

**FILED**  
AUG 27 1990

PUBLISH  
UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

**ROBERT L. HOECKER**  
Clerk

In re: LUIS ATENCIO;  
FRANCIS ATENCIO, doing  
business as El Paragua and  
Las Brazas Restaurants,  
  
Debtors,

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LUIS ATENCIO; FRANCIS ATENCIO,  
  
Appellants,

No. 90-2087

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JOHN D. PHILLIPS,  
  
Trustee and Real Party  
in Interest,

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EL PUEBLO STATE BANK,  
  
Movant-Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
(D.C. No. 89-1204-JB)  
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Lorenzo E. Atencio, Espanola, New Mexico, for Debtors-Appellants.

John D. Phillips and Larry Heyeck, of Keleher & McLeod, P.A.,  
Albuquerque, New Mexico for the Trustee.

Ernest E. Valdez, of Valdez & Read, Santa Fe, New Mexico, and  
Robert A. Bassett and Martin R. Esquivel, of Montgomery & Andrews,  
P.A., Albuquerque, New Mexico, for Movant-Appellee.

Before BALDOCK, BRORBY, and EBEL, Circuit Judges.\*

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BALDOCK, Circuit Judge.

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Debtors appeal from a district court order denying their motion for a stay pending appeal. See Bankr. R. 8005 (stay pending appeal). Still pending in the district court is a motion for rehearing concerning that denial. See Bankr. R. 8015, but see D.N.M. R. 9(a)(7) (Jan. 26, 1990) (purporting to eliminate motions for rehearing unless district judge grants leave to file in the order entered on appeal). The requested stay pertains to the debtors' pending appeal to the district court of the bankruptcy court's order modifying the automatic stay and appointing a trustee. See 11 U.S.C. § 362(d)(1) (relief from automatic stay may be granted for cause) & § 1104(a)(1) (trustee may be appointed for cause).

Debtors claim that we have jurisdiction to consider this appeal under 28 U.S.C. § 1292(a). The bank and the trustee contend that the exclusive jurisdictional statute for bankruptcy appeals is 28 U.S.C. § 158, and rely upon Teleport Oil Co. v. Security Pac. Nat'l Bank (In re Teleport Oil Co.), 759 F.2d 1376, 1378 (9th Cir. 1985). In Teleport Oil, the district court, acting as an appellate court under § 158(a), denied a stay of the bankruptcy court's order appointing a trustee. The debtor

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\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause therefore is ordered submitted without oral argument.

appealed that denial to the court of appeals which held, inter alia, that § 158(d) is the exclusive basis of jurisdiction for bankruptcy appeals to the courts of appeals; §§ 1291 and 1292 are inapplicable. Teleport, 759 F.2d at 1378.

Applying Teleport, we would dismiss the appeal. However, this court's decision in Teton Exploration Drilling v. Bokum Resources, 818 F.2d 1521, 1524 (10th Cir. 1987), gives us pause. See United States v. Spedaliere, No. 89-2181, slip op. at 7 n.3 (10th Cir. Aug. 7, 1990) [1990 WL 111215] (a panel may not overrule circuit precedent). In Teton, a divided panel declined to follow Teleport, reasoning that if § 158(d) were the exclusive means of jurisdiction over bankruptcy appeals, the court of appeals would lack jurisdiction when the district court enters orders in bankruptcy proceedings pursuant to 28 U.S.C. § 157(c)(1). Under § 157(c)(1), the district court exercises bankruptcy trial court jurisdiction and conducts a de novo review of the bankruptcy court's proposed findings and conclusions, and objections thereto by the parties. Teton, 818 F.2d at 1524 n.2. We recently noted that Teton may be confined to instances in which the district court exercises original bankruptcy jurisdiction, rather than appellate jurisdiction under § 158(a). Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.), No. 90-1013, slip op. at 9 n.4 (10th Cir. Aug. 15, 1990) [1990 WL 114246].

Several courts have criticized the broad statement in Teleport that § 158(d) is the exclusive source of jurisdiction over bankruptcy appeals. Such a rule would deprive the court of appeals of jurisdiction to review final district court orders when

the district court acts other than in its appellate function, see § 158(a), for instance when the district court acts as a bankruptcy trial court. See River Prod. Co. v. Webb (In re Topco), 894 F.2d 727, 734-37 (holding that § 1291 and § 158(d) apply when district court acts as bankruptcy appellate court; § 1291 applies when district court acts as bankruptcy trial court); Benny v. England (In re Benny), 791 F.2d 712, 717-18 (9th Cir. 1986) (holding that § 1291 applies when district court acts other than in its appellate function); Kelley v. Nodine (In re Salem Mortgage), 783 F.2d 626, 632 (6th Cir. 1986) (holding that § 158 is not exclusive basis of jurisdiction to review district court bankruptcy orders; § 1291 applies regardless of whether a referral has been made to the bankruptcy court); see also In re Amatex Corp., 755 F.2d 1034, 1038 (3rd Cir. 1985) (§ 1291 provides the basis for appellate review when district court acts in its original jurisdiction); Hialeah Hosp. v. Dep't of Health & Rehabilitative Servs. (In re King Mem. Hosp.), 767 F.2d 1508, 1510 (11th Cir. 1985) (§ 1291 and § 158 used to analyze jurisdiction from district court acting in bankruptcy appellate function).

Despite other criticism of Teleport, and mindful of our responsibility to follow circuit precedent, we believe Teleport's conclusion narrowly confined to its facts is still good law. See Kaiser Steel, No. 90-1013, slip op. at 9 (citing Teleport for proposition that § 1292 does not supplement § 158(d) jurisdiction). When a district court, acting in its appellate capacity, denies a stay of a bankruptcy order pending appeal, the court of appeals lacks jurisdiction to review that interlocutory

order under § 1292(a). Teleport, 759 F.2d at 1378. Accord Topco, 894 F.2d at 735-36 n. 12 & 737; In re First South Sav. Ass'n, 820 F.2d 700, 708-09 (5th Cir. 1987); Nat'l Bank Commerce v. Barrier (In re Barrier), 776 F.2d 1298, 1299-1300 (5th Cir. 1985). We have reached the same conclusion when a district court, acting in its appellate capacity, certified an interlocutory order for review by this court under § 1292(b). Kaiser Steel, No. 90-1013, slip op. at 8-10 (holding that § 158(d) precludes an interlocutory appeal to this court under § 1292(b) when the district court acts as a bankruptcy appellate court). The denial of a stay by the district court is interlocutory and cannot be reviewed under § 158(d).<sup>1</sup> Topco, 894 F.2d at 736 n.12. An aggrieved party is limited to the remedy of seeking mandamus in the court of appeals, with its requirement that the movant's right to relief be "clear and indisputable,"<sup>2</sup> see Mallard v. United States Dist. Ct., 109 S. Ct. 1814, 1822 (1989); Allied Chemical Corp. v. Daiflon, Inc., 449

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<sup>1</sup> Likewise, when the district court, acting in its original jurisdiction, grants or denies a petition for a writ of mandamus or prohibition directed to the bankruptcy court, an interlocutory appeal to this court normally is unavailable. Kaiser Steel, No. 90-1013, slip op. at 10-11 (10th Cir. Aug. 10, 1990) [1990 WL 114246]; Magic Circle Energy 1981-A Drilling Program (In re Magic Circle Energy Corp.), 889 F.2d 950, 953-54 (10th Cir. 1989).

<sup>2</sup> Even if we construed this appeal as a petition for a writ of mandamus, the debtors have not met this difficult standard and would not be entitled to relief under the nonconclusive guidelines for issuance of the writ contained in Dalton v. United States (In re Dalton), 733 F.2d 710, 717 (10th Cir. 1984), cert. dismissed, 469 U.S. 1185 (1985). See Kaiser Steel, No. 90-1013, slip op. at 13 (construing request for appellate review as a petition for writ of mandamus and relying upon Dalton guidelines). The district court's denial of the stay is anchored in factual determinations made by the bankruptcy court; it cannot be said that the district court abused its discretion and that the debtors' right to relief is clear and indisputable.

U.S. 33, 35-36 (1980) (per curiam); Kaiser Steel, No. 90-1013, slip op. at 12-14; Dalton v. United States (In re Dalton), 733 F.2d 710, 715-718 (10th Cir. 1984), cert. dismissed, 469 U.S. 1185 (1985), under the All Writs Act, 28 U.S.C. § 1651(a). See Topco, 894 F.2d at 736 n.12; First South, 820 F.2d at 708-09; Barrier, 776 F.2d at 1299; Teleport, 759 F.2d at 1378. Our determination that we lack jurisdiction in these circumstances is consistent with this circuit's traditional, rather than more flexible, approach to finality, even in the bankruptcy context. See Kaiser Steel, No. 90-1013, slip op. at 9-11; State Bank v. Anderson (In re Bucyrus Grain Co.), 905 F.2d 1362, 1365-66 (10th Cir. 1990); Magic Circle Energy 1981-A Drilling Program (In re Magic Circle Energy Corp.), 889 F.2d 950, 953 (10th Cir. 1989); Homa Ltd. v. Stone (In re Commercial Contractors, Inc.), 771 F.2d 1373, 1375 (10th Cir. 1985); First Bank v. Albuquerque Nat'l Bank (In re Glover, Inc.), 697 F.2d 907, 909-10 (10th Cir. 1983).

APPEAL DISMISSED. The mandate shall issue forthwith.