Miami Beach, for
Appellee-Guy Martinache.

Not final until disposition of timely filed motion for rehearing.